File Number: 40506

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

PRINCES GATES GP INC. IN ITS CAPACITY AS GENERAL PARTNER OF PRINCES GATES HOTEL LIMITED PARTNERSHIP

Applicant
(Appellant below)

and

2505243 ONTARIO LIMITED o/a BYPETRERANDPAUL.COM

Respondent
(Respondent below)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL OF THE RESPONDENT
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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TAB A

PART I - OVERVIEW AND STATEMENT OF FACTS

A. The proposed appeal does not raise matters of public importance

1. This application does not raise any issue of national or public importance. There is no conflict, uncertainty or gap in the law that requires this Court's intervention. The decisions and findings of the courts below are grounded in extensive findings of fact made after a lengthy trial and specific to the parties to this litigation. Leave should not be granted.

2. This case centers around the manner in which the Applicant, in the midst of a global pandemic and a period of great economic uncertainty, terminated three agreements pursuant to which the Respondent operated at Hotel X Toronto. After hearing 13 days of evidence, the Trial Judge found that the Applicant breached its duty of good faith and wrongfully terminated the Respondent's agreements.

3. The Trial Judge's evidentiary findings go directly to the heart of the two issues raised by the Applicant in the leave application. The Court of Appeal upheld all of these findings.

4. First, the Trial Judge found that the Applicant engaged in a surreptitious and bad faith course of conduct to rid itself of the Respondent by secretly negotiating an agreement with a new food and beverage operator and by invoking a pretext to refuse to provide necessary documentation for the Respondent to apply for pandemic assistance under the Canada Emergency Commercial Rent Assistance Program (**CECRA**).

5. The Court of Appeal did not provide any statement of law on this point, but simply confirmed that in the specific circumstances of this case, the Applicant had failed in its duties of good faith and honest contractual performance.

6. Second, as it relates to the Applicant's mistrial motion, the Trial Judge concluded that the extreme, last-resort remedy of a mistrial was not required. The Trial Judge found that she needed to rely very little on the evidence of two of the impugned witnesses, while much of the evidence of the third impugned witness was on subject matters over which he alone had expertise. In upholding these findings, the Court of Appeal also noted that the Trial Judge was best placed to make this call in the context of the absence of an exclusion order. This

is not an issue of national importance.

7. There is no gap or inconsistency in the principles underlying attestations or virtual hearings.

8. The application for leave to appeal should be dismissed.

B. Facts

9. The Respondent objects to the statement of facts set out in the Applicant's Memorandum of Argument, which omits key facts and mischaracterizes aspects of the Trial Judge's reasons.

10. The Applicant is the owner and operator of Hotel X Toronto (the **Hotel**). The Respondent operated two restaurants and provided food and beverage services at the Hotel pursuant to three agreements with the Applicant (the **Agreements**). The food and beverage services provided by the Respondent included, among other things, room service, catered banquet events and the operation of a rooftop bar.

(i) The parties' financial arrangements

11. Under the terms of the Agreements, the Applicant was responsible for collecting all funds from customers relating to the Respondent's operations and then paying to the Respondent its portion of revenue.[1]

12. The Applicant was also required to pay to the Respondent customer deposits for catered events within two weeks of receipt of funds, a practice that the Applicant ceased, unilaterally and without legal basis, in or around November 2019.[2] The Trial Judge found that the failure to pay the deposits was a breach of the Agreements, a finding not challenged by the Applicant before this Court.[3]

13. Funds were collected by the Applicant through a point of sale system operated by the

[1] Trial Judgment of C. Gilmore, J. reported at 2021 ONSC 4649 [**Trial Decision**] at para 201, Application Record of the Applicant [**Applicant Record**], Tab B2.
[2] Trial Decision at paras 19, 123-125, Applicant Record, Tab B2.
[3] Trial Decision at paras 308, 319, Applicant Record, Tab B2.

Respondent.[4] Of the funds collected by the Applicant, referred to as "gross receipts" in the Agreements, only certain portions were payable to the Respondent as its revenue. Other portions, including license fees, were retained by the Applicant as its revenue, while gratuities collected for banquet staff flowed through a clearance account directly to staff.[5] Despite these arrangements, all funds, including those comprising the revenue of the Applicant, were collected on the Respondent's HST number.[6]

14. The Respondent would routinely remit all of the HST to the government. On receipt of proof that the HST had been remitted to the government, the Applicant would then pay to the Respondent its share of the collected HST.[7] In February 2020, again unilaterally and without notice, the Applicant stopped paying the Respondent its portion of collected HST.[8]

(ii) The Applicant's secret negotiations with a new operator

15. Unbeknownst to the Respondent, the Applicant had been secretly negotiating an agreement to have Harlo Entertainment Inc. (**Harlo**) replace the Respondent as the Hotel's food and beverage operator since roughly April or early May 2020.[9]

16. By June 3, 2020, the Applicant and Harlo had signed a Letter of Intent to this effect. The execution of formal agreements was conditional upon the Applicant terminating the Respondent's Agreements.[10] The Applicant never informed the Respondent of its negotiations with Harlo or its intention to seek a replacement operator.[11]

(iii)The parties' discussions related to CECRA

17. The Applicant chose to close the Hotel on March 17, 2020, without providing notice to the Respondent.[12]

[4] Trial Decision at para 201, Applicant Record, Tab B2.
[5] Trial Decision at paras 203, 220-222, Applicant Record, Tab B2.
[6] Trial Decision at para 201, Applicant Record, Tab B2.
[7] Trial Decision at para 201, Applicant Record, Tab B2.
[8] Trial Decision at para 202, Applicant Record, Tab B2.
[9] Trial Decision at para 237, Applicant Record, Tab B2.
[10] Trial Decision at paras 12(k), 241, Applicant Record, Tab B2.
[11] Trial Decision at paras 242, 244, 362, 365, Applicant Record, Tab B2.
[12] Trial Decision at para 12(j), Applicant Record, Tab B2.

18. On April 19, 2020, in the context of discussions related to ongoing rental payments, the Applicant wrote a letter to the Respondent advising that the Respondent had an obligation to explore options for rental assistance, such as government loans and subsidies.[13] Shortly thereafter, the parties began to discuss an application for CECRA. These discussions included emails and several phone calls between the parties' respective CFOs.[14]

19. On Friday, May 1, 2020, following an initial phone call, the Applicant's CFO, Mr. Laksmono, wrote an email to the Respondent's CFO, Mr. Dash, requesting confirmation that the Respondent's revenue for 2019 was below the $20 million threshold required for CECRA eligibility.[15]

20. Before Mr. Dash had responded, and only three business days later, on Wednesday, May 6, 2020, Mr. Laksmono again wrote to Mr. Dash advising that he had run a T12 report for 2019 and determined that the Respondent's revenue surpassed the $20 million threshold.[16] The T12 report was based on the funds collected through the point of sale system and, consequently, the HST reports that the Respondent had submitted to the government which, as the Applicant was aware, included the Applicant's portion of revenue.[17]

21. On May 20, 2020, Mr. Dash wrote to Mr. Laksmono to advise why the T12 or HST reports were not an accurate reflection of the Respondent's revenue. Mr. Dash explained that those reports included the Applicant's portion of revenue and gratuities that flowed through a clearance account to banquet staff, which were not considered revenue of the Respondent. Mr. Dash confirmed that the Respondent's 2019 revenue was below the $20 million

