Rent, repudiation, and re-leasing: The February 18 SCC hearing that could shift Canadian leasing leverage

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On Feb. 18, 2026, the Supreme Court of Canada (SCC) will hear *Aphria Inc. v. Canada Life Assurance Company, et al*. The issue before the SCC sits at the intersection of commercial leasing doctrine and mainstream contract law: when a tenant repudiates a commercial lease and vacates, can the landlord "do nothing," keep the lease alive, and sue for rent as it falls due without any duty to mitigate? We previously wrote about this development here.

For commercial landlords and tenants, this is not an academic point. It goes directly to how default risk is priced, how remedies are exercised, and how disputes are litigated. The impact of this decision will be particularly pronounced in urban markets where hybrid work, relocations, mergers, and restructuring all increase the frequency of "tenant wants out" scenarios.

What you need to know

- The SCC may recalibrate the balance of power between commercial tenant and landlord after a tenant repudiates a lease. If a duty to mitigate is imposed even where the landlord keeps the lease alive, landlords' ability to claim rent while letting the space sit empty could be significantly constrained.
- The main issue boils down to how "contract-like" commercial leases truly are. Aphria frames leases as modern contracts with modern contractual responsibilities, including a duty to mitigate. Canada Life emphasizes leases' hybrid conveyance/contract character and the historic remedial structure recognized by the SCC in its 1971 decision of *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.* (*Highway Properties*).
- A decision either way will affect drafting norms nationally. Expect commercial landlords and tenants to pay increased attention to default remedies, "no mitigation" language, rent and damages caps, surrender/termination mechanics, and sublease/assignment rights.
- A decision will also affect operational conduct. If a duty to mitigate applies, landlords will need to make reasonable re-leasing efforts following a tenant's repudiation of a lease, if the landlord refuses to accept the repudiation and wants

to continue collecting rent. Commercial landlords with several assets will also want to reevaluate portfolio-level leasing decisions and loss mitigation strategy. If a duty to mitigate does not apply, commercial tenants will want strong sublet/assignment strategies and more actively seek negotiated exit options.

The procedural history: How we got here

The underlying dispute arose from a downtown Toronto office lease. With several years remaining on the lease, the tenant, Aphria, decided that it no longer needed the space. Aphria provided the landlord, Canada Life, with notice of repudiation and offered three months' rent. Aphria then vacated and removed all of its property from the premises. Canada Life did not accept Aphria's repudiation and took the position that the lease remained in force, which meant that rent continued to be payable as it fell due.

Canada Life brought a motion for summary judgment for, among other things, $638,171.40 in outstanding rent. In its defense, Aphria argued the landlord had a duty to mitigate its losses by, among other things, reletting the premises to a new tenant.

A motion judge of the Ontario Superior Court granted Canada Life summary judgment for rent owing and rejected Aphria's argument that the landlord had a duty to mitigate where it did not accept repudiation and kept the lease alive. The motion judge also rejected Aphria's reliance on a lease clause that Aphria argued capped its exposure at two years of rent. The motion judge interpreted the cap as applying only where the landlord terminates, which did not occur in this case.

The Ontario Court of Appeal upheld the outcome, treating *Highway Properties* as authoritative that no duty to mitigate arises where the landlord declines to accept repudiation and insists the lease remains in force. It also deferred to the motion judge's interpretation of the clause limiting damages.

The parties' arguments

Aphria: Leases are contracts and landlords should be subject to modern contractual duties

In the materials filed in the SCC, Aphria's core submission is that commercial leases, whatever their historic origins, must now be treated as contracts in substance, and therefore landlords should not be carved out from the general duty to mitigate that applies to virtually all plaintiffs claiming contractual loss.

Both Aphria and Canada Life argue that *Highway Properties* helps their case. Aphria emphasizes that *Highway Properties* is widely understood to have recognized commercial leases as contracts and expanded landlord remedies beyond narrow property-law concepts. On Aphria's reading, *Highway Properties* gave landlords "the full armoury" of contractual remedies, and contractual remedies carry contractual responsibilities, including mitigation. Aphria acknowledges the SCC's comments that landlords were not, at the time, under a duty to mitigate, but Aphria says that these comments were *obiter dicta* (non-binding observations from the Court that were not intended to establish precedent).

Aphria also emphasizes the importance of mitigation generally in Canadian law. The duty to mitigate currently extends beyond contract and into tort, fiduciary contexts, and real estate transactions. Aphria argues that commercial landlords should not be treated as a special class exempt from the ordinary requirement to take reasonable steps to reduce avoidable loss.

Aphria seeks harmony in the law. It argues that SCC decisions post-*Highway Properties* impose a duty to mitigate on landlords. Aphria's points in this regard include the following:

- The doctrine of mitigation is premised on fairness and common sense. It would be unfair to allow a plaintiff to recover losses that could have been avoided through reasonable steps.
- Specific performance no longer automatically follows a breach of contract relating to property. The duty to mitigate now applies in several contexts within property and real estate law.
- Good faith is now recognized as an organizing principle of contracts. This sits uneasily with a rule allowing a landlord to refuse any reasonable re-leasing steps and maximize loss.

