SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-17-058763-208

DATE: January 5, 2021

BEFORE: THE HONOURABLE PETER KALICHMAN, J.S.C.

GROUPE DYNAMITE INC.
GRG USA HOLDINGS INC.
GRG USA LLC
Petitioners
v.
DELOITTE RESTRUCTURING INC.
Monitor

JUDGMENT
(Post-filing rent and Covid-19)

OVERVIEW

[1] The Court is asked to decide whether a debtor pursuing a plan of arrangement under the *Companies' Creditors Arrangement Act* (the **CCAA** or the **Act**) should be relieved of the obligation to pay post-filing rent in circumstances where its ability to use leased premises is impeded by government decree.

CONTEXT

[2] Groupe Dynamite Inc. operates over 300 retail stores in Canada and the U.S. under the names, Dynamite and Garage. The business was severely impacted by the Covid-19 pandemic and the government-imposed restrictions which followed. As a result, 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 and an Amended and Restated Initial Order for the purpose of pursuing a restructuring of its business under the CCAA.

[3] The Court rendered an Initial Order on September 8, 2020 (the **Initial Order**)[1] and an Amended and Restated Initial Order, ten days later (the **ARIO**).[2]

[4] The Initial Order imposed a stay to prevent Dynamite's creditors from bringing or continuing proceedings or enforcement orders against it or its assets. The stay period, which was first extended by the ARIO, has been extended several times since and is still in force today.

[5] The Initial Order also provided that no person who supplied goods, services or the "use of leased property" to Dynamite after the Initial Order, could be prohibited from requiring immediate payment. This provision in favour of post-filing suppliers is also contained in the ARIO and mirrors section 11.01 (a) of the CCAA.

[6] Since the Initial Order, Dynamite, with the assistance of the Monitor, has sought to create the conditions necessary for a successful plan of restructuring. To this end, it has sent disclaimer notices in regards to certain of its leases in accordance with section 32 (1) and following of the CCAA. Dynamite has renegotiated or is in the process of renegotiating the remaining leases, including those at issue here.

[7] On November 11, 2020, the government of Manitoba issued an order closing non-essential businesses to the public in order to stem the rise in cases of Covid-19 in the Province (the **Manitoba Order**).[3] Dynamite's Manitoba stores are covered by the Manitoba Order and have been closed to the public since November 11, 2020.

[8] On November 22, 2020, the government of Ontario also closed non-essential businesses to the public in several areas of the Province (the **Ontario Order**).[4] Certain of Dynamite's Ontario stores are covered by the Ontario Order and have been closed to the public since November 23, 2020.

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1 Exhibit P-1.
2 Exhibit P-2.
3 The Manitoba Order was issued by the Chief Provincial Health Officer under *The Public Health Act*, CCSM c P210. Exhibit P-10.
4 The Ontario Order was issued by the Ontario government under the *Reopening Ontario (A Flexible Response to COVID-19) Act*, 2020, S.O. 2020, c. 17. Exhibit P-25.

[9] Dynamite asserts that so long as the Manitoba and Ontario Orders (collectively the **Covid Restrictions**) are in place, it is not "using" the premises it leases in those Provinces and post-filing rent is neither due nor payable. It asks the Court to amend the ARIO accordingly in regards to three Manitoba stores (the **Manitoba Stores**) and nine Ontario stores (the **Ontario Stores**). The conclusion it seeks to add reads as follows:

> DECLARES that, where the Debtors cannot operate a store in leased premises as a result of a federal, provincial, state, county or city decree, regulation or order (a "**Lockdown Order**"), the Debtors do not use such leased premises from the time such Lockdown Order enters into force until the time such Lockdown Order is no longer in force (the "**Lockdown Period**") such that no Post-Filing Rent shall be due or payable by the Debtors with respect to those leased premises for the Lockdown Period. This paragraph only applies in respect of Post-Filing Rent payable for leased premises located in the following locations...

[10] Dynamite's application is contested by the landlords of the Manitoba and Ontario Stores (the **Landlords**).[5]

THE LAW AND THE ISSUE TO BE DECIDED

[11] The purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor and its creditors so that the company is able to continue its business. The "primary instrument provided by the CCAA to achieve this purpose" is the power to issue a broad stay of proceedings.[6] The stay period provides the company with breathing room in which to craft a viable plan of arrangement and present it to its creditors for approval.