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[13] Trial Decision at para 382, Applicant Record, Tab B2.
[14] Trial Decision at para 207; Excerpts from Transcript of Examination-in-Chief of Anil Dash, held March 3, 2021 [**Dash Transcript**], Responding Record of the Respondent [**Respondent Record**], Tab B5.
[15] Dash Transcript, Respondent Record, Tab B5; Email from Laksmono to Dash dated May 1, 2020 (Trial Exhibit 13), Respondent Record, Tab B1.
[16] Email from Laksmono to Dash dated May 6, 2020 (Trial Exhibit 13), Respondent Record, Tab B2.
[17] The Applicant acknowledges at paragraphs 23, 26 and 32 of its Memorandum of Argument that this report, and the basis for the Applicant's position that the Respondent surpassed the revenue threshold, was based on the Respondent's HST returns.

threshold.[18]

22. On May 23, 2020, the Managing Director of the Hotel, Mr. Lambert, wrote to Mr. Dash to insist that Mr. Dash send the Respondent's 2019 financial statements reviewed by an independent CPA in order to prove its revenue.[19] These email discussions were punctuated by telephone calls between the parties' management teams to further discuss the issue.[20]

23. The Respondent's 2019 audited financial statements, prepared in late 2020, and its 2019 corporate tax return confirmed that the Respondent had revenue of $17.557 million, below the $20 million threshold.[21]

(iv) The Applicant terminated the Agreements

24. On July 2, 2020, the Applicant terminated the Agreements. The Applicant set out a long list of alleged breaches to justify termination. These alleged breaches included non-payment of rent, the Respondent's alleged insolvency, various complaints related to the Respondent's level of service and staffing levels, marketing failures, and allegations of theft and diversion of business to the Respondent's other venues.[22]

25. As a result of the Applicant's unilateral termination of the Agreements, nearly 250 of the Respondent's employees had to be terminated, which resulted in multiple claims for termination pay.[23]

26. On July 9, 2020, the Hotel was selected to host the National Hockey League bubble for the resumed NHL season. The Hotel opened its doors on July 14, 2020, with Harlo as its food and beverage operator.[24]

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[18] Email from Dash to Laksmono dated May 20, 2020 (Trial Exhibit 13), Respondent Record, Tab B3.
[19] Email from Lambert to Dash dated May 23, 2020 (Trial Exhibit 13), Respondent Record, Tab B3.
[20] Dash Transcript, Respondent Record, Tab B5.
[21] Trial Decision at para 211, 320(f), Applicant Record, Tab B2.
[22] Trial Decision at para 36, 265, Applicant Record, Tab B2.
[23] Trial Decision at paras 290-291, Applicant Record, Tab B2.
[24] Trial Decision at para 12(m), 12(n), Applicant Record, Tab B2.

27. The Respondent commenced this action on July 20, 2020.[25]

(v) The Applicant sought to petition the Respondent into bankruptcy

28. On September 9, 2020, the Applicant, along with other smaller creditors, commenced an application seeking to have the Respondent involuntarily adjudged bankrupt.[26]

29. On October 9, 2020, the bankruptcy application was stayed in favour of a Notice of Intention to file a proposal filed by the Respondent.[27] In written reasons staying the Applicant's bankruptcy application, Justice Koehnen of the Ontario Superior Court of Justice concluded that the Applicant had commenced the application "for the collateral purpose of putting an end to the litigation, not to protect any legitimate creditor interest".[28]

(vi) The Trial

30. The Trial proceeded virtually before Justice Gilmore of the Ontario Superior Court over 13 days in March, April, and May 2021. The Applicant did not seek an order excluding witnesses.

31. On the first day of trial, as the Court was determining who was present on Zoom, counsel for the Respondent advised that one of the participant screens logged in to the Zoom was connected to a separate boardroom at his law firm where his clients were present. As was the practice, where a screen was not actively participating in the hearing, the camera was turned off.

32. On March 8, 2021, after one of the Respondent's witnesses referred to observing the trial, the Applicant moved for a mistrial. The trial was adjourned for the hearing of the Applicant's mistrial motion. On April 9, 2021, the Trial Judge released a mid-trial decision dismissing the motion. Her reasons for doing so are discussed below.

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[25] Trial Decision at para 12(o), Applicant Record, Tab B2.
[26] Trial Decision at para 12(q), Applicant Record, Tab B2.
[27] Trial Decision at para 12(r), Applicant Record, Tab B2.
[28] Endorsement of Koehnen, J dated October 9, 2020, Respondent Record, Tab B4.

C. The Decisions Below

(i) Ontario Superior Court of Justice (Gilmore J, 2021 ONSC 4649)

33. The Trial Judge delivered comprehensive reasons for decision spanning 459 paragraphs. The Trial Judge found that the Applicant improperly terminated the Agreements and breached its duty of good faith in contractual performance.

34. The Trial Judge found that the Applicant's unilateral withholding of deposits, HST and other amounts owing to the Respondent was improper and contributed to the Respondent's financial difficulties and inability to pay rent.[29] The Trial Judge found that the Applicant used the withheld deposits as leverage to extract concessions from the Respondent to which it was not entitled.[30]

35. On the issue of unpaid rent, the Trial Judge found that as of the date of termination of the Agreements, the Applicant owed more money to the Respondent than the Respondent owed to the Applicant in outstanding rent.[31]

36. With respect to CECRA, the Trial Judge preferred the evidence of the Respondent's expert witness that (i) the Applicant's portion of collected funds and gratuities that flowed through to banquet staff were not properly characterized as revenue of the Respondent, (ii) the Respondent's HST returns were not an appropriate method for determining the Respondent's revenue, and (iii) the Respondent's revenue was below the $20 million threshold for CECRA eligibility.[32]

37. On that basis, the Trial Judge held that the Applicant's refusal to apply for CECRA was unjustified. She further held that the Applicant's insistence on financial statements reviewed by an independent CPA was unreasonable, unnecessary and would have been impossible to obtain in time. Ultimately, the Trial Judge determined that the Applicant's conduct was motivated by the fact that it had already secretly decided to cut ties with the

[29] Trial Decision at paras 318-319, 336, 361, Applicant Record, Tab B2.
[30] Trial Decision at paras 312, 319, Applicant Record, Tab B2.
[31] Trial Decision at para 317, 361, Applicant Record, Tab B2.
[32] Trial Decision at paras 221-222, 226, 320, Applicant Record, Tab B2.

Respondent and move on with Harlo as its new operator.[33]

38. On the issue of Harlo, the Trial Judge found that the Applicant misled the Respondent into believing that it was business as usual despite knowing that it intended to terminate the Respondent's Agreements and replace it with Harlo.[34]

39. Ultimately, the Trial Judge found that the termination of the Agreements was unlawful, in breach of the duty of good faith, and that the Applicant's behaviour was "bordering on cruel".[35] With respect to the laundry list of contractual breaches alleged by the Applicant, the Trial Judge found that they were "groundless".[36] The Applicant's reliance at trial on the Respondent's failure to respond to a letter in February 2020 as a grounds to justify termination was described by the Trial Judge as "disingenuous" and a "ruse" to justify the Applicant's "secretive and intentional steps" to sever ties with the Respondent.[37]

i. Mistrial Decision

40. As it relates to the mistrial motion, The Trial Judge concluded that the appropriate remedy would be to examine the weight to be given to the evidence of the impugned witnesses, Ms. Breckbill, Mr. Park and Mr. Dash, and to consider the issue when assessing the reliability and credibility of the Respondent's witnesses.[38]

41. These conclusions were reiterated in the Trial Decision. The Trial Judge found that she relied very little on the testimony of Ms. Breckbill and Mr. Park.[39] While Mr. Dash's evidence was more significant, as the CFO he was the sole expert with respect to many issues about which the other witnesses lacked knowledge, including the parties' financial arrangements, HST issues, and CECRA.[40]

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[33] Trial Decision at para 324, Applicant Record, Tab B2.
[34] Trial Decisions at para 362, 386, Applicant Record, Tab B2.
[35] Trial Decision at paras 361, 365, 386, Applicant Record, Tab B2.
[36] Trial Decision at para 361, Applicant Record, Tab B2.
[37] Trial Decision at para 362, 386, Applicant Record, Tab B2.
[38] Endorsement of Gilmore, J. dated April 9, 2021 [**Mistrial Decision**] at para 18, Applicant Record, Tab B1.
[39] Trial Decision at para 299, Applicant Record, Tab B2.
[40] Trial Decision at paras 300- 301, Applicant Record, Tab B2.

