

# Will the Supreme Court of Canada impose a duty to mitigate on commercial landlords?

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In a development with major implications for the commercial leasing sector, the Supreme Court of Canada has granted leave to appeal in *Canada Life Assurance Company v. Aphria Inc. (Canada Life)*. At the heart of the case is a question that affects every commercial lease in the country: When a tenant walks away from a lease, and the landlord refuses to accept that repudiation, is the landlord required to mitigate its damages?

## Key takeaways

- Commercial landlords generally have no duty to mitigate if the lease is affirmed by the landlord after a tenant walks away.
- Under the current state of the law, commercial tenants are generally responsible for ongoing rent obligations if they repudiate their lease but the landlord refuses to accept that repudiation.
- Contract law imposes a duty to mitigate in most contractual relationships. This duty prevents parties from recovering avoidable losses caused by their own inaction.
- The Supreme Court of Canada will consider whether a duty to mitigate should be imposed on commercial landlords if a tenant walks away from a lease.
- If the Supreme Court of Canada imposes a mitigation requirement when a tenant repudiates a lease and the landlord affirms the lease, then landlords will be expected to take action to prevent losses, including by making efforts to re-let the premises.

## The status quo: No mitigation duty for landlords who keep the lease alive

Under a legal principle established by the Supreme Court of Canada in *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd. (1971) (Highway Properties)*, a commercial landlord who chooses to reject a tenant's repudiation can leave the lease in place and sue for ongoing rent, without any obligation to re-let the premises or minimize losses. Specifically, the Supreme Court of Canada held that a landlord may "do nothing

to alter the relationship of landlord and tenant, but simply insist on performance of the terms and sue for rent or damages on the footing that the lease remains in force.”

The rule from Highway Properties is supported by the argument that the parties to a lease made a bargain and the landlord should be able to rely on the terms of the lease until the conclusion of the deal, including by holding the tenant to its obligation to pay full rent as it comes due throughout the remaining term of the lease. This rule creates predictability for landlords in enforcing long-term lease rights.

In Canada Life, the tenant argued that the Supreme Court of Canada’s comments in Highway Properties about how a landlord can “do nothing” and “insist on performance of the terms and sue for rent” were not binding and that the law should recognize a duty to mitigate on commercial landlords. An intervener before the Court, arguing in support of the tenant’s position, argued that the contractualization of commercial leases meant that landlords were not free from the “ubiquitous” contractual duty to mitigate. The Ontario Court of Appeal disagreed, noting that appellate courts in Ontario and British Columbia had followed Highway Properties as standing for the principle that a landlord who keeps the lease alive has no duty to mitigate. The Ontario Court of Appeal added in conclusion that “it is not for this court to change this law but for the Supreme Court or the Legislature to do so.”

The Supreme Court of Canada has since granted the tenant in Canada Life leave to appeal the Ontario Court of Appeal’s decision.

## The duty to mitigate in contract law

The Supreme Court of Canada’s decision to hear the appeal suggests a willingness to revisit the Highway Properties framework and align it with broader principles of contract law – where parties generally have a duty to mitigate losses after a breach.

The duty to mitigate was only briefly discussed in Highway Properties. Considering a landlord’s option to re-let the premises, the Supreme Court of Canada stated, “under the present case law the landlord is not under a duty of mitigation, but mitigation is in fact involved where there is a re-letting on the tenant’s account.” Despite acknowledging that there is no duty to mitigate on the landlord in the commercial leasing context where the lease remains in good standing, the Supreme Court of Canada also observed that “[i]t is no longer sensible to pretend that a commercial lease, such as the one before this Court, is simply a conveyance and not also a contract.” In light of this latter comment, the time may have come for courts to treat commercial leases as any other contract and impose such a duty to mitigate on commercial landlords.

## What’s at stake

If the Court imposes a mitigation requirement on landlords who maintain a lease after repudiation, the shift would be significant and may:

- require landlords to actively re-let premises even if they wish to hold the tenant to their lease obligations;
- affect how lease damages are calculated;
- shift negotiating leverage in lease disputes; and

- introduce uncertainty into longstanding commercial lease arrangements.

For landlords, this could limit the ability to enforce lease terms strictly following a tenant's repudiation of the lease. For tenants, it may open new arguments in rent disputes following repudiation and affect how lease exits are approached.

## What should landlords and tenants do now?

While the law remains unchanged for now, the outcome of this appeal could have a profound impact. Landlords may want to revisit their lease enforcement and mitigation strategies. Tenants facing financial pressure should be aware that repudiating a lease under the current law may not relieve them of obligations – but that could soon change.

We are monitoring this appeal closely and will provide updates as the case proceeds. If you are a landlord or tenant involved in a lease dispute – or negotiating a commercial lease – please reach out to discuss how this case might affect your rights.

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