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**Court of Appeal for Saskatchewan**  
**Docket: CACV4402**

**Citation: *RIP Beverages Co. Ltd. v Dunn,***  
**2026 SKCA 10**

**Date: 2026-01-21**

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Between:

**RIP Beverages Co. Ltd., Urban Cellars (Market Mall) Ltd., Urban Cellars  
(Cumberland) Ltd., Peter Klassen, Randy Wilson and Ian MacDonald**

*Appellants/Respondents in Cross-appeal  
(Defendants)*

And

**David Dunn**

*Respondent/Appellant in Cross-appeal  
(Plaintiff)*

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Before: Leurer C.J.S., Bardai and Kilback JJ.A.

Disposition: Appeal allowed, Cross-appeal dismissed

Written reasons by: The Honourable Chief Justice Robert W. Leurer  
In concurrence: The Honourable Justice Naheed Bardai  
The Honourable Justice Keith D. Kilback

On appeal from: QBG-RG-01234-2022, Regina (SKKB)  
Appeal heard: June 16, 2025

Counsel: Lauren Wihak, K.C., for the Appellants  
Eric Marcotte for the Respondents

## Leurer C.J.S.

### I. INTRODUCTION

[1] The issue in this appeal is whether a defendant can assert a defence of equitable set-off in circumstances where it cannot claim a money judgment because of an expired limitation period.

[2] On March 2, 2022, RIP Beverages Co. Ltd. [RIP], MacDonald Jewellery Design Ltd., Randall Wilson, Ian MacDonald and Peter Klassen [RIP Plaintiffs] commenced an action against Dave Dunn Enterprises Ltd. and David Dunn [Dunn Defendants]. I will call this the “RIP Action”. In their statement of claim, the RIP Plaintiffs allege that monies they advanced for the purposes of developing three specific liquor stores were improperly used by the Dunn Defendants to develop different stores.

[3] On May 17, 2022, Mr. Dunn commenced his own action against RIP, Mr. MacDonald, Mr. Klassen, Mr. Wilson, Urban Cellars (Market Mall) Ltd. and Urban Cellars (Cumberland) Ltd. [RIP Defendants]. I will call this the “Dunn Action” to distinguish it from the RIP Action. In the Dunn Action, Mr. Dunn seeks judgment against the RIP Defendants for monies he alleges are owing under a series of agreements that pertained to the sale of his interests in two liquor stores. In their statement of defence, the RIP Defendants plead that any amounts that they may owe to Mr. Dunn must be set off by an amount that is equivalent to what is claimed by the RIP Plaintiffs in the RIP Action.

[4] A Court of King’s Bench judge sitting in Chambers granted summary judgment in both the RIP Action and the Dunn Action: *Dunn v RIP Beverages Co. Ltd.* (8 July 2024), Regina QBG-RG-01234-2022 (SKKB) [*Decision*].

[5] In the RIP Action, the principal issue that the judge was called to decide was if the RIP Plaintiffs knew, or ought to have known, of the use to which their monies had been put more than two years before they issued their statement of claim. The judge found that this was the case and that the action was therefore barred pursuant to s. 19 of *The Limitations Act*, SS 2004, c L-16.1. The appeal by the RIP Plaintiffs from the summary dismissal of the RIP Action is rejected by this Court in reasons delivered contemporaneously with this judgment: *RIP Beverages Co. Ltd. v Dave*

*Dunn Enterprises Ltd.*, 2026 SKCA 9 [*RIP Action Appeal Judgment*]. More specifically, this Court has concluded that the RIP Plaintiffs are precluded from suing for damages based on the alleged misappropriation of their monies by the Dunn Defendants because the applicable limitation period had expired.

