

## Commercial Leasing Bulletin:

---

### **Lessons for Landlords: Landlord's obligation to mitigate tenant's default due to non-payment of rent where lease is not terminated**

December 13, 2021

By: [Boris W. Zayachkowski](#) - [Commercial Leasing Group](#) – Minden Gross LLP

Landlords have a variety of remedies available to them in the event of a tenant's default for non-payment of rent. One remedy has been understood as the right of a landlord to sue a tenant for unpaid rent, while electing not to accept the tenant's repudiation and terminate the lease, thereby avoiding a duty to mitigate its damages. Such an approach was sanctioned by Justice Laskin (as he then was) in [Highway Properties Ltd v. Kelly, Douglas & Co](#) [1971] 2 SCR 562, where he wrote, by way of obiter, 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."

There have, however, been recent reported cases that show a trend on the part of the courts to revisit this issue, demonstrating that the older case law is out of step with the modern view that real property leases should be dealt with in the same way as other contracts, with an obligation on the part of the landlord to mitigate its damages in the absence of a termination of the lease.

### ***Panther Sports Medicine and Rehabilitation Centres Inc. v. Adrian G. Anderton Professional Corporation***

In [Panther Sports Medicine and Rehabilitation Centres Inc. v. Adrian G. Anderton Professional Corporation](#), 2019 ABQB 973, Anderton subleased premises from Panther in 2013 and vacated the premises in February 2018. In August 2018, Panther sued Anderton seeking to recover rent it said Anderton owed it under the sub-lease from May 2018 when Anderton stopped paying rent. In June 2019, Panther applied for summary judgment seeking payment of the rent owing through to April 2019, when Panther terminated its head lease with the landlord, thereby also terminating the sublease with Anderton. Panther claimed that Anderton attempted to repudiate the lease by vacating the premises. Panther argued that it exercised its legal right to refuse repudiation and treat the sublease as ongoing and that, accordingly, Panther could sue Anderton to recover unpaid rent under the sublease. Panther elected to take the course of action sanctioned by Justice Laskin, as

referenced above, and simply demanded payment for unpaid rent while avoiding a duty to mitigate its damages. Panther, accordingly, moved for summary judgment against Anderton on the basis that, where Panther proved the existence of the lease (or sublease, in this case) and the rent owing thereunder, there was no duty to mitigate, and the Court ought to grant summary judgment in its favour.

Anderton, in response, disputed the claim that Panther owed no duty of mitigation. In July 2019, it applied for an order requiring Panther to provide disclosure and particulars with respect to Panther's efforts to mitigate its losses arising from Anderton having vacated the subleased premises.

In August 2019, the Master denied Panther's application for summary judgment at first instance and granted Anderton's application for further and better disclosure on the question of Panther's efforts to mitigate its losses.

Panther appealed the Master's decision to the Court of Queen's Bench of Alberta. In December 2019, the Court denied Panther's appeal, noting that "this case raises a genuine issue for trial with respect to the nature and extent of a commercial landlord's duty to mitigate its losses, whether Panther had such a duty in this case, and whether it failed to mitigate such that it ought not to recover all of the amounts it claims from Anderton."

The Court noted that while it agreed that Canadian courts have traditionally accepted the premise that landlords who refuse a tenant's repudiation have no duty to mitigate, the Court went on to state "that case law almost entirely predates Supreme Court jurisprudence in relation to the duty to mitigate for contracts relating to land, particularly its decision in *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51," and that such cases, and cases that preceded it, create a change of circumstances that "fundamentally shifts the parameters of the debate" and "merits this Court's reconsideration of the issue." The Court further noted that "a lease must be assessed in light of the law of contract, suggesting that landlords should not be given an unqualified right to elect specific performance by refusing repudiation, and thereby avoid the ordinary contractual obligation to mitigate their losses."

### ***Anthem Crestpoint Tillicum Holdings Ltd. v. Hudson's Bay Company***

In *Anthem Crestpoint Tillicum Holdings Ltd. v. Hudson's Bay Company*, 2021 BCSC 2108, HBC leased premises from Anthem since January 2009 comprising 30,396 square feet in the Tillicum Centre mall in Victoria, BC, for the purpose of a Home Outfitters store. The lease was set to expire in 2024. In June 2019, HBC ceased its operations of the Home Outfitters store but continued to pay the rent due under the lease until April 1, 2020, at which time it advised Anthem that it would no longer pay rent. Anthem did not terminate HBC's lease but, instead, claimed the rent owing under the lease was a contractual debt and sought judgment for such rent by way of a summary judgment motion.

HBC argued, in reply, that, as a result of the circumstances which resulted in HBC's decision to discontinue operations, and the subsequent actions of Anthem and HBC in respect of efforts to locate a replacement tenant, Anthem became obliged to act in good faith, to assist HBC in its efforts to mitigate, and to make reasonable efforts to reduce its own losses resulting from HBC's decision to cease operations. Contrary to its obligations in that regard, Anthem failed or refused to do so.

