CITATION:Metro Ontario Real Estate Limited v. Hillmond Investments Ltd., 2024 ONSC 6670
COURT FILE NO.: CV-09-375202
DATE: 20241129

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Metro Ontario Real Estate Limited Plaintiff	Linda Galessiere, for the plaintiff
– and –	
Hillmond Investments Ltd. carrying on business as Central Parkway Mall Defendant	James McReynolds and Mel Solmon, for the defendant
AND BETWEEN:	
Hillmond Investments Ltd. carrying on business as Central Parkway Mall Plaintiff by counterclaim	James McReynolds and Mel Solmon, for the plaintiff by counterclaim
– and –	
Metro Ontario Inc. and Metro Ontario Real Estate Limited Defendants by counterclaim	Linda Galessiere, for the defendants by counterclaim
	HEARD: November 5, 2024.

ROBERT CENTA J.

[1] This endorsement is further to my reasons for decision in this ten-day trial heard between February 26, 2024, and March 11, 2024.[1] It addresses the calculation and finalization of certain damages issues arising from my reasons for decision.

[1] *Metro Ontario Real Estate Ltd. v. Hillmond Investments Ltd.*, 2024 ONSC 2625. The trial briefly re-convened on April 11, 2024, to mark the trial exhibits.

1. Trial decision and background

[2] To provide context for this endorsement, I will draw heavily on the overview found in paragraphs 1 to 10 of my reasons for decision.

[3] From 1978 to 2023, a grocery store served as the anchor tenant of a shopping mall in Mississauga. The lease for the premises had an initial term of 20 years and was renewed five times, each for an additional five-year term.

[4] In 2009, a major dispute arose between the parties regarding how the rent should be calculated. Once that happened, each side identified a laundry list of historical grievances with the other. The relationship soured as each party repeatedly sought to utilize its economic power to advance its position at the expense of the other.

[5] The tenant started this action in 2009. The landlord counterclaimed. By the time the action reached trial in 2024, the pleadings and their repeated amendments spanned tabs A to Q of the trial record. The parties obtained leave to amend their pleadings again on the first day of trial. As the trial progressed, the parties abandoned several of the issues in dispute.

[6] In my reasons for decision, I reached the following conclusions.

[7] First, I found that the tenant's decision to assign the lease to a related company in 1987 was irrelevant to any of the issues in dispute. Even if the tenant did not immediately advise the landlord of the assignment, I found that the landlord knew about the assignment long before the 2009 rent dispute and did nothing about it. The landlord's concern over the assignment appeared to me to be driven primarily by a desire to obtain a strategic or tactical advantage in the litigation, not by genuine concern over whether the tenant followed all the required formalities.

[8] Second, I found that the landlord knowingly inflated the invoices that it sent to the tenant for common area maintenance charges. The landlord inflated the CAM invoices in three ways:

a. The landlord included the cost of a contractor to clean the passport office, which was a private office leased by another tenant. The landlord knew that the cleaning charges were not for a common area and could not properly be included in the CAM charges. Yet even after the tenant brought this matter to the landlord's attention, the landlord continued to charge for this amount in violation of the terms of the lease;

b. The landlord artificially reduced the gross leasable area of the shopping centre, which had the effect of increasing the proportion of the CAM charges for which it billed the tenant. I found that the landlord knew that its calculations were incorrect, indefensible, and in violation of an agreement it reached with the tenant in 1990; and

c. The landlord charged a management fee that was not properly recoverable under the provisions of the lease.

[9] I held that the landlord's CAM charges needed to be recalculated in accordance with my reasons for decision. Moreover, as I found that the landlord knowingly delivered false invoices to the tenant, I also held that the landlord was not entitled to interest on any unpaid CAM charges.

[10] Third, I found that by June 2009, it was necessary to replace, not simply repair, the roof over the leased premises. I held that the lease permitted the tenant to replace the roof and allocated this expense to the landlord, not to the tenant. I held that the tenant was entitled to be reimbursed for the entire cost of the roof replacement.

[11] Fourth, I held that s. 38 of the lease modified the calculation of rent contained in Article III of the lease. Put simply, I agreed with the tenant's interpretation of the lease and its method of calculating the rent owing to the landlord starting with the first lease renewal (December 1, 1998, to November 30, 2003) and thereafter. I also dismissed the landlord's counterclaim for unpaid rent that is based on its interpretation of the rent provision.

[12] Fifth, I found that the tenant unjustly enriched the landlord by overpaying the rent under the lease for the two years prior to the initiation of its claim. The landlord was enriched by $493,269.66 and the tenant suffered a corresponding deprivation. In my view, there was no juristic reason for the landlord's enrichment and no equitable principles justify denying the tenant's recovery.

[13] At paragraphs 328 and 329 of my reasons for decision, I asked the parties to work out the accounting of who owed what to whom in accordance with my reasons for decision and to arrange for a further attendance if they could not reach an agreement:

> In closing submissions, the landlord confirmed that the parties had not provided me with damages schedules that would permit me to calculate that exact amounts owing, given the number of moving parts.
>
> The accounting of who owes what to whom is to be determined and adjusted in accordance with my findings. The parties should work together over the next 14 days to see if they can agree on the amounts owing in light of these findings. If they are not able to reach an agreement in that time, they may contact my judicial assistant to arrange a further attendance and I will decide the issue.

[14] The parties were not able to reach agreement. The landlord filed written submissions on August 16, 2024, and reply submissions on September 20, 2024. The tenant provided responding submissions on September 16, 2024, and sur-reply submissions on September 27, 2024.

[15] This endorsement must be read alongside my original reasons for decision, from which I will excerpt only when necessary.

2. Calculation of CAM payments

[16] In my reasons for decision, I made a series of findings about the CAM charges. In paragraph 61 of my reasons, I directed the parties to recalculate the CAM charges in accordance with my reasons:

> The parties will need to recalculate the CAM charges based on these findings. Based on the figures filed by counsel, I anticipate that the tenant will not owe any unpaid CAM to the landlord. If the tenant does owe unpaid CAM to the landlord after this recalculation, I deny the landlord the right to claim any interest on CAM amounts owing because I find that the landlord knowingly issued false invoices to the tenant.

[17] The parties made good progress on the calculation process, but identified four areas where they could not reach an agreement.