[12] Dynamite's application is based on section 11 of the CCAA which gives the Court discretion to make any order that it considers appropriate in the circumstances, subject to the restrictions set out in the Act. One such restriction is found at section 11.01 (a) of the CCAA, which protects the rights of suppliers who continue to work with the debtor during the restructuring process. It provides that no order made under section 11 can have the effect of prohibiting a person from requiring immediate payment for goods, services or the use of leased or licensed property.

[13] The parties recognize that the Court cannot render an order that circumvents the prohibition of section 11.01 (a) of the CCAA. The principal issue to be decided here turns on the interpretation of that section and, more specifically, on what is meant by "use of leased premises".

[14] If Dynamite is using the Manitoba and Ontario Stores, as the Landlords argue, the Court lacks the discretion to issue the order sought by Dynamite. If the Court has

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5 Morguard Investments Limited, Cushman & Wakefield Asset Services ULC, RioCan Estate Investment Trust, Orlando Corporation, Ivanhoe Cambridge Inc., Cadillac Fairview Corporation Limited, Oxford Properties Group, Primaris Management Inc.

6 *Nortel Networks Corporation (Re)*, 2009 ONCA 833, par.16.

the necessary discretion, then the question is whether or not it should be exercised under the circumstances.

THE POSITIONS OF THE PARTIES

Dynamite

[15] Dynamite maintains that the term "use" found in section 11.01 (a) of the CCAA must be given its ordinary, literal meaning and should be interpreted in the context of the overall objective of the CCAA. According to Dynamite, neither the existence of a lease nor the occupation of leased premises, automatically imply use of such premises within the meaning of the CCAA.[7] To conclude that a debtor is using leased premises, a court must be satisfied that it is enjoying the economic benefit that it bargained for.

[16] In Dynamite's view, that is clearly not the case in either the Manitoba or Ontario Stores.

[17] To fully appreciate Dynamite's position, it is necessary to understand the role that stores play in its overall business strategy.

[18] Dynamite operates retail stores for two broad purposes. The first is to provide a "personal shopping experience", in which human interaction is an essential feature. According to Marie-Soleil Tremblay, Dynamite's Senior Vice-President, Sales and Operations, this explains why over 69% of its sales are made within its 303 retail stores and not online.[8] It also helps to explain why 24% of visitors to its stores will make a purchase as compared with only 1.6% of those who visit its e-commerce platforms.[9]

[19] The second broad purpose served by Dynamite's retail stores is marketing. According to Ms. Tremblay, passing foot traffic "nurtures unaided and spontaneous awareness" of Dynamite's brands and is also beneficial to its e-commerce business.[10]

[20] For these reasons, in selecting the locations of its stores, Dynamite favours first-class shopping malls with high visibility and significant traffic.[11]

[21] As a result of the Covid Restrictions, Dynamite was forced to close the Manitoba and Ontario Stores. It therefore generates no revenue or brand awareness from those locations.[12] Since the Covid Restrictions went into effect, employees have only been inside the stores for logistical purposes, such as emptying cash desks or finalizing

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7 *Smith Brothers Contracting Ltd, Re*, 1998 CanLII 3844 (BC SC) at par. 19.
8 Affidavit of Marie-Soleil Tremblay at par. 11. The 69% figure represents sales in the first 11 months of 2020.
9 Affidavit of Marie-Soleil Tremblay at par. 11.
10 Affidavit of Marie-Soleil Tremblay at par. 12.
11 Affidavit of Marie-Soleil Tremblay at par. 13.
12 Affidavit of Guy Vallières at par.9 and Affidavit of Marie-Soleil Tremblay at par. 32.

unprocessed in-store orders.[13] In fact, Dynamite has temporarily laid off 345 employees from the Manitoba and Ontario Stores.[14]

[22] Dynamite recognizes that because the malls in which the Manitoba and Ontario Stores are located are not closed to the public, it could offer "buy online, pickup in store" services (**BOPIS**) or use the Stores to fulfill online orders, as certain other tenants have done. However, Dynamite maintains that BOPIS is unappealing to its customers and represents only .5% of its overall sales.[15] Furthermore, it adds that all its online orders are already processed in its Montreal headquarters. Finally, Dynamite argues that using its stores for BOPIS or to fulfill online orders was not the purpose for which it leased those locations and, in any event, would make no sense financially.[16]

[23] Based on the role stores play in its overall business strategy, Dynamite argues that it is clearly not using the Manitoba and Ontario Stores within the meaning of section 11.01 (a) of the CCAA.