42. Ultimately, the Trial Judge determined that the issue did not change her view regarding the reliability of the witnesses' testimony. She concluded that the lesson arising was that the Court and counsel ought to be careful to enquire who is present during Zoom hearings.[41]

ii. The Applicant has critically mischaracterized the Trial Judge's decisions

43. Contrary to the assertions made by the Applicant at paragraphs 65 and 66 of its Memorandum of Argument, the Trial Judge did not make a finding of fact, nor did she hold, that the only information available to Mr. Laksmono was contrary to the attestation he was asked to sign in connection with the CECRA application. The portions of the Trial Judge's decision to which the Applicant refers merely summarize the arguments raised by the Applicant and the testimony of the Applicant's witness.

44. When read in full context, it is apparent that at paragraph 204 the Trial Judge is summarizing the testimony of Mr. Lambert and not making findings of fact:

> **Mr. Lambert's evidence was** that the Hotel tried to cooperate with 250 on this issue. However, 250 did not provide the Hotel with any Financial Statements or Corporate Tax Returns. The Hotel only had the HST returns to rely on and they clearly showed that 250's gross revenue exceeded the CECRA threshold. **He reiterated** to the Court that the Hotel was willing to assist 250 with its application so long as it met the eligibility requirements and went so far as to say it would have been unreasonable for the Hotel not to cooperate if 250 had qualified for the program.[42] [**emphasis added**]

45. Similarly, when read in context, it is evident that at paragraph 320(g), the Trial Judge is summarizing the Applicant's submissions rather than making findings of fact or legal holdings about what information was available to the Applicant:

> **The Hotel submitted that** 250 did nothing to verify its income. Its financial statements for 2018 and 2019 were not completed until December 2020. All the Hotel had was the HST return. The attestation required by CRA stipulated that the Landlord "had no knowledge, acting reasonably and without investigation, of any falsehood or misrepresentation contained in the tenant attestation…" The Hotel had knowledge that the tenant's revenue exceeded the threshold so they could

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[41] Trial Decision at para 302, Applicant Record, Tab B2.
[42] Trial Decision at para 204, Applicant Record, Tab B2.

> not attest that they had no knowledge of a falsehood or representation by the tenant. […][43] [**emphasis added**]

46. The Applicant similarly mischaracterizes the Trial Judge's reasoning with respect to her decision on the mistrial motion. At paragraphs 46 and 47 of its Memorandum of Argument, the Applicant describes two passages from the mistrial decision as observations and conclusions reached by the Trial Judge.

47. In fact, the paragraphs quoted by the Applicant are lifted from the portion of the Trial Judge's mistrial decision entitled "The Positions of the Parties – The Defendant – The Hotel" in which she summarizes the arguments raised by the Applicant on the motion and not from the section of the decision in which she sets out her findings and conclusions.[44]

48. The Applicant also criticizes the Trial Judge for "elect[ing] to assess 'reliability' (as opposed to credibility) of the impugned witnesses", as if to suggest that the Trial Judge misunderstood her obligations. However, the Trial Judge was clearly alive to the fact that she was required to assess reliability and credibility, as she noted in the final sentence of the mistrial decision that "these considerations will therefore form part of the Court's overall assessment of the reliability <u>and credibility</u> of 250's witnesses in its Trial Judgment".[45]

(ii) Court of Appeal for Ontario (MacPherson, Miller, and Copeland JJ.A., 2022 ONCA 859)

49. The decision of the Trial Judge was unanimously upheld by a panel of the Court of Appeal for Ontario. In fact, the panel determined that the Trial Judge's decision was so well-founded that it dismissed the appeal from the bench without hearing responding submissions from counsel for the Respondent.[46]

50. The Court of Appeal agreed with the findings of the Trial Judge that, in the context of a global pandemic and a moment of great difficulty where CECRA provided a "golden

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[43] Trial Decision, para 320(g), Applicant Record, Tab B2.
[44] Mistrial Decision at paras 9-10, Applicant Record, Tab B1.
[45] Mistrial Decision at para 18, Applicant Record, Tab B1.
[46] Reasons for Decision of the Court of Appeal for Ontario reported at 2022 ONCA 859 [**Appeal Decision**] at para 15, Applicant Record, Tab B4.

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opportunity" for economic relief, the Applicant's insistence on independently verified financial statements as a precondition to assisting with CECRA was "grossly unfair".[47] The Court of Appeal "entirely agreed" with the Trial Judge's conclusion that the Applicant's refusal to apply for CECRA was unjustified and motivated by a desire to cut ties with the Respondent after negotiating an agreement with Harlo.[48]

51. The Court of Appeal deferred to the Trial Judge's discretion not to grant a mistrial, holding that the Trial Judge "was in the best position" to make determinations with respect to credibility of witnesses and the weight to be afforded to evidence, particularly because the Applicant had not sought an order excluding witnesses.[49]

PART II - QUESTIONS IN ISSUE

52. The only issue to be determined on this application for leave is whether the proposed appeal raises an issue of public importance.

PART III - STATEMENT OF ARGUMENT

53. Neither of the issues proposed by the Applicant raise a matter of public importance that warrants granting leave to appeal.

54. First, there is no gap or uncertainty in the law with respect to the standards of honesty required when interacting with public agencies, nor would this be an appropriate case to comment on that issue. The factual finding in this case is that the Respondent met CECRA's revenue requirements and that the Applicant breached its private law duties to the Respondent by refusing to submit an attestation while misleading the Respondent.

55. Second, there is no gap or uncertainty in the law as it relates to virtual hearings or the remedy of declaring a mistrial. There is sufficient existing guidance from all levels of court across Canada related to exclusion of witnesses, the conduct of virtual hearings and the appropriate test for a mistrial. This guidance is consistent with the mandate of Canadian

[47] Appeal Decision at paras 22-23, Applicant Record, Tab B4.
[48] Appeal Decision at para 23, Applicant Record, Tab B4.
[49] Appeal Decision at paras 37-38, Applicant Record, Tab B4.

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courts to develop and enforce their own procedure.

56. A newly recognized duty of candour in virtual litigation, as proposed by the Applicant, is wholly unnecessary in light of the existing and over-arching duty of candour owed by all lawyers to the administration of justice, courts and tribunals under the current Code of Professional Conduct.

57. The application for leave to appeal should be dismissed.

A. Issue I: Duty of Honesty to Public Agencies

(i) The CECRA issue cannot be viewed in a vacuum

58. The decisions of the Trial Judge and the Court of Appeal with respect to CECRA must be viewed in the context of the factual findings and evidence on the record. When viewed as part of the overall record, it is clear that there is no basis to the Applicant's submission that the lower Court decisions stand for the proposition that a landlord must prioritize its tenants and submit false attestations to the government.[50] To find otherwise would require this Court to overturn the factual findings of the Trial Judge.