A. The landlord's CAM claims for the years 2009 to 2011

[18] The landlord seeks to recover unpaid CAM charges for the years 2009 to 2011. As I will explain below, the landlord first issued invoices for these amounts in 2013 and did not amend its pleading to seek to recover these amounts until 2019. The tenant submits that these claims are statute barred. For the reasons that follow, I agree with the tenant.

[19] The evidence at trial demonstrated that the landlord invoiced the tenant for CAM charges on a regular basis, usually within the first six months of the following year. The evidence demonstrated that the landlord delivered invoices as follows:

a. Invoice for 2003 CAM charges delivered May 2004;

b. Invoice for 2004 CAM charges delivered June 2005;

c. Invoice for 2005 CAM charges delivered June 2006;

d. Invoice for 2008 CAM charges delivered June 2009;

e. Invoice for 2013 CAM charges delivered May 2014; and

f. Invoice for 2015 CAM charges delivered March 2016.

[20] The landlord adopted a very different approach for the invoices for 2009, 2010, and 2011 CAM charges. The landlord did not deliver those three invoices until July 31, 2013, despite the significant litigation with the tenant that started in 2009.

[21] On February 24, 2010, the landlord delivered its statement of defence and counterclaim. In paragraph 50(c) of the counterclaim, the landlord pleaded that the tenant owed the landlord $281,627 for unpaid CAM charges for the years spanning 2000 to 2008. Although the

pleading was issued in 2010, the landlord did not make a claim for the 2009 CAM charges. Paragraph 30 of the statement of defence set out on a year-by-year basis the precise amounts allegedly owed by the tenant:

30. Metro has further breached the Lease by failing to pay the following amounts of CAM due and owing:

Year	Amount of CAM outstanding
2000	$9,625
2001	$9,746
2002	$12,163
2003	$12,375
2004	$31,390
2005	$31,973
2006	$29,930
2007	$100,828
2008	$43,597
Total	**$281,627**

[22] On July 22, 2010, the landlord issued an amended statement of defence and counterclaim. The landlord did not amend either paragraph 30 of the statement of defence (which became paragraph 40 of the amended defence) or paragraph 50(c) of the counterclaim (which became paragraph 62(c) of the amended counterclaim). Therefore, on July 22, 2010, the landlord did not advance a claim for the 2009 CAM charge, despite the fact that, based on its historical practice, it would have invoiced the tenant for the 2009 CAM charge before the date of its amended pleading.

[23] About a year later, on July 12, 2011, the landlord issued a fresh as amended statement of defence and counterclaim. The landlord did not amend paragraph 40 (formerly 30) of the amended statement of defence, or paragraph 62(c) (formerly 50(c)) of the amended counterclaim. Therefore, on July 12, 2011, the landlord did not advance a claim for the 2009 or 2010 CAM charges despite the fact that, based on its historical practice, it would have invoiced the tenant for the 2009 and 2010 CAM charges before the date of its fresh as amended statement of defence and counterclaim.

[24] Indeed, the landlord never advanced a claim for unpaid CAM charges for the years 2009 to 2011 until March 1, 2019, when it issued its "Thrice Amended Statement of Defence and Counterclaim." In this pleading, the landlord amended what became paragraph 99 of the counterclaim (formerly paragraph 62(c)) to now claim "$512,491.00 for amounts owing for CAM from 2000 to 2011." The landlord also amended what became paragraph 75 of the thrice amended statement of defence (formerly paragraph 40) as follows:

75. MOI and/or MOREL ~~The Plaintiff Lessee~~ ~~Metro~~ has further breached the Lease by failing to pay the following amounts of CAM due and owing:

Year	Amount of CAM outstanding
2000	$9,625
2001	$9,746
2002	$12,163
2003	$12,375
2004	$31,390
2005	$31,973
2006	$29,930
2007	$100,828
2008	$43,597
2009	$61,291
2010	$89,908
2011	$79,655
Total	$512,491

[25] Both parties submit that I should apply the six-year limitation period contained in s. 17 of the *Real Property Limitations Act.*[2] Subsection 17(1) of the *Real Property Limitations Act* provides as follows:

> No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, whether it is or is not charged upon land, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress or action but within six years next after the same respectively has become due, or next after any acknowledgment in writing of the same has been given to the person entitled thereto or the person's agent, signed by the person by whom the same was payable or that person's agent.

[26] Rent is defined in s. 1 of the *Real Property Limitations Act* to include "all annuities and periodical sums of money charged upon or payable out of land."

[27] First, I do not accept that the landlord's inclusion of the phrase "outstanding rent would be updated prior to trial" in the original statement of defence and counterclaim is sufficient to put the plaintiff on notice of the claim for unpaid CAM charges for 2009 to 2011. This is particularly the case where the statement of defence and counterclaim expressly included only the years spanning 2000 to 2008. An update to outstanding rent is not the same as a

[2] *Real Property Limitations Act*, R.S.O. 1990, c. L.15, at s. 17. I think there is an arguable case that the CAM charges are not "rent" within the meaning of the *RPLA* such that the two-year limitation period in the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. applies. See *Pinnacle International (One Yonge) Ltd. v. Torstar Corporation*, 2024 ONCA 755, at paras. 102 to 108. However, since neither party advanced this argument, I will not consider it further.

new claim for unpaid CAM charges in a different year in respect of a totally different set of expenses.

[28] Second, I do not accept the landlord's reliance on s. 117 of the *Courts of Justice Act* to forestall the running of the limitation period on unpaid CAM charges.[3] Given the way the landlord pleaded its claim, including a chart that stopped in 2008, they needed to do something more to put the tenant on notice if it wished to claim for unpaid CAM charges for 2009 to 2011.

[29] Third, the landlord amended its pleading in 2010 and 2011, and while it updated its calculation of other forms of unpaid rent, it did not include a claim for 2009 or 2010 unpaid CAM charges. The landlord turned its mind to exactly what it alleged the tenant owed to it under the lease on the days it amended the claim. Nevertheless, the landlord did not amend the claim to add a claim for unpaid CAM charges for those years.