[24] Dynamite argues that this conclusion is also in line with the wording of the ARIA and, in particular, paragraph 52, which reads as follows:

> ORDERS that, for the use of each leased premises, the Debtors shall pay all amounts constituting rent or payable as rent under real property or immovable leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under its lease, but for greater certainty, excluding accelerated rent or penalties, fees, interests or other charges arising as a result of the insolvency of the Debtors or the making of this Order) or as otherwise may be negotiated between the Debtors and the landlord from time to time ("**Post-Filing Rent**"), for the period commencing on the Effective Time, twice-monthly in equal payments on the first and fifteenth day of each month, or the immediately following business day if that day is not a business day, in advance (but not in arrears). On the date of the first of such payments, any Post-Filing Rent relating to the period from the Effective Time to such date shall also be paid.
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> (Underlining added by the Court)

[25] According to Dynamite, this particular wording, which focuses on use as opposed to occupancy, was requested in anticipation of just such a situation and was not opposed by the Landlords.

[26] Dynamite adds that this Court has already endorsed its interpretation of the term "use" as it appears in section 11.01 (a) of the CCAA. In September, 2020, Dynamite's

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13 Supplemental Affidavit of Marie-Soleil Tremblay at par. 2.
14 The Monitor's Fourth Report, par. 34.
15 Affidavit of Marie-Soleil Tremblay at par. 22.
16 Supplemental Affidavit of Guy Vallières at par.4.

U.S. affiliate was prevented from operating four Dynamite stores located in California as a result of government-issued lockdown orders. The Court ruled that under the circumstances, it was not in fact using those premises and issued the following order:

> DECLARES that, subject to the terms of this paragraph, where GRG USA LLC cannot operate a store in leased premises as a result of a federal, state or county decree, regulation or order (a "**Lockdown Order**"), GRG USA LLC does not use such leased premises from the time such Lockdown Order enters into force until the time such Lockdown Order is no longer in force (the "**Lockdown Period**") such that no Post-Filing Rent shall be due or payable by GRG USA LLC with respect to those leased premises for the Lockdown Period. This paragraph only applies in respect of Post-Filing Rent payable for leased premises located in the following locations:
>
> (a) Canoga Park, California, USA;
>
> (b) Torrance, California, USA;
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> (c) Cerritos, California, USA; and
>
> (d) Glendale, California, USA.

[27] According to Dynamite, the situation in Manitoba and Ontario is virtually identical and should lead to the same result.

[28] In Dynamite's view, it is not necessary to consider the terms of the leases for the Manitoba and Ontario Stores. If the application is granted, the Landlords may file a claim on the basis that they suffered harm as a result of the Court's order. In the context of such a claim, the terms of the leases may be relevant.

[29] Dynamite recognizes that requiring it to pay the rent for the Manitoba and Ontario Stores would not necessarily jeopardize its ability to craft a viable plan of arrangement. In fact, the Monitor is of the view that Dynamite could pay the rent without availing itself of the DIP financing authorized under the ARIO. However, Dynamite maintains that requiring it to use a portion of its limited resources to pay for premises that it cannot currently use would be contrary to the objectives of the CCAA. Furthermore, it argues, the general interest of all creditors should be preferred over the particular interest of one creditor or group of creditors, in this case, the Landlords.[17]

[30] Because the order it seeks would not violate the prohibition set out at section 11.01 (a) of the CCAA, Dynamite argues that the Court has the discretion to amend the ARIO and that it should exercise this discretion in light of the extraordinary circumstances.

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[17] In support of this argument, Dynamite cites *Boutiques San Francisco Inc., Re*, 2004 CanLII 16649 (Que SC) at par. 23.

The Landlords

[31] The Landlords maintain that so long as a true lease[18] is in place that has not been disclaimed, the debtor occupying leased premises is using them within the meaning of section 11.01 (a) of the CCAA and a landlord cannot be prohibited from requiring the immediate payment of rent. They argue that this interpretation is consistent with the overall scheme of the CCAA. In their view, the fact that Dynamite is occupying the Manitoba and Ontario Stores is sufficient to dispose of the application, without having to examine the terms of the leases.