59. First, there is simply no truth to the Applicant's repeated assertions that the *only* information available to it confirmed that the Respondent's revenue surpassed the $20 million threshold. The Applicant was aware that it collected, through the point of sale system, its own revenue, the Respondent's revenue, and gratuities that flowed directly to banquet staff. The Applicant was also aware that the Respondent's monthly HST remittances accounted for both the Applicant's and Respondent's portion of revenue, as well as gratuities.[51]

60. As a result, the Applicant was aware that HST reports or T12 reports would overstate the Respondent's revenue by improperly including the Applicant's revenue and staff gratuities. This fact was explained to the Applicant by Mr. Dash, who confirmed that when those sources of funds were removed, the Respondent's revenue was below the $20 million

[50] Applicant's Memorandum of Argument at para 2.
[51] Trial Decision at paras 201, 203, 220-222, Applicant Record, Tab B2.

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threshold.[52]

61. The terms of the CECRA application required the Applicant to attest that it had no knowledge of any falsehood in the tenant's attestation "acting reasonably and without investigation".[53] Contrary to assertions raised in its Memorandum of Argument, the Applicant did conduct an investigation and it did not act reasonably.

62. On Friday, May 1, 2020, the Applicant's CFO Mr. Laksmono asked Mr. Dash to confirm whether the Respondent's revenue fell below the $20 million threshold.[54] That was all that was required or permitted of the Applicant. Three business days later, before Mr. Dash could undertake the required financial analysis and respond, Mr. Laksmono ran a T12 report and conducted his own analysis.[55] That is an investigation.

63. Nor did the Applicant act reasonably. It ran a T12 report that it knew overstated the Respondent's revenue despite guidance that prohibited an investigation, and then relied on the results of that flawed investigation to deny the Respondent relief.

64. Second, the Applicant's assertion that it made *bona fide* attempts to assist the Respondent while also fulfilling its obligations to CMHC cannot be divorced from the Trial Judge's numerous findings of bad faith that demonstrate the contrary.[56] While the Applicant submits that it was trying to do the right thing, that submission is belied by the Trial Judge's findings that:

(a) The Applicant failed to cooperate and act reasonably with respect to CECRA;[57]

(b) The Applicant refused to cooperate with an application for CECRA because it had already decided that it wanted to terminate the Agreements and contract with Harlo,

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[52] Email from Dash to Laksmono dated May 20, 2020 (Trial Exhibit 13), Respondent Record, Tab B3.
[53] CECRA Property Owner's Attestation, para 4, Applicant Record, Tab D3.
[54] Email from Laksmono to Dash dated May 1, 2020 (Trial Exhibit 13), Respondent Record, Tab B1.
[55] Email from Laksmono to Dash dated May 6, 2020 (Trial Exhibit 13), Respondent Record, Tab B2.
[56] Applicant's Memorandum of Argument at para 35.
[57] Trial Decision at para 307, 361(c), Applicant Record, Tab B2.

a position that it failed to communicate to the Respondent;[58]

(c) The amounts the Applicant owed to the Respondent exceeded outstanding rent as of June 30, 2020, immediately before termination;[59]

(d) The Applicant, in an approach the Trial Judge characterized as "high-handed", wrongfully withheld deposits owing to the Respondent and then used deposits properly in the possession of the Respondent to justify a wrongful termination;[60]

(e) The Applicant's conduct contributed to the Respondent's financial difficulties;[61]

(f) The Applicant covertly negotiated an agreement with a replacement operator, while allowing the Respondent to believe it was business as usual and continue to incur costs;[62] and

(g) The Applicant concocted a list of "groundless" alleged breaches to justify termination.[63]

65. When considered in this factual context, it is apparent that the lower Court decisions do not cry out for correction. Instead, the decisions appropriately apply the law of the duty of good faith and honest performance, as recently clarified by this Court in *C.M. Callow Inc. v Zollinger*, (***Callow***).[64]

(ii) No reason to create new law where existing doctrines are sufficient

66. Even if it were necessary for this Court to create a new duty of honesty in making attestations to public agencies, it would not be appropriate to do so on this factual record. This case is not ripe for such a determination because (i) no attestation was ever made; and (ii) as the Trial Judge found, if an attestation had been made, it would have been accurate

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[58] Trial Decision at para 320(g), Applicant Record, Tab B2.
[59] Trial Decision at para 317, 361(b), Applicant Record, Tab B2.
[60] Trial Decision at para 319, Applicant Record, Tab B2.
[61] Trial Decision at para 336, 339, 361, Applicant Record, Tab B2.
[62] Trial Decision at para 336(d), 362, 364-365, 369, 385-386, Applicant Record, Tab B2.
[63] Trial Decision at para 361(e), Applicant Record, Tab B2.
[64] *C.M. Callow Inc. v Zollinger,* 2020 SCC 45.

and truthful.[65]

67. In any event, there is no gap in the law as it relates to the duty of honesty owed to public agencies. The existing law around the duty of good faith and honest performance, as recently clarified by this Court in *Callow* is sufficient to address the concerns raised by the Applicant.

68. As acknowledged by the Applicant in its Memorandum of Argument, the submission of an application for CECRA constitutes "contractual performance" because it results in a binding tripartite agreement between the landlord, tenant, and CMHC.[66] It follows that the duty of good faith and honest performance applies.

69. That duty applies to all contracts, irrespective of the intentions of the parties, and requires honest contractual performance.[67] Dishonesty can include both an outright lie and other forms of misleading conduct such as silence, omissions or failure to correct a misapprehension.[68] The duty also accords with the general expectation confirmed by this Court that contracts will be performed without lies or deception and that parties are entitled to expect their contracting partners to be honest.[69] There is no need for an additional duty of honesty that applies only as it relates to attestations submitted to public agencies.

70. First, contrary to the submissions of the Applicant, an attestation does not naturally elevate the required standard of honesty.[70] The Ontario Court of Appeal decision in *Pinder Estate* stands for no such proposition, nor does any other decision of any other Canadian court.[71]

71. Second, the government and public agencies have sufficient existing remedies outside of the duty of good faith and honest performance to address instances of misrepresentation

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[65] Trial Decision at paras 320, 324, 361(c), Applicant Record, Tab B2.
[66] Applicant's Memorandum of Argument at para 62
[67] *Bhasin v Hrynew*, 2014 SCC 71 at para 74-75; This Court's decision in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 leaves no doubt that the duty applies to government bodies.
[68] *Callow* at para 90.
[69] *Callow* at para 83; *IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing,* 2017 ABCA 157 at para 4.
[70] Applicant's Memorandum of Argument at para 64.
[71] *Pinder Estate v Farmers Mutual Insurance Company (Lindsay),* 2020 ONCA 413.

and fraud. These include breach of contract, unjust enrichment, civil fraud, and fraudulent and negligent misrepresentation, as well as criminal and statutory remedies. Government bodies and public agencies routinely commence actions, both criminal and civil, against corporate entities and individuals, to seek restitution for benefits wrongfully obtained through misrepresentation and fraud.[72]

72. Government bodies and public agencies also have the ability to dictate the parameters of benefits programs and their application criteria, depending on the level of scrutiny warranted in the circumstances. They can and do require varying types of application materials ranging from oaths and attestations, sworn affidavits and notarized statements, to documentary evidence, depending on their needs and objectives.

73. The Applicant, in effect, asks this Court to develop a new duty of honesty to public agencies that overrides and supersedes the existing duties of good faith and honest performance on which this case was decided in the Courts below.