In particular, HBC asserted that: (A) Anthem breached its duty of good faith in such performance by failing to (i) deal with inquiries from prospective replacement tenants reasonably; (ii) advise HBC of such expressions of interest; and (iii) take customary and reasonable steps to find a replacement tenant for the premises including advertising the spaces available for rent on its website; and (B) Anthem failed to mitigate its losses by refusing to consent to an assignment of HBC's lease to Value Village.

Anthem argued, in reply, that it had no obligation to so assist HBC and that HBC had no defence to Anthem's claim based on Justice Laskin's decision in *Highway Properties* referenced above.

The British Columbia Supreme Court ultimately refused the motion for summary judgment by Anthem, noting that HBC raised triable issues regarding Anthem's approach to securing a replacement tenant and holding, in part, that "the development of the law with regard to the duty to exercise contractual discretionary powers in good faith in a manner consistent with the purpose for which it was granted in the contract has evolved since *Highway Properties* was decided."

## **What steps should landlords be taking in light of the foregoing?**

Landlords can no longer assume that, in the event of a tenant's default for non-payment of rent, the landlord can simply sit back and claim the rent owing under the lease as a contractual debt without any obligation to mitigate its damages. The assumption that there is no duty to mitigate under such circumstances is becoming increasingly outdated and not supported by recent jurisprudence. In fact, much of the recent case law on measuring damages for breach of a lease is based on the notion that landlords have a duty to mitigate, whether or not the landlord in fact terminated the subject lease. Landlords should at least consider seeking alternate tenants for the premises and gather evidence of their efforts to do so, in order to assist in rebutting any claims by a defaulting tenant that the landlord failed to discharge its duty to mitigate.

In cases where a landlord chooses not to take steps to mitigate, the following considerations may come into play:

1. The primary obligation to mitigate should rest on the defaulting tenant. Where the tenant is in a position to look for a replacement assignee or subtenant (whether with or without the landlord's consent) and chooses not to do so, it will be more difficult for the tenant to allege that the landlord has failed to mitigate.



2. Alternatively, many landlords form leases that contain onerous clauses that make it very difficult for the tenant to assign or sublease without the landlord's consent which may, in some cases, be unreasonably withheld. In such circumstances, it will be more difficult for the landlord to take the position that the tenant bore the primary obligation to mitigate.
3. There are cases that have held that where the landlord has other available premises in the project, it is not obligated to lease up the defaulting tenant's premises (e.g., an office building that has empty floors or a mall with other vacancies).

## Conclusion

We will continue to provide updates on commercial leasing topics of interest. If you have any questions or would like to obtain legal advice on any leasing issues or litigation, please contact any lawyer in our Commercial Leasing Group.

## Commercial Leasing Group

### **Stephen Posen**

Chair, Commercial Leasing Group  
e: [sposen@mindengross.com](mailto:sposen@mindengross.com)  
p: (416) 369-4103

### **Ian Cantor**

Partner, Litigation Group  
e: [icantor@mindengross.com](mailto:icantor@mindengross.com)  
p: (416) 369-4314

### **Christina Kobi**

Partner, Commercial Leasing Group  
e: [ckobi@mindengross.com](mailto:ckobi@mindengross.com)  
p: (416) 369-4154

### **Benjamin Radcliffe**

Partner, Commercial Leasing Group  
e: [bradcliffe@mindengross.com](mailto:bradcliffe@mindengross.com)  
p: (416) 369-4112

### **Steven Birken**

Associate, Commercial Leasing Group  
e: [sbirken@mindengross.com](mailto:sbirken@mindengross.com)  
p: (416) 369-4129

### **Alyssa Girardi**

Associate, Commercial Leasing Group  
e: [agirardi@mindengross.com](mailto:agirardi@mindengross.com)  
p: (416) 369-4104

### **Catherine Francis**

Partner, Litigation Group  
e: [cfrancis@mindengross.com](mailto:cfrancis@mindengross.com)  
p: (416) 369-4137

### **Michael Horowitz**

Partner, Commercial Leasing Group  
e: [mhorowitz@mindengross.com](mailto:mhorowitz@mindengross.com)  
p: (416) 369-4121

### **Boris Zayachkowski**

Partner, Commercial Leasing Group  
e: [bzayachkowski@mindengross.com](mailto:bzayachkowski@mindengross.com)  
p: (416) 369-4117

### **Melodie Eng**

Partner, Commercial Leasing Group  
e: [meng@mindengross.com](mailto:meng@mindengross.com)  
p: (416) 369-4161

### **Leonidas Mylonopoulos**

Associate, Commercial Leasing Group  
e: [lmylonopoulos@mindengross.com](mailto:lmylonopoulos@mindengross.com)  
p: (416) 369-4324

### **Benji Wiseman**

Associate, Commercial Leasing Group  
e: [bwiseman@mindengross.com](mailto:bwiseman@mindengross.com)  
p: (416) 369-4114

*This article is intended to provide general information only and not legal advice. This information should not be acted upon without prior consultation with legal advisors.*