[30] Fourth, I do not accept the landlord's submission that the limitation period did not start to run until it issued the three invoices on July 31, 2013. To accept that submission would allow the landlord to engage in entirely self-serving strategic and tactical behaviour. On the landlord's theory, it could choose not to deliver an invoice and thereby toll the limitation period for as long as it believed such delay to be to its advantage. I would be reluctant to embrace a rule that would create such perverse incentives.

[31] In a case involving an action for breach of contract related to the construction of a residential cottage and tennis court, Nordheimer J. (as he then was), rejected the position now advanced by the landlord.[4] The case was decided under the six-year limitation period contained in the old *Limitations Act*, R.S.O. 1990, c. L.15. Justice Nordheimer rejected the submission that a plaintiff's limitation period did not begin to run until it delivered an invoice:

> In my view it is neither the time that the work was done nor is it the time when the invoice was delivered. To select the latter date would allow the plaintiff to effectively toll the limitation period for as long as it wished by simply withholding delivery of an invoice - not an unrealistic event as is evidenced by the very fact that the invoice for the July and August 1989 work in this case was not sent out until December 30. 1994.[5]

[32] Justice Nordheimer concluded that it was appropriate to have the limitation period begin to run after the expiration of a reasonable period of time for the plaintiff to deliver an invoice to the defendant plus a reasonable period of time for the defendant to pay the

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[3] *Courts of Justice Act*, R.S.O. 1990, c. C.43.
[4] *G.J. White Construction Ltd v. Palermo* (1999), 2 C.P.C. (5th) 110, (Ont. S.C.J.).
[5] *G.J. White*, at para. 20.

invoice. To determine the reasonable period of time, Nordheimer J. looked to the past practice of the parties:

> I have therefore concluded that the cause of action in this particular case arose from the time after two events took place - the expiration of a reasonable period of time for the plaintiff to deliver an invoice to the defendants, and the expiration of a reasonable time for the defendants to pay that invoice. This conclusion accords with the practice that had developed between the plaintiff and the defendants regarding payments for this project. In each case after a reasonable period of time from the completion of a segment of the work, the plaintiff delivered an invoice and in each case after a reasonable period of time from receiving the invoice the defendant would make payment.[6]

[33] The court has followed this approach in other cases and I agree with it.[7]

[34] In this case, the landlord had established a very clear practice of delivering CAM invoices no later than June of the following year. It followed this pattern in 2003, 2004, 2005, 2006, 2008, 2013, and 2015. Each invoice marked was due on receipt. In my view, it is reasonable to add a further 30 days to allow for the tenant to remit payment. Therefore, I find that the limitation period began to run on the CAM charges as follows:

a. for the 2009 CAM charges, the six-year limitation period began to run on July 31, 2010, and expired on July 31, 2016;

b. for the 2010 CAM charges, the six-year limitation period began to run on July 31, 2011, and expired on July 31, 2017; and

c. for the 2011 CAM charges, the six-year limitation period began to run on July 31, 2012, and expired on July 31, 2018.

[35] As noted above, the landlord did not advance a claim for unpaid CAM charges from 2009 to 2011 until March 1, 2019, when it issued its "Thrice Amended Statement of Defence and Counterclaim." This is well after the expiration of the relevant limitation periods. Therefore, I dismiss the landlord's claims for unpaid CAM charges for the years 2009 to 2011 as statute barred under the *Real Property Limitations Act*.

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[6] *G.J. White*, at para. 22.
[7] *1838120 Ontario Inc. v. Township of East Zorra-Tavistock*, 2021 ONSC 3341, 14 C.L.R. (5th) 189, at para. 54; *Bougadis Chang LLP v. 1231238 Ontario Inc*., 2012 CarswellOnt 10430, at para. 15; *East-West Disposal Service Ltd. v. Jerudan Developments Ltd*., 2003 CarswellOnt 855, at para. 30; *Environmental Building Solutions v. 2420124 Ontario Limited*, 2018 ONSC 3112, 92 C.L.R. (4th) 153, at para. 62; *Licata Disability Management Paralegal Professional Corp. v. Triluc Enterprises Ltd*., 2014 ONSC 7470, para. 25; *Hugh Munro Construction Ltd. v. Moschuk*, 2011 ONSC 3271.

[36] The tenant submits that, given this result, it owes $78,420.84 in unpaid CAM charges to the landlord for the period from 2002 to 2008. The landlord did not challenge this calculation.

B. Equitable set-off of CAM charges

[37] Each of the landlord and the tenant seek orders permitting equitable set-off of certain amounts related to the CAM charges.

[38] The tenant submits that it overpaid $1.3 million in rent to the landlord that it could not recover as damages because the claim was statute barred. The tenant submits that it is entitled to an order permitting equitable set-off of this amount against the $78,420.84 in unpaid CAM charges that it owes to the landlord. For its part, the landlord seeks to set off the amount of the statute-barred claim for 2009 to 2011 CAM charges against any amounts it is held to owe to the tenant. I decline to order that either party may benefit from equitable set-off related to the CAM charges.

[39] The Supreme Court of Canada recently explained equitable set-off as follows:

> Equitable set-off is available on a broader basis than legal set-off. Equitable set-off applies to both liquidated and unliquidated claims and regardless of whether there is mutuality. In considering whether to grant equitable set-off, courts "look at the connection between debts that are sought to be set off against each other. If the connection between the debts is such that it would be unfair or inequitable to stand without set-off, then the courts will permit it". "Equitable set-off is available if the transactions or dealings are so inseparably connected that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim". [Internal citations omitted.][8]

[40] The parties agree on the applicable legal principles. The leading case on equitable set-off in Canada is the Supreme Court of Canada's decision in *Holt v. Telford*.[9] Justice Wilson identified five principles governing equitable set-off:

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed
>
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff

[8] *Scott v. Golden Oaks Enterprises Inc*., 2024 SCC 32, at para. 91.
[9] [1987] 2 S.C.R. 193.

