

## Leasing Case Bulletin:

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### A Sigh of Relief for Landlords: Tenants are not excused from paying rent when the rented premises are shut down due to COVID-19 restrictions

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By: Minden Gross LLP's [Commercial Leasing Group](#)\*

On January 5, 2021, the Superior Court of Quebec (Commercial Division) released its decision in *Groupe Dynamite Inc. et al. v. Deloitte Restructuring Inc.* The case held that tenants are not excused from paying rent while the rented premises are subject to a mandatory shutdown due to COVID-19 restrictions. The decision hinged on a finding whether Dynamite was, or was not, “using” the premises during the COVID-19 shutdown.

### Background

#### Law

Under section 11 of the *Companies' Creditors Arrangement Act* (the “CCAA”), the Court has wide discretion in making any order it considers appropriate in the circumstances to facilitate the arrangement between an insolvent debtor and its creditors. The primary instrument used in such proceedings is the power to stay proceedings and executions by creditors.

Section 11.01 (a) of the CCAA prohibits any order from being made that would prohibit immediate payment to persons who supply goods, services, and the use of leased property to the insolvent debtor.

Section 32 of the CCAA permits debtor companies to disclaim any agreement, including leases, on 30 days' notice, with the approval of the court-appointed monitor.

#### Facts

Groupe Dynamite Inc., along with its US affiliates GRG USA Holdings Inc. and GRG USA LLC (collectively “Dynamite”), filed an application for an initial order to restructure its business under the CCAA. The application was granted by the Court, and has been extended through amended and restated initial orders (together with the initial order, the “Orders”) so as to still be in force today.

As is customary, the Orders imposed a stay on Dynamite’s creditors from bringing proceedings or enforcement orders against it or its assets. However, the initial order mirrored section 11.01(a) of the CCAA in providing an exception for persons who supply goods, services, and the use of leased property to Dynamite, allowing them to require immediate payment.

The governments of Manitoba and Ontario shut down certain non-essential business to the public to stem the rise of COVID-19 on November 11 and 22, respectively (collectively the “COVID Restrictions”).

Dynamite applied to the Court for a finding that no rent shall be due or payable with respect to certain of its leased premises in Manitoba and Ontario until such time as the COVID Restrictions are no longer in force.

## **The Positions of the Parties**

Both parties recognized that a court cannot prevent a landlord from requiring immediate payment for an insolvent tenant’s “use of leased premises”. Instead, the decision ultimately depended on whether Dynamite was “using” the leased premises given the COVID Restrictions in place.

### **Dynamite**

Dynamite argued that, so long as the COVID Restrictions are in place, they are not using the premises, therefore making the rent neither due nor payable until the COVID Restrictions are lifted. In order to “use” the premises, Dynamite would have to enjoy the economic benefit of what they bargained for, and not simply occupy a leased premise or be party to a lease. The economic benefit of generating revenue and brand awareness of having operational stores was voided by the COVID Restrictions, and as such, so was Dynamite’s use of the premises.

Dynamite further argued that they had successfully and intentionally inserted the verbiage of “use”, rather than “occupy” or “lease” into the Orders for this exact purpose. Additionally, Dynamite’s US affiliate successfully argued this exact distinction in California, such that “use” of the premises did not continue during lockdown orders in California.

### **The Landlords**

Dynamite was opposed by the landlords of the properties for which the rent was contested (collectively the “Landlords”). In essence, the Landlords’ position was that Dynamite could either disclaim the leases and relinquish possession or pay rent and maintain possession, but it would be inequitable to allow Dynamite not to pay rent and maintain possession for free.

Firstly, the Landlords argued that, because Dynamite had not disclaimed the leases as permitted by the CCAA, they continued to “use” the premises. Secondly, the Landlords pointed to a variety of Dynamite’s alternative options available, such as in-store pick-up, thus pointing to Dynamite’s choice not to use the premises rather than their inability to use them. Thirdly, the Landlords argued

that their obligation to assume the expenses of the lease while not receiving rent is tantamount to being forced to advance credit to an insolvent tenant.

## The Decision

The Court concluded that the order sought by Dynamite would violate section 11.01(a) of the CCAA, prohibiting courts from making orders which would prevent persons supplying use of a leased premise from requiring immediate payment by an insolvent debtor.

The Court dismissed Dynamite's argument that "use" must be carrying on the activity for which the property was leased. To the contrary, the Court found that Dynamite asserting its right to sole possession of the premises was sufficient to engage section 11.01(a) of the CCAA.

In these uncertain times, the Court was very clear in stating:

"...where leased premises are occupied by a debtor and cannot be leased to anyone else, the landlord is not prevented from demanding immediate payment of rent regardless of whether or not the debtor is carrying on business."

and the Court supported such finding that mere possession of leased property can constitute "use" in a number of cases.

The Court also found that, in the alternative, the Landlords would be able to claim rent under the terms of the leases because such leases did not relieve Dynamite from paying rent due to government regulations or *force majeure* preventing the parties from fulfilling its obligations.

The Court concluded that it had no power to issue the order sought due to section 11.01(a) of the CCAA, and, in the alternative, would not exercise such discretionary power were it available.

## Takeaway and Implications

Tenants are not excused from paying rent to their landlord when the rented premises are subject to a mandatory shut down due to COVID-19 restrictions. A tenant's mere possession of leased premises can constitute "use" of the premises. The landlord's inability to lease the premises to anyone else due to the tenant's occupancy is sufficient to require the tenant to continue to pay rent.

We will continue to provide updates on litigation that affects landlords and tenants during COVID-19. If you have any questions or would like to obtain legal advice on any leasing issues or commercial leasing litigation, please contact any lawyer in our [Commercial Leasing Group](#).

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