[32] According to the Landlords, if it is necessary to examine the leases for the Manitoba and Ontario Stores in order to determine whether or not Dynamite is using the premises, this would only reinforce their argument. They maintain that the leases are governed by the applicable provincial laws[19], according to which a landlord's duty to provide quiet or peaceable enjoyment is extremely limited.[20] Furthermore, they point out that under the terms of the leases for the Manitoba and Ontario Stores, Dynamite remains responsible for the payment of rent even if it is unable to operate as a result of government regulations.[21]

[33] Even if the Court adopts Dynamite's interpretation of section 11.01 (a) of the CCAA, the Landlords argue that it is still using or, at the very least, is not prevented from using the Manitoba and Ontario Stores. In this regard, the Landlords point out that Dynamite has not disclaimed the leases for the Manitoba and Ontario Stores, and, therefore, refuses to relinquish possession to the Landlords. Furthermore, despite the Covid Restrictions, various options are available to Dynamite, including BOPIS and, in Manitoba, the in-store sale of certain items of winter clothing.[22] The fact that Dynamite has chosen not to use the leased premises in these ways should not be confused with its inability to do so. In their view, Dynamite clearly has the use of the Manitoba and Ontario Stores.

[34] In any event, the Landlords maintain that the order Dynamite seeks is also a violation of section 11.01 (b) of the CCAA, which provides that no order under section 11 can require the further advance of money or credit. According to the Landlords, the order Dynamite seeks would require them to continue to assume the expenses related to the Manitoba and Ontario Stores without the benefit of receiving rent. In this sense, they argue, it would require them to advance credit to Dynamite.

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18 The Landlords do not contest that the leases for the Manitoba and Ontario Stores are true leases as opposed to financial leases.

19 David Bish, *Canadian Bankruptcy and Insolvency Law for Commercial Tenancies* (Toronto : Lexis Nexis Canada, 2016), p. 45.

20 Manitoba : *Landlord and Tenant Act*, CCSM c 170 as well as opinion on Manitoba law prepared by Fillmore Riley LLP. Ontario : *Commercial Tenancies Act*, RSO 1990, c L7.

21 Exhibits P-4, P-5, P-6, P-12 through P16 and P-18 through P-24.

22 List of Essential Items for Retail Sale – Detailed List (Manitoba).

[35] Since the order Dynamite seeks would violate the prohibitions of sections 11.01 (a) and (b) of the CCAA, the Landlords argue that the Court does not have the discretion to issue it.

[36] Finally, the Landlords argue that even if the Court has discretion to issue the order, it should refuse to exercise it. According to them, Dynamite is asking the Court to rewrite the leases for the Manitoba and Ontario Stores and to require the Landlords to bear the entire economic burden resulting from the Covid Restrictions.

THE COURT'S DECISION

[37] For the reasons that follow, the Court concludes that the order sought by Dynamite would violate the prohibition set out at section 11.01 (a) of the CCAA. The Court does not have the power to issue such an order.[23]

[38] While extraordinary circumstances, such as those at issue here, may be a factor for the Court to consider in deciding whether or not to exercise its discretion, they are not a factor in determining whether or not it has such discretion. For that, the Court must interpret section 11.01 (a) of the CCAA and its interpretation must apply in all circumstances, extraordinary or not.

[39] The Court does not agree with Dynamite that for a debtor to be making "use" of property within the meaning of section 11.01 (a) of the CCAA, it must necessarily be carrying on the activity for which the property was leased. If that were the case, a debtor could choose to temporarily shut down operations in leased premises and the landlord would not have the right to insist on immediate payment. This could not have been what Parliament intended.

[40] While there is no doubt that Dynamite's ability to operate the Manitoba and Ontario Stores is severely limited by the Covid Restrctions, it is still using those premises within the meaning of the CCAA and the ARIO.

[41] Dynamite has chosen not to send notices to disclaim the leases for the Manitoba and Ontario Stores because, quite obviously, it chose these locations carefully, they are important to its restructuring efforts and it does not wish to surrender them to the Landlord at this time. In making this decision, Dynamite is asserting its right to "sole possession"[24] of the Manitoba and Ontario Stores. In the Court's view, this is sufficient to trigger the application of section 11.01 (a) CCAA and the Landlords cannot be prevented from claiming the immediate payment of rent.

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23 *Nortel Networks Corporation (Re)*, 2009 ONCA 833, par.18.
24 *Quest University Canada (Re)*, 2020 BCSC 921, par. 90.

[42] The Court recognizes that an exception to the stay of proceedings, section 11.01 (a) of the CCAA must be "narrowly construed".[25] Nonetheless, it is clearly drafted from the post-filing suppliers' standpoint and is intended to protect them and to counter-balance the rights of the debtor.[26] In this light, it is clear that 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.