> to enforce payment without taking into consideration the cross-claim
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract
>
> 5. Unliquidated claims are on the same footing as liquidated claims.[10]

[41] I would not permit the tenant to set off the rent it overpaid against the CAM charges that it underpaid. The tenant is responsible for failing to calculate the rent correctly for many years. As I explained in paragraphs 290 to 293 of my reasons for decision:

> Each year, the tenant sent a letter advising the landlord of the annual calculation of percentage rent. The letters were clear and signed by senior staff members at the tenant. For example, the letter sent on March 8, 2000, was signed by F.G. Torrie, Vice-President, Controller and Corporate Secretary of The Great Atlantic & Pacific Company of Canada Ltd. It read:
>
> > In accordance with the lease covering the above premises, we have calculated The Great Atlantic & Pacific Company's 1999 percentage sales clause liability as follows:
> >
> > A&P 1999 Fiscal Year of 52 weeks ended February 26, 2000.
> >
> > | | |
> > |---|---|
> > | Gross sales | $20,585,928.35 |
> > | 1 ¼% of sales in excess of 10 million | $132,324.10 |
> > | Plus GST | $ 9,262.69 |
> > | Total due: | $141,586.79 |
>
> I also accept the landlord's observation that the tenant had access to the lease summary and the lease itself each year when it made these calculations. I accept the evidence of the tenant that the leases were physically kept in a different building than where the people doing these calculations and sending these letters worked. That, however, is irrelevant. The tenant is responsible for all of the information in its possession, and it is no answer for the tenant to suggest that office logistics could somehow excuse its failure to review the lease carefully or to interpret it correctly each and every year.

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[10] *Holt*, at p. 212.

> I accept the landlord's submission that when the tenant's executives decided to exercise the options to renew, they would have had access to the information necessary to carry out a full economic analysis of the decision to renew. I also accept that the tenant may have conducted calculations in accordance with the landlord's interpretation of the lease.

[42] As I held in my reasons for decision, the tenant was entitled to recover some of these amounts from the landlord through unjust enrichment, but the tenant's claim for older payments was statute barred. However, beyond the recoverable amounts, I think it is equitable to leave that loss where it fell. The tenant is solely responsible for the overpayments, which it made long ago. I think it would be inequitable to allow the tenant to set off the overpaid rent against other amounts it owes to the landlord for different expenses that it was required to pay under the lease. Although these charges both arise under the lease, rent charges are different than CAM charges. I decline to make an order allowing the tenant to set off its overpaid rent against the underpaid CAM charges.

[43] Similarly, I reject the landlord's request to set off the amount of its statute-barred claim for 2009 to 2011 CAM charges. As explained in paragraphs 59 to 171 of my reasons for decision, I found that the landlord engaged in significant misfeasance with respect to its CAM charges to the tenant. I summarized these findings in paragraph 60 of my reasons for decision:

> As I explain below, I find that the landlord has not proven that the tenant owes it any unpaid CAM charges. I do not accept much of Mr. Sorokolit's evidence regarding the landlord's practices with respect to billing for CAM charges. I reject his evidence that the landlord's goal was to minimize CAM expenses for tenants. Indeed, it appears that the landlord treated the CAM charges as a convenient tool to shift costs that it properly should have borne to the tenant. The landlord does not appear to have been concerned about the accuracy of its CAM billings. Indeed, as set out below, I find that the landlord took deliberate steps to inflate artificially the tenant's CAM costs in at least three ways:
>
> > a. the landlord knowingly included cleaning fees for the passport office that did not fall within CAM and continued to do so even after the tenant brought this matter to the landlord's attention;
> >
> > b. the landlord knowingly and intentionally understated the gross leasable area of the shopping mall, which artificially increased the tenant's proportionate share of the CAM expenses;

> c. the landlord knowingly did not make a good faith estimate of the management salaries to be allocated to the tenant and has not proved its entitlement to claim the amounts billed to the tenant.

[44] The landlord does not come to court with clean hands. Its iniquitous conduct has an immediate and necessary relationship to the amount of the CAM charges such that it would be unjust to grant relief in the circumstances. I decline to make an order for equitable set-off in favour of the landlord.

C. Interest owing on CAM payments

[45] The tenant submits that it is entitled to prejudgment interest on its overpayment of CAM charges to the landlord without first deducting the amounts of underpaid CAM charges it owes to the landlord. I disagree.

[46] This tenant's approach is artificial and does not properly reflect the time value of money or the fact that each side owes money to the other for a series of discrete events over a long period of time. It is true that I disallowed the landlord's claim to 10% per year interest on unpaid CAM charges because those amounts were not due and payable at a time that the landlord knowingly issued false invoices.[11] I disagree with the tenant's submission that it is necessary to adopt its approach to prejudgment interest owed to the tenant "to give full effect" to my decision.

[47] In my view, all amounts that I have found to be owing should be netted out and then prejudgment interest should be applied.

D. Conclusion

[48] In light of these findings, the parties have calculated the CAM adjustment as follows:

a. The landlord owes the tenant $207,294.04 for overpaid CAM charges for the years 2012 to 2016;

b. the tenant owes the landlord $8,128.20 for unpaid property taxes plus $78,420.84 for underpaid CAM charges from 2002 to 2008.

[49] The net result is that, as of May 6, 2024, the landlord owes the tenant $120,745, plus prejudgment interest of $18,508.72 with respect to the CAM charges over the history of the dispute.

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[11] See reasons for decision, paras. 172-176.

3. Recalculation of the Rent

[50] The landlord submits that there should be a recalculation of the rent owed by the tenant to the landlord. The landlord makes two distinct but related submissions with respect to the recalculation of the rent:

a. there should be a recalculation of the amount by which the tenant unjustly enriched the landlord by overpaying minimum rent and percentage rent between 2007 and 2009; and

b. there should be a recalculation of the amount of rent owed by the tenant to the landlord from 2009 until 2023.

A. The recalculation of the amount by which the tenant unjustly enriched the landlord between 2007 and 2009

[51] At trial, the tenant submitted that it was entitled to restitution in the amount of $493,269.66, plus HST, representing the amount it mistakenly overpaid as minimum rent (between April 1, 2007, and March 25, 2009) and percentage rent (March 25, 2007, to March 25, 2009). I found that the tenant was entitled to recover the amount claimed on the basis of unjust enrichment.

