

Landlord Considerations: To Term or to Terminate

Commercial Real Estate | Landlord | Litigation & Dispute Resolution | Terminate

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On February 18, 2026, the Supreme Court of Canada will hear the appeal of *Canada Life Assurance Company v Aphria Inc.* [1] In this momentous hearing, the Court will be asked to decide whether commercial landlords have an obligation to mitigate their damages when a tenant repudiates a commercial lease. Since the decision made in the *Highway Properties* case in 1971, the law has been settled that commercial landlords do not have a duty to mitigate if they insist on continued performance under the lease following a tenant's repudiation. [2] This appeal provides the Court with an opportunity to change that settled law and to obligate landlords to seek out new tenants during the term of an existing lease which has been repudiated.

Current Landscape

The law recognizes four mutually exclusive courses of action a landlord may take where a tenant has fundamentally breached or repudiated a lease:

- affirm the lease and sue for ongoing rent and/or damages;
- terminate the lease and claim accrued rent and/or damages to termination;
- re-enter the premises and re-let on the tenant's account (with the tenant liable for any shortfall); or
- terminate and claim accelerated damages for the loss of the lease over the unexpired term. [3]

This case deals with the first option.

Practically, we note that when a landlord chooses to affirm the lease, the landlord must avoid any action or communication which could evidence an intent to terminate the lease (e.g. locking the tenant out of the premises).

Factual Background

In 2018, Aphria Inc. entered into a 10-year lease for a commercial office space in Toronto. In 2021, Aphria vacated the premises, served a notice repudiating the lease and stopped paying rent. The landlord refused to accept Aphria's repudiation, and informed Aphria that it was required to uphold its obligations under the lease including its obligation to pay rent. Aphria's real estate broker provided the landlord with leads for new tenants but the landlord rejected these leads, refused to re-let the premises, and reminded Aphria of its right to sublet the premises.

The landlord brought a motion for summary judgment for unpaid rent owing from the date on which Aphria stopped paying rent, as well as for future rent. The landlord argued that it had no obligation to mitigate its damages by finding a new tenant, since it never accepted Aphria's repudiation of the lease – the lease remained in place. Aphria argued that the landlord had a duty to mitigate and, if damages were to be awarded to the landlord, those damages should be capped at two years of rent following Aphria's repudiation of the lease (in accordance with a provision of the lease that related to an early termination by the landlord for default).

Lower Court Decisions

The motion judge stated that he was bound to follow the precedent set in *Highway Properties*, and held that since the landlord did not accept Aphria's termination, the lease remained alive. Accordingly, the landlord was not obligated to mitigate its damages, and the lease provision capping damages only applied if the lease was terminated. However, the motion judge declined to order damages for future rent – stating that it would be premature because the landlord would have to account for any mitigation in the future. Ultimately, the motion judge awarded over \$630,000 to the landlord for the rent payments owed from January 1, 2022 to June 15, 2023.

Aphria appealed to the Ontario Court of Appeal (“**ONCA**”), which upheld the motion judge’s decision to follow past authoritative decisions in accordance with *stare decisis*. As the ruling in *Highway Properties* has been the law for decades, there was no reason to depart from it. ONCA noted that such a fundamental change to the law should remain in the hands of the Supreme Court or the Legislature. ONCA also held that the motion judge made no palpable and overriding error in refusing to place a cap on the landlord’s entitlement to damages. Accordingly, ONCA dismissed Aphria’s appeal.

Potential Implications

This appeal gives the Supreme Court of Canada an opportunity to either affirm or rewrite a legal principle that has been in place for over fifty years. If the Court establishes a new obligation for landlords to mitigate damages in the event of a repudiation of a lease, landlords would be obligated to immediately commence mitigation efforts, notwithstanding the fact that the lease remains in place. An innocent landlord’s failure to appropriately mitigate its damages could benefit tenants who intentionally repudiate a lease. This creates particular difficulty for absentee landlords with long-term tenants who default before the landlord is positioned – operationally or strategically – to pursue replacement tenants.

This much anticipated appeal will be heard by the Supreme Court of Canada on February 18, 2026, with a decision expected several months to a year thereafter. Given the implications of the Court’s decision, landlords and tenants alike should be prepared for a potential shift in enforcement strategy, drafting conventions, and risk allocation that may influence commercial leasing for years to come. A PDF version is available for download [here](#).

[1] 2024 ONCA 882.

[2] *Highway Properties Ltd v Kelly, Douglas and Co. Ltd.*, [1971] SCR 562.

[3] *Ibid.*

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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