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TOP COURTS IN ONTARIO AND B.C. CONFIRM LANDLORD'S RIGHTS WHEN TENANT TRIES TO DUMP THE LEASE

In our February 8, 2024, News ReLease, we reported on *The Canada Life Assurance Company et al. v Aphria Inc.* ("*Aphria*"). In that case, the tenant wanted out of its lease and purported to "repudiate", in an attempt to force the landlord to take the (office) space to market. The landlord took the position that it had no obligation to accept the tenant's repudiation or look for a replacement tenant, and that the tenant was required to pay rent over the balance of the term.

According to one of the most important Court rulings in the field of commercial property leasing (the Supreme Court of Canada's 1971 decision in *Highway Properties Ltd. v Kelly, Douglas and Co. Ltd.* ("*Highway Properties*")), a landlord has 4 options when its tenant fundamentally breaches a commercial lease. One of those options is to keep the lease alive (or "affirm" the lease) and sue for rent over the balance of the term on the basis that the lease remains in force. The Courts have consistently held that when a landlord elects this option, it has no obligation to mitigate.

In *Aphria,* the tenant argued that regardless of the option selected, the landlord ought to be required to mitigate. The tenant asserted that it was anomalous in commercial law to permit a wronged party to sit on its hands and allow its losses to mount while demanding that the other party perform its obligations. Practically, the tenant's argument means that the landlord would have to search for a replacement tenant (as opposed to the tenant being saddled with the burden of finding a subtenant or assignee, while continuing to pay the rent).

Although the Ontario Superior Court expressed sympathy for the tenant's argument, it decided in favour of the landlord. The Court refused to depart from *Highway Properties*, noting that to do otherwise would fundamentally alter the remedies available to a commercial landlord.

The facts in *Aphria* were unusual in that when a tenant throws in the towel, typically it is low on funds. In *Aphria*, the tenant was a well-funded cannabis producer who could afford to pay the rent, but it simply chose not to and tried to push the problem on the landlord.

The tenant appealed.

Ontario Court of Appeal

The Ontario Court of Appeal found in favour of the landlord. It held that *Highway Properties* is binding precedent from the Supreme Court of Canada. The Ontario Court of Appeal noted that it is for the Supreme Court of Canada or the provincial legislature, to change the law on this point.

This outcome was undoubtedly disappointing to the tenant, who had argued that requiring the landlord to mitigate its loss was simply "fairness and common sense". The tenant pointed to the requirement for landlords to mitigate in the case of residential leases in Ontario and in the case of commercial leases in Quebec and various US states.

British Columbia Court of Appeal

The British Columbia Court of Appeal recently

contended with a dispute concerning the right of a landlord to "do nothing" in the face of a commercial tenant's repudiation of its lease.

The case was *Centurion Apartment Properties (Scott Road 1) Inc. v Piquancy Enterprises, Ltd.* ("*Centurion*"). The tenant signed a 10-year lease and waived all conditions. However, just before taking possession, it decided not to proceed and repudiated the lease. Like the landlord in *Aphria*, the landlord decided to keep the lease alive, but in this case, only for nine months. After nine months, the landlord accepted the tenant's repudiation and re-let the premises to a new tenant at a discount to the value of the defaulting tenant's lease.

In stark contrast to the decision in *Aphria*, the British Columbia Superior Court decided that the landlord waited too long before accepting the tenant's repudiation and held that six months was a reasonable period to wait before acceptance. Further, the Court held that the landlord had not demonstrated that it adequately mitigated after it accepted the repudiation, and on this basis, knocked down the landlord's claim for the difference in rent between the two leases by 50%!

The landlord appealed and the British Columbia Court of Appeal set the record straight. It overturned the lower court's decision, confirming (on the basis of *Highway Properties*) that the landlord had no obligation whatsoever to accept the tenant's repudiation, much less within a period that the Court considered to be reasonable. The Court of Appeal held that the tenant was liable for the rent for the entire nine-month period before the landlord accepted the repudiation.

The Court of Appeal also clarified that the burden of proving the inadequacy of the landlord's mitigation efforts was on the tenant, and there was no burden on the landlord to prove that its mitigation efforts were adequate. Since the tenant led no evidence that the landlord could have obtained a better deal with a different replacement tenant, the tenant was liable for the delta between rent over the balance of the term and the rent under the new lease.

Supreme Court of Canada?

If either tenant wishes to appeal to the Supreme Court of Canada, it must first overcome the hurdle of obtaining "leave" (i.e., permission) from the Court. That may be difficult, particularly in light of the aligned decisions of the Ontario and British Columbia Courts of Appeal.

For now, *Highway Properties* remains the law of the land.

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