[52] In its post-trial submissions, the landlord submits that the amount of the tenant's recovery should be recalculated and that the tenant is only entitled to $461,047.92. The landlord makes the following submissions:

> 25. The calculation of minimum rental payable for the Third Renewal Period requires the average of the minimum rental paid between October 1, 2005, and September 30, 2008.
>
> 26. The calculation is based upon 18 months of minimum rent actually paid at $43,393.43 per month ($16.21 p.s.f.), and not effected by this proceeding, and 18 months of minimum rent "paid" at the rate ordered by the Court, being $34,258.20 per month ($12.88 p.s.f.).
>
> 27. The calculation also requires the average of percentage rent paid for tenant fiscal years 2006-2008, consisting of [the tenant's] Fiscal Year 2006 - $123,835.67 actually paid, and the adjusted percentage rent for [the tenant's] fiscal years 2007 and 2008 of zero.
>
> 28. The proper application of the Renewal Clause renewal formula for the Third Renewal Period is therefore:
>
> > Average minimum rent for three fiscal years prior to renewal (($43,393.43 x 18 + $34,258.20 x 18)/3 = $465,909.78) plus average percentage rent for the three fiscal years prior to

> renewal ($123,835.67/3 = $41,278.56) = $507,188.34 ($42,265.69 per month or $15.79 p.s.f.) starting December 1, 2008.
>
> 29. [The tenant] would therefore be entitled to overpaid rent for April, 2007 to November, 2008 in the amount of $182,582.77. It would also recover an overpayment from December, 2008 to March, 2009 in the amount of $44,226.79 ($19.92-$15.79 x 32,126 x 4/12) ($10,820.48 x 4). Including the overpaid percentage rent for 2007 and 2008, the total correction in favour of [the tenant] for overpaid rent would be $461,047.92, as at March 26, 2009.

[53] I do not accept the landlord's submissions for three reasons.

[54] First, in my reasons for decision, I accepted the tenant's evidence and submissions on the quantification of its damages and ordered that the tenant recover $493,269.66. I would be reluctant to revisit this decision without good reason.

[55] Second, the tenant filed evidence and calculations in support of its claim that it overpaid rent in the amount of $493,269.66. The tenant filed a detailed three-page spreadsheet setting out its calculation of rent overpayments, which became Exhibit 10 (Tab 48). The spreadsheet provided a detailed set of calculations demonstrating how the tenant justified its claim that it had overpaid a total of $1,880,426.25 in base rent and percentage rent between 1999 and 2009. It also precisely calculated the $493,269.66 total overpayment of minimum rent and percentage rent for the two-year period before it issued its notice of action on March 25, 2009.

[56] During trial, the landlord never challenged the tenant's evidence on damages or the tenant's calculation of the amount of rent owing for the two-year period before the notice of action was issued, if the tenant's interpretation of the lease was correct. Counsel for the landlord did not cross-examine any of the tenant's witnesses on either the tenant's methodology or calculations set out in Exhibit 10 (Tab 48).

[57] Third, given the landlord's answers to undertakings, the tenant had no notice or reason to believe that the landlord would challenge its damages calculations. In 2022, the tenant brought a refusals motion before Associate Justice McGraw.[12] In the reasons for decision, Associate Justice McGraw made the following order:

> Undertakings 1 and 2 – [The landlord] agrees to answer and/or provide more fulsome answers to these undertakings within 30 days. Specifically, [the landlord] has agreed to: i.) advise if, assuming [tenant's] position is found to be correct, [the landlord] agrees with [the tenant's] calculation of what rent/percentage rent should have

[12] *Metro Ontario Real Estate Limited v. Hillmond Investments Ltd*., 2022 ONSC 3321, at para. 13.

> been owing for the relevant period as set out in the overpayment calculations at Tab 209 of [the tenant's] Affidavit of Documents (Undertaking 1)…. [Emphasis added.].[13]

[58] The landlord did not comply with the deadline in the court order. However, a few weeks before trial, the landlord provided its answer:

> It appears based on [the tenant's] methodology for calculating rent, that their arithmetic is correct.

[59] In its answer to the undertaking, the landlord explicitly accepted the tenant's calculation of the amount it would be entitled to recover. The tenant then led evidence of that amount in Exhibit 10 (Tab 48). Given the landlord's answer to the undertaking, which it delivered shortly before trial, it is difficult to see how it could subsequently challenge the tenant's calculations without leave of the court, which it neither sought nor obtained.

[60] For the reasons set out above, I do not accept the landlord's submissions with respect to the recalculation of the amount by which the tenant unjustly enriched the landlord between 2007 and 2009. I decline to adjust my award to the tenant of $493,269.66, plus HST, representing the amount by which it unjustly enriched the landlord.

B. The landlord's Rent Paid Theory for rent from 2009 to 2023

[61] The landlord submits that that it is entitled to an order that the tenant underpaid rent between April 1, 2009, to November 30, 2023, in the total amount of $1,448,989.79. To oversimplify for purposes of this introduction, the landlord submits that once the tenant overpaid the actual rent owing under the contract, that amount became "rent paid" and all future rent amounts are calculated upon that number. Therefore, even though the tenant identified its error in 2009, correctly interpreted the lease, calculated the amount owing, and paid that amount in full starting in 2009, the landlord was entitled to have the rent after 2009 calculated based in part on the incorrect amount of rent paid prior to that time. For convenience, I will refer to this as the landlord's Rent Paid Theory.

[62] The landlord starts its submission by pointing to s. 38 of the lease, which states:

> 38. Options for Renewal
>
> The Lessee shall have options to extend the term hereof for not more than four successive additional terms of five years each. The Lessee may exercise its option by giving written notice to the Lessor during the term hereof or any successive additional term at least six (6) months prior to the expiration thereof extending the expiring term for one or more successive additional terms, upon the same terms and conditions as herein provided save as to the right of further

[13] *Metro Ontario Real Estate Limited v. Hillmond Investments Ltd*., 2022 ONSC 3321, at para. 13.

> extension beyond the fourth successive additional term, and save as to minimum rental which during each successive additional term shall be the average of the total minimum rent and percentage rent paid by the Lessee during the three (3) fiscal years of the Lessee preceding the commencement of each successive additional term; and save as to additional rent calculated on percentage of sales which during each successive additional term shall be 1.25% of the amount, if any, by which annual sales from the leased premises exceeds the greater of the average annual sales during the three (3) fiscal years of the Lessee preceding the commencement of each successive additional term or TEN MILLION ($10,000,00) DOLLARS.