[43] This interpretation is consistent with the provisions of the CCAA dealing with the disclaimer of agreements and, specifically, section 32 (5), which prescribes that the disclaimer only takes effect thirty days after notice is sent. This provision ensures that the party whose contract is being disclaimed benefits from a delay in which to consider its position and, in the case of a lease, an additional month's rent. If Dynamite's interpretation of section 11.01 (a) of the CCAA were correct, a debtor could and likely would cease operations in the leased premises at the same time as it sent its notice of disclaimer. The landlord in that scenario would not receive rent, would be unable to demand it and would be forced to wait thirty days until the disclaimer took effect. The Court agrees with the Landlords that this is not a result that Parliament intended.

[44] The notion that mere possession of leased property or occupation of leased premises can constitute use within the meaning of section 11 of the CCAA, has been recognized in a number of cases.[27]

[45] In *Air Canada*, Justice Farley ruled that the debtor was required to pay the full amount of its rent despite the fact that the aircraft it had leased was parked and sitting idle for months prior to the repudiation (disclaimer) of the lease.[28]

[46] Similarly, in *Budget Waste*, the debtor argued that a distinction must be drawn between a post-filing creditor who supplies goods and services and a lessor of vehicles that are not being used. Justice Lo Vecchio rejected that distinction and held that since the debtor had the care and control of the leased vehicles, even though it was generating no revenue from them, the lessor was still providing a good or service and was entitled to the immediate payment of rent.[29]

[47] Finally, in *Quest University*, which was also rendered in the context of the Covid-19 pandemic, Justice Fitzpatrick ruled that the University was not entitled to an order allowing it to defer the payment of rent owing on four of its student residences despite

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25 *Nortel Networks Corporation (Re)*, 2009 ONCA 833, par.17. See also *Smith Bros. Contracting Ltd., Re*, 1998 CanLII3844 (BC SC) at paras. 41 and 47.

26 *Quest University Canada (Re)*, 2020 BCSC 921, par. 45.

27 See also David Bish, Canadian Bankruptcy and Insolvency Law for Commercial Tenancies (Toronto : Lexis Nexis Canada, 2016), p. 143.

28 *Air Canada, Re*, 2004 CarswellOnt 643 (SC), pars. 7 and 12.

29 *Budget Waste Inc. (Re)*, 2009 ABQB 752, par. 27. See also, *Allarco Entertainment Inc (Re)*, 2009 ABQB 503.

the fact that its ability to use them was limited by government decree. She held that the lack of physical occupation of the residences was not a determining factor and that the word "use" had a more expansive meaning than that which the debtor had proposed.[30] Among the reasons Justice Fitzpatrick listed for concluding that the University was using the residences within the meaning of section 11.01 (a) of the CCAA, were the following:

> (...)
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> (b) Quest is asserting, as against Southern Star, its landlord, sole possession of the Residences, in accordance with its right to quiet enjoyment of the Residences under the Subleases. In other words, Quest is exercising its right to "use" the Residences, as intended;
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> (...)
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> (e) Quest has not seen fit to disclaim the Subleases. To the contrary, Quest's evidence is that the Residences are very important and it must maintain them to further the possible restructuring options available to them, as discussed above. The existence of the Residences, and Quest's rights under the Subleases, remain a key selling point in relation to potential partners.

[48] Both these factors are equally applicable to Dynamite's situation.

[49] The Court recognizes that according to paragraph 52 of the ARIO, Dynamite must pay post-filing rent for the "use" of leased premises. However, this provision simply mirrors the wording of the CCAA and does not impact the Court's analysis.

[50] With respect to the September, 2020 judgment regarding the California lockdown orders, there are no doubt certain parallels to be drawn with the current situation. However, as Dynamite recognizes, the Court is not bound by its earlier judgment. That said, it is important to note that, unlike the situation at issue here, the malls in which the California stores were located were entirely closed to the public. Furthermore, in rendering the order, which was for a relatively short period, the Court did not have the benefit of the complete record it has here. In its reasons for judgment, the Court noted:

> [13] The evidence discloses that the four leased premises at issue are all located in shopping malls that are shuttered as a result of government decrees. Consequently, the Debtors have no access to the premises during the lockdown period.
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> [14] Given the policy objectives of the CCAA and given that exceptions to a stay order are to be narrowly interpreted, the Court agrees that the Debtors are not currently using these particular leased premises. However, this determination is made for a relatively brief period and nothing precludes Brookfield or any of the other landlords at

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30 *Quest University Canada (Re)*, 2020 BCSC 921, pars. 88 and 89.

issue, from contesting a request for renewal and from bringing evidence that is not currently before the Court.