74. That issue does not properly arise in this case. Nor would it be an incremental step in the development of the law. If the Applicant's submissions are accepted, parties in the position of the Applicant would be permitted to subvert the legitimate interests of their contracting partners in favour of public agencies. Such a result would directly undermine the Trial Judge's findings of bad faith and this Court's recent guidance in *Callow.*

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[72] See for example: *Canada (Attorney General) v. Courchene,* 2010 MBQB 200 (claim by Attorney General for Canada in civil fraud in connection with a scheme to falsely obtain and misappropriate benefits from Health Canada (the defendant was also charged criminally)); *Regional Municipality of Halton v Ohashi*, 2021 ONSC 6780 (claim by municipality in civil fraud and breach of contract, among other causes of action, in connection with a false invoicing scheme and scheme to obtain improper procurement advantages (the defendant was also charged criminally)); *Canada (Attorney General) v Merchant Law Group LLP,* 2017 SKCA 62 (claim by Attorney General for Canada in civil fraud, deceit and fraudulent representation for misrepresentations made by the defendant law firm in the negotiation of a class action settlement); *York (Regional Municipality) v LeBlanc,* 2015 ONCA 431 (claim by municipality in breach of contract, fraud, deceit, negligent misrepresentation and conspiracy in connection with a scheme to induce the municipality to award a waste management contract); *Edmonton (City) v Gosine,* 2020 ABQB 546 (claim by City in conspiracy, breach of contract, deceit, negligence and unjust enrichment in connection with a false invoicing scheme).

B. Issue II: Duty of Candour in Virtual Litigation

(i) The Appellant attacks factual findings and places undue weight on perceived trial unfairness

75. The fact that "clients" were observing the trial was made clear to the Court and the Applicant. There was no direction that witnesses could not observe the proceedings, no exclusion order was sought nor made until the midst of the trial, and no one asked who the "clients" were. When an exclusion order was ultimately made, it was fully complied with. The Trial Judge's pre-trial direction that witnesses shall be alone was limited to circumstances where they were giving evidence.

76. While the Applicant asserts that it does not seek to interfere with the Trial Judge's factual findings, there can be no doubt that is exactly what the Applicant seeks to do.[73] In attacking the Trial Judge's factual finding that Mr. Dash gave evidence on topics about which he alone had expertise, the Applicant notes that Mr. Dash's name is referenced 55 times in the Trial Decision and argues that his evidence was "heavily relied upon" and substantially overlapped with the evidence of other witnesses.[74]

77. The Applicant makes these assertions in support of its argument that the Trial Judge misapplied the test for a mistrial by justifying reliance on Mr. Dash's evidence.[75] This, the Applicant argues, resulted in trial unfairness.[76]

78. Not only does this argument attack the Trial Judge's factual findings that Mr. Dash's evidence was not "tainted", so to speak, it also places undue weight on perceived trial unfairness, which is only one aspect of the test for a mistrial.

79. A mistrial is a remedy of last resort which should be ordered only in the clearest of cases where there is a real danger of prejudice or miscarriage of justice and where no other

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[73] Applicant's Memorandum of Argument at para 52.
[74] Applicant's Memorandum of Argument at para 54, 71.
[75] Applicant's Memorandum of Argument at para 71.
[76] Applicant's Memorandum of Argument at para 70.

remedy will adequately redress the harm occasioned.[77] As confirmed by the Court of Appeal in this case, the Trial Judge is in the best position to assess the impact of potentially prejudicial evidence.[78] As a result, a Trial Judge's discretionary decision not to declare a mistrial attracts considerable deference.[79]

80. There is no reason in this case to depart from the Trial Judge's factual findings and interfere with her discretionary decisions, which attract considerable deference.

(ii) There is sufficient guidance on this issue

81. There is ample direction on the conduct of virtual litigation to sufficiently guide Canadian litigants and courts. The intervention of this Court is not required.

82. As noted above, the Applicant conflates the summaries provided and the decision made by the Trial Judge. The only two lessons or principles arising from the issues leading to the Applicant's mistrial motion have already been pronounced in decisions of the Courts below:

(a) As the Trial Judge noted in her decision, since "there is no courtroom where those present can be easily accounted for, counsel and the Court must be aware of and enquire as to exactly who is present in each Zoom "room" during a trial to ensure trial fairness";[80] and

(b) If it is important to parties that witnesses not observe a trial, they ought to seek an order excluding witnesses. Otherwise, as the Court of Appeal noted, it is within the discretion of a Trial Judge to not declare a mistrial.[81]

83. Superior courts across Canada have the legislative authority to make their own rules and

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[77] *Gilbert v South,* 2015 ONCA 712 at paras 22-23; *Pena v U-Pak Disposals Limited,* 2017 ONSC 3887 at para 21.
[78] Appeal Decision at para 38, Applicant Record, Tab B4; *Pena v U-Pak Disposals Limited,* 2017 ONSC 3887 at para 21(v).
[79] *Gilbert v South,* 2015 ONCA 712 at para 22.
[80] Trial Decision at para 302, Applicant Record, Tab B2.
[81] Appeal Decision at paras 37-38, Applicant Record, Tab B4.

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develop their own practices and procedures to govern the conduct of proceedings. Consistent with that authority, nearly every Canadian jurisdiction has developed practice directions to guide litigants on the conduct of virtual litigation.[82] These resources are sufficient to give Canadian litigants the guidance they need to conduct virtual litigation. There is no need for this Court to retread the same ground, especially in a case like this where no exclusion order was sought.

84. Likewise, there is no need for this Court to recognize a new duty of candour in virtual litigation, when a duty of candour to the administration of justice already exists under section 5.1-1 of the Model Code of Professional Conduct.[83]

85. The commentary to the Model Code notes that this duty requires the lawyer "to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done" and applies to all appearances before courts, boards, administrative tribunals, arbitrators, mediators and others who resolve disputes.[84]

86. Section 5.1-1 of the Model Code has been adopted by the law societies of every Canadian common law jurisdiction, with the Barreau du Quebec adopting substantially similar language.[85]

87. There is no reason to suggest that the duty set out in the Code of Professional Conduct does not apply with equal force to lawyers conducting virtual litigation. In short, there is no need for this Court to recognize a duty of candour in virtual litigation because such a duty already exists.

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[82] A list of the relevant practice directions can be found at Schedule "A" to this Memorandum.
[83] Section 5.1 of the *Model Code of Professional Conduct* notes as follows: When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, **while treating the tribunal with candour**, fairness, courtesy and respect. [emphasis added].
[84] *Model Code of Professional Conduct,* s. 5.1-1, commentary notes 1 and 2.
[85] Section 112 of the Code of Professional Conduct of advocates of the Barreau du Quebec reads: "A lawyer must act for a client resolutely and honourably, in compliance with the law, while treating the tribunal and all other participants in the justice system with candour, courtesy and respect […].