[63] The landlord then submits that the "minimum rental" should be calculated on the basis of the amounts actually paid by the tenant, regardless of the fact that I found that the lease did not oblige the tenant to pay those amounts:

> Relying upon the plain meaning of the words in the Renewal Clause, the calculation of the minimum rental for the third renewal period (December 2008 to November 2013) should have been the average of the total minimum rent and percentage rent **paid** by the Lessee during the three fiscal years of the Lessee preceding the commencement of the successor additional term, as adjusted by the findings of the Court. [emphasis in landlord's submissions]

[64] The landlord submits (and I held) that the *Limitations Act, 2002*, meant that the tenant could recover the payments that unjustly enriched the landlord only for the two years prior to the date of its notice of action. The landlord extrapolates from that holding to submit that "amounts paid as rent prior to that date are unaffected." Building on its Rent Paid Theory, the landlord makes the following submissions in support of its request for an order requiring the tenant to pay an additional $1,448,989.79 in rent:

> 25. The calculation of minimum rental payable for the Third Renewal Period requires the average of the minimum rental paid between October 1, 2005, and September 30, 2008.
>
> 26. The calculation is based upon 18 months of minimum rent actually paid at $43,393.43 per month ($16.21 p.s.f.), and not effected by this proceeding, and 18 months of minimum rent "paid" at the rate ordered by the Court, being $34,258.20 per month ($12.88 p.s.f.).
>
> 27. The calculation also requires the average of percentage rent paid for tenant fiscal years 2006-2008, consisting of [the tenant's] Fiscal Year 2006 - $123,835.67 actually paid, and the adjusted percentage rent for [the tenant's] fiscal years 2007 and 2008 of zero.

28. The proper application of the Renewal Clause renewal formula for the Third Renewal Period is therefore:

> Average minimum rent for three fiscal years prior to renewal (($43,393.43 x 18 + $34,258.20 x 18)/3 = $465,909.78) plus average percentage rent for the three fiscal years prior to renewal ($123,835.67/3 = $41,278.56) = $507,188.34 ($42,265.69 per month or $15.79 p.s.f.) starting December 1, 2008.

29. [The tenant] would therefore be entitled to overpaid rent for April, 2007 to November, 2008 in the amount of $182,582.77. It would also recover an overpayment from December, 2008 to March, 2009 in the amount of $44,226.79 ($19.92-$15.79 x 32,126 x 4/12) ($10,820.48 x 4). Including the overpaid percentage rent for 2007 and 2008, the total correction in favour of [the tenant] for overpaid rent would be $461,047.92, as at March 26, 2009.

30. However, from April 1, 2009, for the duration of the Third Renewal Period, [the tenant] short paid rent to Hillmond in the amount of $8,004.73 per month totalling $448,264.79 ($15.79 - 12.88 x 32,126 sf /12 x 56 months).

31. For the Fourth Renewal Period, (December 1, 2013 to November, 2018), [the tenant] paid minimum rental of $13.35 p.s.f. ($428,882.10 annually, or $35,740.18 per month). It also paid percentage rent for 2011 ($25,771.75), 2012 ($31,453.01) and 2013 ($19,222.88). Using the renewal formula, with the amount [the tenant] should have paid as Minimum Rent ($15.79 x 32,126 = $507,269.54), plus the average annual percentage rent of $25,482.55, $16.58 p.s.f. should have been the minimum rental for the Fourth Renewal Period. Metro continued to short pay rent for the Fourth Renewal Period in the amount of $8,647.25 per month ($16.58-$13.35 x 32,126/12). [The tenant's] short payment during the Fourth Renewal Period totalled $518,835.00.

32. For the Fifth Renewal Period, December 1, 2018 to November 30, 2023, [the tenant] paid minimum rental in the amount of $13.67 p.s.f. ($439,162.42 annually, or $36,596.87/month). [The tenant] also paid percentage rent in 2016 ($8,802.58). Using the formula, the amount [the tenant] should have paid for the Fifth Renewal Period is $16.67 p.s.f. Metro continued to short pay in the amount of $8,031.50 per month ($16.67-13.67 x 32,126/12). Metro's total short payment for the Fifth Renewal Term was $481,890.00.

> 33. Attached to these written submissions as Schedule "C" is a calculation demonstrating [the tenant's] persistent rent shortfall, net of the amounts initially overpaid by [the tenant], and net of the amount of damages awarded to [the tenant] for the replacement of the roof.

[65] Schedule C to the landlord's written submission is a 287-row, six-column spread sheet of calculations. To foreshadow one of my concerns, the landlord did not put Schedule C or the operation of the renewal formula set out above into evidence at trial. For a constellation of related reasons set out below, I would not give effect to the landlord's Rent Paid Theory.

The landlord first raised this issue in its closing submissions

[66] The tenant submits that I should not allow the landlord to advance the Rent Paid Theory because the landlord first advanced it after the completion of the trial. I do not think this submission is quite correct, although it is understandable given how the landlord proceeded at trial. Almost all of the landlord's time, energy, evidence, and submissions focussed on proving that its interpretation of the lease was correct and that the tenant owed over $15 million in unpaid rent and interest. The landlord submitted that the correct interpretation of the lease required the tenant to pay to the landlord 1.25% of all sales in excess of $10 million and to fold those amounts into minimum rental at the beginning of each renewal period. In my reasons for decision, I summarized the landlord's position as follows:

> [253] The landlord submits that the calculation of "percentage rent" was not amended by the renewal provisions in s. 38 and that, at all times, the tenant was obliged to pay to the landlord 1.25% of all sales in excess of $10 million and to fold those amounts in to minimum rental at the beginning of each renewal period. In essence, the landlord argues that the renewal provisions in s. 38 did not modify the existing "percentage rent," but rather created a new type of rent, "premium rent", which was to be paid on top of the existing percentage rent.
>
> [254] The landlord submits that the tenant correctly calculated and paid the minimum rent and percentage rent until April 1, 2009. After that date, the tenant adopted an incorrect interpretation of the lease and began to pay lower amounts of rent than required by the lease.
>
> [255] The landlord submits that from April 1, 2009, until the end of the lease on November 30, 2023, the tenant should have paid an additional $5,902,867 in minimum rent and $2,207,835 in percentage rent (both amounts inclusive of HST). The total amount owing in unpaid rent, according to the landlord, is $8,058,015. The landlord also claims $7,377,160 in interest on those amounts for a total amount owing of $15,487,412.