In addition to its arguments on the law, Aphria stresses the public policy rationale for imposing a duty to mitigate on landlords. Aphria also it says that imposing a duty to mitigate on landlords avoids economic waste. Otherwise, landlords are incentivized to let productive property sit idle.

Canada Life: *Highway Properties*

Canada Life submits that the *status quo* is doctrinally grounded, commercially relied upon, and structurally coherent.

In the materials filed in the SCC, Canada Life stresses that commercial leases are not just contracts, they are also conveyances of an estate in land. These conveyances create ongoing covenants that give tenants possessory and proprietary rights and protect both parties against early unilateral termination. On that premise, a tenant cannot unilaterally dissolve the landlord-tenant relationship unless the landlord elects to accept the repudiation.

Canada Life also argues that the SCC's statements on mitigation in *Highway Properties* were not a casual aside (in other words, *obiter dicta*) but a fully considered, authoritative articulation of the remedial structure available to the landlord if a tenant repudiates a lease. This framing matters because, if accepted by the SCC, it makes Aphria's argument less an "interpretation" of *Highway Properties* and more an invitation to revisit settled law – the latter of which is a much larger "ask" of the SCC.

Canada Life emphasizes that Aphria maintained possession of the premises and the lease gave Aphria the right to sublease. On this point, the argument that the landlord unreasonably failed to relet the premises, despite Aphria providing leads on potential tenants, has the lease "backwards": if Aphria knew of prospective occupants, it could have pursued a sublet or assignment process.

Canada Life leans heavily on commercial reliance on the status quo. It notes that the principle arising from *Highway Properties* has guided commercial leasing for decades. This longevity has allowed landlords and tenants to negotiate decades-long leases on the premise that the landlord may keep the lease alive and insist on performance without a mitigation obligation. Imposing mitigation now, Canada Life argues, could fundamentally alter remedy expectations and disrupt bargains made in thousands of long-term commercial leases across the country.

The likely outcomes

The SCC is likely to base its decision based on one of two possible framings of *Highway Properties*:

1. **Duty to mitigate:** The SCC finds that *Highway Properties* shifted leases toward the law of contract, but did not address the issue of mitigation. The lack of a duty to mitigate in such circumstances remained a historical leftover that is now inconsistent with, and must be brought in line with, modern contract remedial principles.
2. **No duty to mitigate:** The SCC finds that *Highway Properties* affirms a landlord's right to keep the lease alive and sue for rent without mitigation. This principle continues to stand despite developments in the duty to mitigate imposed generally in contract law.

Potential impacts for commercial landlords and tenants

1. Duty to mitigate

If the SCC accepts Aphria's arguments that the law on leases must be brought to conform with the general principles of modern contract law and imposes a duty to mitigate on landlords even when the landlord keeps the lease alive, the practical consequences will be significant:

- Commercial landlords' lease enforcement strategies will change. A landlord who previously could preserve leverage by keeping the lease alive may need to demonstrate reasonable re-leasing efforts or explain why efforts were unreasonable or futile.
- Expect future lease repudiation disputes to focus on marketing steps, brokerage engagement, asking rent strategy, inducements, build-out costs, timing, and how landlords allocate attention among multiple vacancies. Evidence becomes vital and commercial landlords will want to document every step taken.
- Lease drafting must adapt quickly. Parties may respond with clearer language on:
    - whether mitigation is required, or contracted out of;
    - what constitutes "reasonable" mitigation;
    - whether re-letting terminates the lease or whether obligations continue for the tenant; and,
    - liquidated damages or agreed upon exit fees.

- Tenants gain negotiating leverage in exit discussions. Particularly for tenants who are up to date on rent payments, the threat of a mitigation argument may strengthen settlement positioning when a tenant needs to downsize or relocate.
- Portfolio operations matter. Sophisticated commercial landlords may need internal protocols to ensure mitigation efforts are protocol, documented, and consistent because the “reasonable steps” inquiry is fact-driven.

2. No duty to mitigate

If the SCC sides with Canada Life, upholding the principle that commercial landlords do not have a duty to mitigate where the lease is kept alive, much of the current enforcement landscape remains intact:

- *Status quo* commercial lease bargaining power is preserved. Landlords retain the ability to insist on performance and sue for rent as it comes due, subject to other constraints in the lease and general law.
- Tenants must treat sublease and assignment rights as essential to a lease. If the tenant is the party positioned by contract to find a replacement occupant, tenants will need to negotiate workable transfer provisions at the front end, rather than relying on post-default mitigation arguments.
- Greater focus on negotiated off-ramps. Tenants may push harder for termination options, contraction rights, assignment flexibility, and rent liability caps tied to default and repudiation scenarios.

Why February 18 matters for landlords and tenants, even if you never litigate

Commercial leasing professionals should treat this appeal as a possible inflection point in Canadian leasing risk allocation, particularly in long-term office and retail leases where a mid-term exit can represent a multi-year exposure event.

We are monitoring this appeal closely and will provide an update following the release of the SCC’s decision. 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.

By

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