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PART IV - SUBMISSION CONCERNING COSTS

88. The Respondent submits that the costs of this application for leave should be in the cause.

PART V - ORDER SOUGHT

89. The Respondent asks this Court to dismiss the application for leave to appeal, with costs awarded to the Respondent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day January, 2023

Norton Rose Fulbright Canada LLP
Solicitors for the Respondent

PART VI - TABLE OF AUTHORITIES

Authority	Paragraph Cited
Jurisprudence	
Bhasin v Hrynew, 2014 SCC 71	74-75
Canada (Attorney General) v. Courchene, 2010 MBQB 200	
Canada (Attorney General) v Merchant Law Group LLP, 2017 SKCA 62	
C.M. Callow Inc. v Zollinger, 2020 SCC 45	83, 90
Edmonton (City) v Gosine, 2020 ABQB 546	
Gilbert v South, 2015 ONCA 712	22-23
IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing, 2017 ABCA 157	4
Pena v U-Pak Disposals Limited, 2017 ONSC 3887	21
Regional Municipality of Halton v Ohashi, 2021 ONSC 6780	
Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District, 2021 SCC 7	
York (Regional Municipality) v LeBlanc, 2015 ONCA 431	
Codes of Conduct	
Code of Professional Conduct of advocates of the Barreau du Quebec	112
Model Code of Professional Conduct	5.1-1

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SCHEDULE "A"

PRACTICE DIRECTIONS RELATED TO VIRTUAL LITIGATION

Jurisdiction	Practice Direction
Ontario	Remote Court Appearances Guide for Participants | Ontario Court of Justice (ontariocourts.ca) best-practices-remote-hearings.pdf (ontariocourts.ca)
Manitoba	Court of King's Bench COVID-19 Notices and Practice Directions - Manitoba Courts
Saskatchewan	COVID-19 UPDATE | Saskatchewan Courts (sasklawcourts.ca)
British Columbia	Attending Court Remotely | Provincial Court of British Columbia
Alberta	Remote Hearings Protocol & Troubleshooting (albertacourts.ca)
New Brunswick	Updated COVID-19 Directive (courtsnb-coursnb.ca) COVID-19 - Law Society of New Brunswick (lawsociety-barreau.nb.ca)
Newfoundland and Labrador	Provincial Court - Expansion of Operations - Virtual Court - The Law Society of Newfoundland and Labrador (lsnl.ca)
Northwest Territories	NWT Courts response to COVID 19 :: Courts of the Northwest Territories
Nova Scotia	Virtual_Court (courts.ns.ca)
Quebec	Courtroom hearings held in virtual rooms | Gouvernement du Québec (quebec.ca) COURT OF QUÉBEC GUIDELINES FOR SEMI-VIRTUAL HEARINGS (courduquebec.ca)

TAB B1

Subject: Canada Emergency Commercial Rent Assistance
Sent: Fri, 01 May 2020 18:58:12 -0000
From: "Budi Laksmono" <budi.laksmono@hotelxtoronto.com>
To: "Anil Dash" <anil@bypnp.com>
utf-8"rtf-body.rtf

Good afternoon Anil,

Please confirm that your BPNP income is below $20MM at the Hotel, not sure if the number company is only covers those revenues generated from the F&B agreement, Maxx's & Petros82?

Thank you

Budi Laksmono

Chief Financial Officer

E. <mailto:travina.chong@hotelxtoronto.com> budi.laksmono@hotelxtoronto.com

D. 647.475.9259

C. 289.552.1713

111 Princes' Boulevard

Toronto, ON, Canada

M6K 3C3

The information contained in this communication is confidential and intended only for the use of the recipient named above, and may be legally privileged and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please resend it to the sender and delete the original message and copy of it from your computer system. Opinions, conclusions and other information in this message that do not relate to our official business should be understood as neither given nor endorsed by the company.

TAB B2

To: Anil Dash[anil@bypnp.com]
From: Budi Laksmono
Sent: 2020-05-06T15:08:29Z
Importance: Normal
Subject: FW: April & May 2020 - Rent Invoice
Received: 2020-05-06T15:10:27Z

Good morning Anil,

I ran the 2019 & T12, 2505243 ONTARIO Limited revenues surpasses the $20MM mark, so the company would not be qualified for the CECRA.

It is on the best interest for 2505243 ONTARIO Limited to cover the outstanding rental for April & May 2020.

Thank you

Budi

From: Michelle Law <michelle.law@hotelxtoronto.com>
Sent: Wednesday, May 6, 2020 10:48 AM
To: Budi Laksmono <budi.laksmono@hotelxtoronto.com>
Subject: RE: April & May 2020 - Rent Invoice

Thank you

From: Budi Laksmono <budi.laksmono@hotelxtoronto.com>
Sent: May 5, 2020 4:02 PM
To: Michelle Law <michelle.law@hotelxtoronto.com>
Cc: Daniel Machado <daniel.machado@hotelxtoronto.com>
Subject: FW: April & May 2020 - Rent Invoice

Good afternoon Michelle,

Per attached, I am resending April 2020 rent invoice and May 2020 rent invoice.

Thank you

Budi

From: Budi Laksmono
Sent: Friday, April 3, 2020 12:03 PM
To: Michelle Law <michelle.law@hotelxtoronto.com>
Cc: Daniel Machado <daniel.machado@hotelxtoronto.com>
Subject: April 2020 - Rent Invoice

Good morning Michelle,

Per attached, please find the April 2020 rent invoice.

Thank you

Budi Laksmono
Chief Financial Officer

E. budi.laksmono@hotelxtoronto.com
D. 647.475.9259
C. 289.552.1713
111 Princes' Boulevard
Toronto, ON, Canada
M6K 3C3

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TAB B3

To: Christopher Lambert[Christopher.Lambert@hotelxtoronto.com]; Anil Dash[anil@bypnp.com]
Cc: Dino Galanis[dino@bypnp.com]
From: Budi Laksmono
Sent: 2020-05-25T15:16:59Z
Importance: Normal
Subject: RE: April & May 2020 - Rent Invoice
Received: 2020-05-25T15:17:15Z
BPNP Revenue 2019 and T12.xlsx

Good morning Anil,

Based on your HST reporting under 2505243 Ontario Ltd

2019 Sales & Revenue $21,614,368
T-12 March 2020 Sales & Revenue $22,383,099

2505243 Ontario Limited would not be qualified under the current CECRA program.

Thank you

Budi

From: Christopher Lambert <Christopher.Lambert@hotelxtoronto.com>
Sent: Saturday, May 23, 2020 3:30 PM
To: Anil Dash <anil@bypnp.com>
Cc: Dino Galanis <dino@bypnp.com>; Budi Laksmono <budi.laksmono@hotelxtoronto.com>
Subject: RE: April & May 2020 - Rent Invoice

Hi Anil,
Budi forwarded me your email. Please copy me on all correspondence going forward.

In regards to the outstanding rent, please review our letter on April 19 – see attached.
We have established that you are reporting more than $20M on a consolidated basis and are therefore not eligible for the CECRA program. If you disagree, please send us the 2019 financials for the 2505243 company, reviewed by an independent CPA.
Can you please explain where in the lease it contemplates rent refunds due to pandemic emergencies declaring restaurants to be closed for dine in services?
I understand from Budi that you will not refund deposits to the Hotel that you are holding, even though we are now refunding some cancelled events with deposits that were previously paid out to you. Can you please confirm your position on this?

Thank you,
Chris

Christopher Lambert, CPA, CGA
Managing Director

E. christopher.lambert@hotelxtoronto.com

D. 647-475-9252
C. 647-401-8144
111 Princes' Boulevard
Toronto, ON M6K 3C3
Canada

From: Budi Laksmono <budi.laksmono@hotelxtoronto.com>
Sent: May 21, 2020 4:01 AM
To: Christopher Lambert <Christopher.Lambert@hotelxtoronto.com>
Subject: Fwd: April & May 2020 - Rent Invoice

Good morning Chris,

See below from BPNP.

Budi Laksmono
Chief Financial Officer
Hotel X Toronto and Ten X Toronto
Begin forwarded message:

From: Anil Dash <anil@bypnp.com>
Date: May 20, 2020 at 11:54:25 PM EDT
To: Budi Laksmono <budi.laksmono@hotelxtoronto.com>
Cc: Dino Galanis <dino@bypnp.com>
Subject: FW: April & May 2020 - Rent Invoice

?
Hi Budi,

This is in reference to your today's discussion with Dino.