[51] Dynamite takes no position on whether or not the Landlords can claim rent under the terms of the leases for the Manitoba and Ontario Stores despite the Covid Restrictions. While such an analysis may not be strictly necessary to rule on the application[31], the Court agrees with the Landlords that under the terms of the leases, Dynamite is not relieved of the obligation to pay rent even if a government regulation or a situation of *force majeure* prevents one of the parties from fulfilling its obligations.[32]

[52] The Court thus concludes that an order declaring that no post-filing rent is due and payable for the Manitoba and Ontario Stores would violate section 11.01 (a) of the CCAA and is beyond the Court's discretion. Under the circumstances, it is not necessary to determine if such an order would also constitute a further advance of credit within the meaning of section 11.01 (b) of the CCAA.[33]

[53] The Court adds that even if it had the power to issue the order sought by Dynamite, it would refuse to exercise it.

[54] The Court has broad discretion under section 11 of the CCAA. The test governing the exercise of this discretion is whether the order sought "will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company."[34]

[55] Even though Dynamite acknowledges that the continuing payment of rent for the Manitoba and Ontario Stores will not, in and of itself, jeopardize its ability to craft a viable plan or arrangement, it is equally clear that not paying the rent would improve its cash flow and, from that perspective, enhance its prospects of a successful restructuring.

[56] However, achieving the Act's remedial purpose is not a simple matter of analyzing the debtor's financial situation. As the Supreme Court of Canada affirmed in *Century Services*, "Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit."[35]

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31 For this reason, the opinion on Manitoba law filed by certain of the Landlords, was not useful to the Court and does not form part of the award for costs.

32 Exhibit P-4, par. 21.12; Exhibit P-24, par. 15.07; Exhibit P-5, par. 1.18.17; Exhibit P-16, par. 17.08; Exhibit P-12, par. 17.08; Exhibit P-13, par. 17.08; Exhibit P-18, par. 20.14; Exhibit P-19, par. 20.14; Exhibit P-20, par. 20.14; Exhibit P-21, par. 20.14; Exhibit P-22, par. 20.14; Exhibit P-23, par. 20.14; Exhibit P-15, par. 17.09; Exhibit P-16, pars. 16.03 and 16.06.

33 See *Allarco Entertainment Inc. (Re)*, 2009 ABQB 503, par. 55, in which Madam J.B. Veit reached the same conclusion.

34 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, par. 70.

35 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, par. 70.

[57] In *Quest University*, Justice Fitzpartrick noted that "it is commonly considered "fair" that a person continuing to supply an insolvent debtor or allow the debtor to continue using its property during the restructuring should also be compensated for that supply or use..."[36]

[58] The Court considers that even though the order would strengthen Dynamite's financial position, it would achieve that result in a manner that is unfair to the Landlords. In reaching this determination, the Court considered the following:

a) Dynamite has thus far elected not to disclaim any of the leases at issue so the Landlords cannot rent the premises to anyone else;

b) The Covid Restrictions may be in place for an extended period of time;

c) The Landlords would continue to support the costs associated with the Manitoba and Ontario Stores, including maintenance, utilities, security and insurance, without receiving rent;

d) Nothing prevents Dynamite from disclaiming the leases at issue at a later date;

e) If the requested order were rendered, the only claim the Landlords would be left with would be as unsecured creditors through the restructuring; and

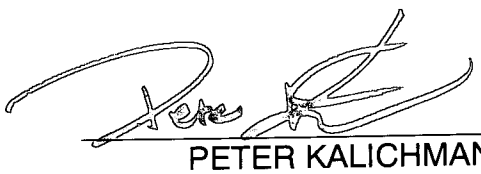
f) Granting the order would effectively result in a redrafting of the leases for the Manitoba and Ontario Stores by allowing Dynamite to invoke government regulations as justification for not paying rent.

[59] In such circumstances, it would have been inappropriate for the Court to exercise its discretion under section 11 of the CCAA.

FOR THESE REASONS, THE COURT:

[60] **DISMISSES** the Debtors' Amended Application to Amend the Initial Order with the respect to the Payment of Post-Filing Rent in Manitoba and Ontario.

[61] **WITH JUDICIAL COSTS.**



PETER KALICHMAN, J.S.C.

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36 *Quest University Canada (Re)*, 2020 BCSC 921, par. 98.

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