> [256] In support of its position, the landlord submits the factual matrix evidence of the negotiation and execution of the first and second lease amending agreements assists with the interpretation of the lease.

[67] The landlord's Rent Paid Theory is an alternative submission, which posits that even if the tenant's interpretation of the lease was correct, the landlord was still entitled to a significant judgment in its favour. Each of the two lawyers representing the landlord appear to have made passing reference to the Rent Paid Theory in their oral submissions at the end of the trial. Mr. Solmon closed his oral submissions as follows:

> MR. SOLMON: Okay? So, one thing that I should point out, Your Honour, is that if you should find that my -- that Metro's entitled to any recovery and it go back -- it goes back two years to March 2007, the calculation is somewhat complicated because you have to recalculate -- there was some percentage rent, so you have to recalculate what the minimal -- what the minimum rental would be --
>
> THE COURT: Mm-hmm.
>
> MR. SOLMON: -- and we say that they underpaid it about three dollars a square foot since then. And that results in a calculation that number -- they would have a four hundred and some odd thousand-dollar credit at that time, so -- but surely, we would cash up the credit and the money would be owed, plus interest. If -- so, but we'd need to do that calculation for you, if you make that finding.

[68] Mr. McReynolds then made submissions regarding the CAM payments, the roof, and what he indicated would be "a limitations issue." Mr. McReynolds closed his submissions as follows:

> Mr. McReynolds: Lastly, I'd like to speak about the effect of limitation periods on the potential claim for recovery. Should Your Honour determine that the plaintiff's interpretation of the agreement is the one you wish to follow, it creates certain issues.
>
> One is that the percentage rent payment for 2007 and 2008 would likely be struck out.
>
> Likewise, the rent that was paid between April 1, 2007 forward, if Your Honour goes their way, would also be reduced to an amount that they have suggested, which I understand was $12.77 a square foot. They were paying $16.21 a square foot.
>
> Now, where this gets complicated is the lease requires a 2008 calculation for the renewal period 2008 to 2013. And if section 38

> applies to the renewal, which it does, you'd be obliged to take the 36 months of rent that occurred in the three fiscal years before November 30th, 2008, and the percentage rent, which remains extant from 2006, to create the ongoing minimum rental for the 2008- 2013 period. Our calculation on that point is that that would be $15.82 a square foot, which is a concern because the amount paid by [the tenant] was based on $12.77 a square foot at that point going forward.
>
> So, even in the event that the court is inclined to support the position of the plaintiff in this regard, the result is an initial surge in favour of the plaintiff, but every month from April 1, 2009 to the end of the lease, a persistent shortfall in favour of [the landlord]. Now, because it's --
>
> The Court: Is that in one of the schedules, that calculation?
>
> Mr. McReynolds: No, we haven't done that because there are, frankly, so many moving parts it's not even fun. There are so many variations which you could determine that -- we will certainly provide -- should Your Honour want that calculation, I will be happy to perform it.
>
> The Court: I think it has to be in evidence; I don't think I could just take it.
>
> Mr. McReynolds: Yeah. Now, I believe you've been indulgent with me because I think we're done with our time. Subject to any questions you have, sir, those are my submissions.

[69] Given these brief references during the closing submissions of counsel for the landlord, I cannot accept the tenant's submission that the landlord never raised the Rent Paid Theory until after trial. It is more accurate to say that the landlord first raised the Rent Paid Theory at trial in its closing submissions.

[70] The landlord also sought leave to introduce evidence from its pre-trial conference memo, ostensibly to assert that the tenant was aware of the Rent Paid Theory. I deny the landlord leave to do so. The trial judge should not receive pre-trial conference communications except in the most unusual circumstances. I see no benefit to admitting this evidence to aid my understanding of what the landlord may have said in an attempt to reach a negotiated resolution of the case before trial. As I will explain below, in my view, the landlord's answers to undertakings and what happened during trial are far more important than what the landlord might have said at the pre-trial conference.

[71] In any event, I would not give effect to the landlord's submission for three related reasons:

a. the landlord needed to lead evidence during the trial to support its theory of damages, but it did not do so;

b. the landlord's calculations are inconsistent with its answers to undertakings; and

c. in any event, I do not accept the landlord's interpretation of the contract.

[72] In support of the Rent Paid Theory, the landlord filed written submissions explaining its interpretation of the lease and Schedule C, which sets out the damages it claims to be owed under the Rent Paid Theory. The landlord's witness gave no evidence in support of either the Rent Paid Theory or the damages calculations in Schedule C. The landlord did not file an expert damages report at trial. The landlord did not put its damages calculations in Schedule C into evidence and the tenant had no ability to cross-examine on those calculations.

[73] Importantly, the Rent Paid Theory and the damages calculations in Schedule C are inconsistent with answers to undertakings given by the landlord.

[74] Examinations for discovery in this proceeding took place on February 25 and 26, 2021. In March 2022, the parties each brought motions to compel the other to answer undertakings and refusals. In his reasons for decision, Associate Justice McGraw confirmed that the landlord agreed to answer undertaking #3, which required the landlord to quantify its claim for minimum rent owing for the periods from 2009 to present:

> [14] Undertaking 3 – [The landlord] agrees to, 60 days before the pre-trial, provide a breakdown of the amounts set out in paragraph 74 of the Amended Defence and Counterclaim regarding the alleged minimum rent owing from April 1, 2009 to the present.[14]

[75] On December 6, 2023, the landlord delivered its answers to undertakings and refusals.[15] In answer to Undertaking #3, the landlord stated, "Please see Minimum Rent, Percentage Rent and Interest Short Payment and Schedules A and B, attached." The landlord attached an overview in chart form that summarized and broke down its claim for unpaid minimum and percentage rent from April 1, 2009 to June 30, 2022:

Minimum and percentage rent shortpaid
From 01-APR- 2009 to 30-JUN-2022

[14] *Metro Ontario Real Estate Limited v. Hillmond Investments Ltd.*, 2022 ONSC 3321, at para. 14.