- We would like to reconfirm for year 2019,

  With respect to Food and Beverage services agreement, even though total gross receipts shows as per Micros is higher than $20m, our sales net of gratuity is below $20m. In other word out of total sales shown in Micro, we have banquet and room rental revenue $13.2m of which 20% is for gratuities i.e. $2.1m inclusive. Above figure also include room rental sales $1.3m of which 60% allocated to HX at source level, agreement clearly states this is a revenue split and no licensing fees will be collected upon HX portion of revenue (60%).

  With respect to 2nd Floor Restaurant lease agreement we have $2.6m sales (Maxx's) for which we pay $12,556.66 monthly rent + HST.

  With respect to Garden Restaurant lease agreement we have $1m sales (Petro's) for which we pay $31,573.33 monthly rent + HST

Which is falling under the eligibility criteria "that small business tenants that pay less than $50,000 per month in rent**,** per location, as per a valid and legally enforceable rental agreement"

Please find attached two PDF files with respect to CECRA, where in President of Ontario of Chamber of Commerce addressing to Premier about further rent relief for commercial tenants :"*We also believe increasing the cap from $20 to $40 million would allow Ontario's medium-sized enterprises to access the program"*

In other pdf file "Rent Relief Update", wherein they have expressed doubt *whether $20m annual revenue will be measured over the 2019 calendar year*! This specific point is not clear about time-line like any other eligibility requirement.

We understand the deadline to apply for the CECRA is August 31, 2020, in between they might come up with further clarification &/or emerge new guidelines.

I would like to share following article about the calculation of 25% which does not cover profit:
https://www.grantthornton.ca/insights/coronavirus-covid-19/rental-relief-for-small-businesses-canada-emergency-commercial-rent-assistance-cecra

- **OCECRA does not cover profit**: The program will specifically cover rent relating to fixed costs. Funding through OCECRA will not cover any profit element of the landlord.

- In addition to above Dino advised me to remind you about his discussion for ***March 2019 full rent payment***, irrespective of the fact HX asked us to close down the restaurant and we could not do business. So we are expecting HX to refund us back proportionate rent for those lost days.

- With respect to **Gross Receipts**, Dino advised me to remind you as per Food and Beverage services agreement Gross Receipts includes total of all gross sale and **receipts** from all business conducted excepts gross receipts derived from Maxx's and Petro's. This clause even further explains that Interest, installment, finance charges and **deposit** will be included under the definition of Gross Receipts. Furthermore under clause 4.15 catering functions, it clearly states that **all deposits** received and cancellation fees and penalties shall form part of the Gross Receipts. Hence we are requesting you again to give attention and understand the intention of service agreement which serve very foundation for calculation of licensing fees and please remit us all such Gross receipts including **deposit** as defined in the service agreement, which you are withholding since Nov 2019.

Thank you,

Anil Dash
CFO
t. 905-326-8100 www.bypeterandpauls.com
anil@bypnp.com
6250 Hwy 7 Unit J, Vaughan, ON L4H 4G3, Canada.

TAB B4

Endorsement of Mr. Justice Koehnen dated October 9, 2020

From: Koehnen, Mr. Justice Markus (SCJ)
Sent: October 9, 2020 6:09 PM
To: Stam, Jennifer <jennifer.stam@nortonrosefulbright.com>; Sutton, Randy <randy.sutton@nortonrosefulbright.com>; Choi, Peter <peter.choi@nortonrosefulbright.com>; Jeff.Larry@paliareroland.com; Bobby Kofman <bkofman@ksvadvisory.com>; Carey, Peter <pcarey@loonix.com>; Lambert, Thomas <tlambert@loonix.com>
Subject: Re: In the Matter of a Notice of Intention to Make a Proposal of 2505243 Ontario Limited: Estate Number 31-2675288

Counsel:

Jennifer Stam, Randy Sutton, and Peter Tae-Min Choi for 2505243 Ontario Limited

Jeffrey Larry for the Proposal Trustee, KSV Restructuring Inc.

Peter Carey, Thomas P. Lambert for Princes Gates GP Inc. et al.

This email constitutes my endorsement arising out of today's hearing and should be placed into the court file.

The moving party, 2505243 Ontario Limited (the "Company") brings an urgent motion to stay a bankruptcy application commenced by, among others, the operator of Hotel X Toronto. For the reasons set out below, I grant the relief the Company seeks and allow its Notice of Intention to proceed.

The Company leased and operated two restaurants in Hotel X and provided other food and beverage services to the hotel. Disputes arose between the two.

The Company was able to operate at the hotel for between one and two years before the hotel was shut down in March 2020 by virtue of the Covid 19 pandemic. On July 2, 2020, shortly before the hotel was scheduled to host NHL teams, Hotel X terminated the agreements under which the Company operated its facilities at the hotel.

On July 20, 2020, the Company commenced an action against Hotel X. On September 9, 2020 Hotel X and five other creditors commenced a bankruptcy application against the Company. For all intents and purposes, Hotel X is the driving force behind the bankruptcy application. The remaining five creditors are relatively small and have total claims of approximately $100,000.

On September 24, 2020 the Company filed a Notice of Intention pursuant to section 50.4 of the BIA.

The Company submits that its Notice of Intention stayed the bankruptcy application. Hotel X disagrees. Both have pointed to conflicting authorities about the extent to which a Notice of Intention does or does not stay a bankruptcy application. I do not need to decide that issue on today's motion.

Regardless of the effect of a Notice of Intention on a bankruptcy application, section 43 (11) of the BIA allows the court to stay a bankruptcy application "for other sufficient reason." In my view there is sufficient reason to stay the bankruptcy application on the facts of this case.

Counsel for Hotel X candidly admitted that it commenced the bankruptcy application because it found itself to be a defendant in what is described as an unmeritorious action by the Company. Whether that action is meritorious or not is, however, not really an issue for Hotel X to decide. On my view of the record, Hotel X commenced the application for the collateral purpose of putting an end to the litigation, not to protect any legitimate creditor interest.

The most solid asset of the Company is approximately $30,000 in cash. A bankruptcy will swallow more than that in costs.

The other assets of the company include the claim against Hotel X and a receivable of $1,246,000 that the Company says Hotel X owes it.

There is a further asset listed on the books of the Company of property, plant and equipment recorded at a cost of $6,983,000. It appears that all of those assets are located at Hotel X and reflect the cost of building out the restaurants and food and beverage facilities at the hotel. Counsel for Hotel X notes that the leases between the hotel and the Company provide that the assets belong to the hotel once they have been installed.

As a practical matter, the only potential assets beyond the $30,000 and cash that are available to pursue in a bankruptcy are assets that would have to be claimed from Hotel X. Hotel X also asserts significant claims against the Company which would make it a major creditor in a bankruptcy.

In these circumstances, the only plausible motive for Hotel X to bring a bankruptcy application against a company with $30,000 cash but many claims against the hotel, would be to put an end to such claims. That is not a legitimate use of the bankruptcy powers the BIA provides.

A Notice of Intention holds a much better promise of pursuing claims against Hotel X which would create a pool of assets to distribute among creditors. I appreciate that parties related to the Company may also be creditors of the Company and may in fact carry the day when it comes to approving a Notice of Intention. Given however that there are only $30,000 in assets otherwise available, the prejudice to non-arms length creditors if that occurs is nonexistent. The costs of a bankruptcy swallow the $30,000 in any event as a result of which there is nothing to distribute to creditors. The only possibility of a creditor distribution will arise out of whatever claims the company has against Hotel X.

Allowing the Notice of Intention to continue causes no prejudice to any of the creditors. Hotel X has no legitimate basis for using bankruptcy powers to avoid litigation against it. If the litigation is without merit, the litigation process gives Hotel X numerous mechanisms to protect itself against unmeritorious litigation. Remedies for unmeritorious litigation should be pursued using the mechanisms available in civil litigation, not by using bankruptcy as a tool quash litigation.

Given that I heard no submissions about the form of the order during argument today, I have not signed the draft order submitted. I leave it to the parties to agree to the form and content of an order. If the parties are unable to be, they can email me directly for a short case conference to resolve the issue.

The underlying litigation between the parties also calls for case management. I would invite the parties to discuss amongst themselves how best to address that litigation. If the parties are unable to agree, I will make myself available at any time for a case conference at 8:30 in the morning or after 4:30 in the afternoon. Any party can mail me directly for a case conference to address how the disputes between them should be resolved.

Justice Markus Koehnen

TAB B5

Appeal No. C69754

SUPERIOR COURT OF JUSTICE

B E T W E E N:

5

25054243 ONTARIO LTD.

10

Plaintiff

v.

PRINCES GATES GP INC.

Defendant

15

E X C E R P T O F P R O C E E D I N G S

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BEFORE THE HONOURABLE MADAM JUSTICE C. GILMORE
on March 3, 2021, at TORONTO, Ontario

25

APPEARANCES:

R. Sutton, Esq. Counsel for the Plaintiff
R. Frank, Esq. Counsel for the Plaintiff
30
A. Pilieci, Ms. Counsel for the Defendant
P. Carey, Esq. Counsel for the Defendant

SUPERIOR COURT OF JUSTICE

T A B L E   O F   C O N T E N T S

WITNESS:	Exam. in-Ch.	Cr. exam.	Re-exam.
DASH, ANIL	3	--	--

E X H I B I T S

EXHIBIT NUMBER	ENTERED ON PAGE
A. Outline of various assumptions	30
8. Employee termination damages brief	72

Transcript Ordered: .... February 23, 2022

Transcript Completed: .... March 19, 2021

Ordering Party Notified: .... February 23, 2022

requirement, which is for [indiscernible] below 50,000. And overall - if where a financial document, it will [indiscernible] is less than 20 million, then you qualify?

Q. Did 250 consider applying for this program?

A. Yes.

Q. Can you describe for me what you recall as the earliest discussion you had in relation to this program internally at 250 in terms of in the program?

A. Well, after the March finished and the first week of April we started to - with our management, how we can come up with what programs are coming out, until then - after that's finalized. But then again we started to - with hotel and they encourage us, basically, in a letter telling that we should apply for government program. Then I engaged Mr. Budi and that in over a phone call, and we discuss about other programs like financing, [indiscernible], also we discussed how they are dealing with the paying the supplier, and he was telling until July they are not going to pay their supplier, - we wait for the COVID program to finish, we'll work together. And then he said, okay, let me look into it, I'll get back to you. And then he - we started to communicate and he sent me the email and if you want me to explain the [indiscernible], I can explain, or....

Q. That's fine. Just - that's helpful. Just slow down a bit because Her Honour is trying to take notes of what you're saying, so if you slow down just a touch? I'm going to take you then to an email which A8171. Case lines. This is an email from Budi Laksmono to you, dated May the 1st, 2020. And is that the Budi that you were speaking to about previously, Mr. Dash?

A. Yes, this is what had come up from our discussion. Then he said okay, let me look into it, then it said yeah, that is plus 20 million, so please confirm it is less

than 20 million, then I called him back, then I explained yes, it's less than 20 million, and also I said individual lease agreement to look into. But then again he sent another email. He discussed with someone but then again he send me another email that is another email - after this.

Q. In respect to this email, he says, "Please confirm that your BPNP income is below 20 million at the hotel. Not sure if the number company only covers those revenues generated from FB Agreement, Maxx and Petros 82". Does the numbered company have any revenue other than revenue from the hotel?

A. No. We don't have any other revenue. It's 250 is related to Hotel X property.

Q. And does 250 file its returns on a consolidated basis or anything like that?

A. No. 250 is [indiscernible] and it is the individual company.

Q. I'm going to show you at Tab 6 which is A8173, another email from Mr. Laksmono to yourself.

A. Yes, I see that.

Q. Can you describe what's going on here, sir?

A. Before that he sent me another email, I think, it is not here or it's before. In that email he's asking please confirm [indiscernible] if you are filing any other groups that are involved here. I said no, 250 is individual company. He then asked if subsidiary, I said no, it's not a subsidiary. It's just by itself a legal company. And then he went and ran some T2 - oh, I mean, sorry, T12, the HST related report which was really for the reporting system which they had asked me. Usually I forward to them for their knowledge, which Mr. Chris Lambert had asked me when he started beginning. And based on that he's telling you revenue is more than 20 million and you

don't qualify. So, then I said no, we qualify, and I have done my research, we qualify, and then he said, okay, we'll look into it. At this point he's telling no. And then he gave me assurance - let's talk, let me investigate more [indiscernible]. And I requested him, my humble request was please look into, we qualify.

Q. If you go to the bottom of page three of that email chain, go to the next tab, sorry, Tab 7, 76, go to the bottom of page three of that email chain. Email --

A. Yeah, you can look - yeah, this one - after this I think our management and everybody there spoke and they wanted to convince that we qualify, but their management was not listening that argument, so I took the help of Budi, I called Budi, we have to finish this, we both are coming from accounting background, let's look into it, and then he - then I engaged the conversation with Dino, and we were there at the location and he spoke - and then Budi said, okay, you send me your argument, whatever you have [indiscernible] later let me look into it. And then I sent this email identifying why my argument is right. And also I didn't explain what [indiscernible] is telling, what [indiscernible] is telling, and it is very - to conclude something like that because this program is to help payment, and that maybe some news - come up and we'd have time 'til August. And this [indiscernible] so quickly, allow me, so that is what I'm writing in this email.

Q. You say you had 'til August to apply, is that because the program was open 'til August or what was that about?

A. It was there until August to file. Before that, they can file retroactively and they also extended one more month because it went until September, until CRA stepped in.

eligible for the CECRA program. If you disagree, please send us the 2019 financials of 2505243 company reviewed by an independent CPA.

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Do you recall receiving that on Saturday, May 23rd?

A. Yes. The email, what I had was send it to Mr. Budi and now Mr. Christopher Lambert, he [indiscernible]. And he gave his update and telling that this is not possible, and 10 only if it is reviewed by independent CPA, but I know it is not necessary because if you engage [indiscernible] you will end up paying a huge amount. But the CECRA program is to help the [indiscernible] not to [indiscernible] because there is a pandemic is going on. But anyways, I engaged Mr. Budi again and 15 said, Mr. Budi, this is not right. I called him. That's the reason he's replying me on [indiscernible] because otherwise he would have stopped here. It was necessary for him to reply to me. So, he's again replying, Anil, best [indiscernible], that's it, end of the story, no more conversations basically he's 20 telling, this is what our management decided and this is why we are not moving forward. And he stopped me, but I did not stop here. I still engaged.

Q. Still engaged with Hotel X?

A. Yes. In a way I was asking him, and then they 25 asked me to engage with their [indiscernible] because their financial statement was there, so they need my help to certify some of the things so that they can move forward with that. I finished their audit, whatever help they would ask me, and then I wanted to do - program, what, everything, I was engaging KPMG 30 and I had sent a little list of things what I need to finish all my audit, but Mr. Budi cut me off. He said no, we.... Those

Princes Gates GP Inc. in its capacity as General Partner of Princes Gates Hotel Limited Partnership
Applicant (Appellant below)

and

2505243 Ontario Limited o/a Bypetrerandpual.Com
Respondent (Respondent below)

Supreme Court File No.:
Court of Appeal File No.:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

RESPONSE OF THE RESPONDENT TO THE APPLICATION FOR LEAVE TO APPEAL

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