[15] According to the Trial Management Report to Trial Judge prepared by Glustein J., the pre-trial conference in this trial took place on December 15, 2023. Pursuant to the order of Associate Justice McGraw, the landlord was required to deliver its answers to undertakings on or before October 16, 2023. The landlord did not comply with this order. The failure to comply with this court order would likely mean that, without leave, the landlord could not introduce at trial the information that was not provided without leave, per r. 31.07(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194. at

	Amount	HST	Total	Interest	Total including interest	Schedule
Minimum rent	$4,531,543	$543,785	$5,075,328	$2,839,163	$7,914,491	A
Percentage rent	$1,681,633	$218,612	$1,900,245	$1,225,830	$3,126,075	B
Total	$6,213,176	$762,397	$6,975,573	$4,064,993	$11,040,566	

[76] In Schedule A, the landlord set out a month-by-month breakdown of the amounts it claimed the tenant owed for unpaid minimum rent and interest for each year from 2009 to June 30, 2022.

[77] In Schedule B, the landlord set out the amounts it claimed the tenant owed for unpaid percentage rent between 2009 and 2021. It set out the tenant's annual sales for each year, calculated 1.25% of the sales above $10 million, added HST, and deducted the amount actually paid by the tenant in each year, to reach the total amount allegedly owing for each year. The landlord then calculated the accrued interest on that amount up to June 2022.

[78] At trial, the landlord introduced into evidence versions of the charts that fulfilled Undertaking #3. The landlord updated the charts to include all amounts owing as minimum rent and percentage rent up to November 30, 2023:

Minimum and percentage rent shortpaid						
From 01-APR- 2009 to 30-NOV-2023						
	Amount	HST	Total	Interest	Total	Schedule
Minimum rent	$5,223,776	$679,091	$5,902,867		$7,914,491	A
Percentage rent	$1,953,438	$253,947	$2,207,385		$3,126,075	B
Interest				$7,377,160	$7,377,160	C
Total	$7,177,215	$880,800	$8,058,015	$7,377,160	$15,487,412	

[79] Neither the answer to Undertaking #3 nor Exhibit 3 was predicated on or consistent with the Rent Paid Theory. All the data is predicated on the court accepting the landlord's primary argument at trial: that the correct interpretation of the lease required the tenant to pay to the landlord 1.25% of all sales in excess of $10 million and to fold those amounts into minimum rental at the beginning of each renewal period.

[80] I find that if the landlord wished to advance the Rent Paid Theory at trial, it was required to provide a breakdown of the amounts allegedly owed by the tenant under this theory as part of its answer to Undertaking #3. The landlord was required to provide a complete answer to its undertaking to "provide a breakdown of the amounts…regarding the alleged minimum rent owing from April 1, 2009, to the present," including a breakdown of amounts under the alternate Rent Paid Theory. It did not do so.

[81] In addition, if the landlord intended to recover damages under the Rent Paid Theory, it needed to do so on the basis of evidence at trial that the tenant could test through cross-examination. If the landlord wished to be relieved of the consequences of not fulfilling its

undertaking so that it could call evidence to prove damages under the Rent Paid Theory, it needed to seek leave of the court during the trial. It did not do so.

[82] I decline to consider the landlord's claim under the Rent Paid Theory.

[83] However, even if I were to consider the Rent Paid Theory, I would not accept the landlord's argument. In essence, the landlord submits that once the tenant overpaid the rent by incorrectly interpreting the lease, the tenant was stuck. On the landlord's theory, the overpayment would roll forward into all future rent calculations. That interpretation of the lease is inconsistent with sound commercial principles and good business sense.[16] The landlord's Rent Paid Theory is not commercially reasonable. An overpayment is a mistake, capable of being corrected. It is not a vested right of the landlord to be capitalized into the economic value of the lease. Looking at the parties' relationship, and the considering commercial reasonableness, I would reject the Rent Paid Theory, which borders on a commercially absurd interpretation of the lease.

[84] I do not accept the landlord's submission that the *Limitations Act, 2002* entitles it to recover under the Rent Paid Theory. The *Limitations Act, 2002* prevented the tenant from recovering its overpayments more than two years before it noticed the overpayments and commenced the litigation. The *Limitations Act, 2002* says nothing about what the lease required the tenant to pay in rent after it corrected its error in 2009.

[85] I reject the landlord's claim for any additional rent for the period spanning 2009 to 2023. Given that finding, I need not determine whether the landlord's rent calculations are correct (the tenant asserts that the landlord's calculations should be reduced by $64,308.05) or decide whether the landlord would be entitled to interest on any amount found to be owing at 10% per year.

[86] For completeness, if the landlord was entitled to the additional rent for the period from 2009 to 2023 on its recalculation theory, then I would have to consider whether the tenant should be allowed to set off its overpayment of rent against the rent owed to the landlord under the Rent Paid Theory. This issue would raise different considerations than setting rent overpayments off against CAM charge underpayments, which I did not allow above, but I do not reach this issue.

4. Conclusion and costs

[87] Based on my reasons for decision, supplemented by this endorsement, I award the tenant $1,359,799.88 in damages, including pre-judgment interest calculated to May 6, 2024, comprising:

a. $452,810.09 in damages and interest arising from the replacement of the roof;

[16] *Infor Financial Inc. v. CentriLogic, Inc*., 2024 ONCA 849, at para. 49.

b. $767,754.07 in damages and interest arising from overpayment of the rent; and

c. $139,235.72 in damages and interest arising from overpayment of CAM charges.

[88] If the parties are not able to agree on the costs of the proceeding, the tenant may email its costs submission of no more than five double-spaced pages to my judicial assistant on or before December 6, 2024. The landlord may deliver its responding submission of no more than three double-spaced pages on or before December 13, 2024. No reply submissions are to be delivered without leave.

Robert Centa J.

Released: November 29, 2024

CITATION:Metro Ontario Real Estate Limited v. Hillmond Investments Ltd., 2024 ONSC 6670
COURT FILE NO.: CV-09-375202
DATE: 20241129

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Metro Ontario Real Estate Limited

– and –

Hillmond Investments Ltd. carrying on business as Centr

AND BETWEEN:

Hillmond Investments Ltd. carrying on business as Centr

– and –

Metro Ontario Inc. and Metro Ontario Real Estate Limite

REASONS FOR JUDGMENT

Robert Centa J.

Released: November 29, 2024