[6] The judge also granted summary judgment in the Dunn Action. This judgment, in favour of Mr. Dunn against the RIP Defendants, was grounded in his finding that the plea of equitable set-off by the RIP Defendants was also barred by the applicable limitation period. For the reasons set out herein, I would allow the RIP Defendants' appeal from this part of the *Decision*. I do so because *The Limitations Act* does not apply to the defence of equitable set-off. For this reason, the judgment in favour of Mr. Dunn must be set aside and the Dunn Action must be remitted to the Court of King's Bench.

[7] Mr. Dunn has also cross-appealed a finding by the judge, made in the context of his summary determination in the Dunn Action, that if he was mistaken on the limitations point, equitable set-off had been established. At the hearing of this appeal, the RIP Defendants conceded that this finding could not stand. Since the judge's conclusion that equitable set-off had been established was *obiter*, this Court need not issue a judgment concerning Mr. Dunn's cross-appeal.

[8] The overall effect of the *RIP Action Appeal Judgment* and this judgment is that the claim by the RIP Plaintiffs for damages based on the alleged misappropriation of their monies is barred by the applicable limitation period and the RIP Action stands dismissed. However, the RIP Defendants are entitled to continue to assert equitable set-off as a defence to the Dunn Action.

## II. BACKGROUND

### A. The basics of the dispute

[9] The RIP Action and the Dunn Action emerged out of a breakdown in the business relationship between Mr. Dunn, Mr. Wilson, Mr. MacDonald and Mr. Klassen. These individuals, and companies that they controlled, became involved with one another when the Saskatchewan government decided to privatize the sale of liquor in this province.

[10] In 2017, Mr. Dunn and Mr. Wilson entered into a verbal arrangement relating to the development of several liquor stores in Saskatchewan under the “Urban Cellars” brand name. By early 2018, Mr. Dunn and Mr. Wilson had obtained leases and retail liquor licences for eight liquor stores. Each store was to have its own operating company and ownership structure. Mr. Wilson was to have an interest in each of these eight stores. Five of these stores, known as Cumberland, Market Mall, Warman, Brighton and Whiskey Jacks, were to be in the Saskatoon area.

[11] RIP – so named because of the first initials of the first names of Mr. Wilson (R), Mr. MacDonald (I) and Mr. Klassen (P) – was incorporated as the vehicle through which those three individuals were to invest in the Cumberland, Market Mall, and Warman liquor stores. In the *Decision* the judge referred to these stores as the “Enterprise stores”, a phrase I will generally adopt in this judgment.

[12] Between May of 2018 and April of 2019, the RIP Plaintiffs provided approximately \$3.5 million to the Dunn Defendants. The source of the dispute between the parties became the now undeniable fact that the money advanced through or on behalf of the RIP Plaintiffs was commingled with other funds and a significant portion of the money contributed by the RIP Plaintiffs was spent in the development of non-Enterprise stores. The RIP Plaintiffs and RIP Defendants assert that it was improper for the Dunn Defendants to have used RIP funds in this way.

[13] For their part, the Dunn Defendants maintain that they did nothing wrong when they used monies advanced by the RIP Plaintiffs to develop non-Enterprise stores. Mr. Dunn’s evidence was that he “understood that RIP would acquire an equity stake in the Enterprise stores, but that it would also be participating in [Mr.] Wilson’s equity stake in other stores, and would be funding part of [Mr.] Wilson’s required contributions to those stores in order to do so” (*Decision* at para 13).

[14] There were three other liquor stores that were also developed by Mr. Dunn around this time: Golden Mile, Quance and Brighton. In the *Decision*, the judge referred to these three stores as the “Bison stores”, based on the involvement of another investor group, consisting of the principals of Bison Properties Limited, that he referred to as the “Bison group”. It is now

uncontroversial that the Dunn Defendants used some of the RIP funds to develop the three Bison group stores and Whiskey Jacks.

[15] The judge found that, by March 25, 2019, “it was apparent that [Mr.] Klassen and [Mr.] MacDonald were getting concerned about not having a proper accounting for how their funds were being spent” (at para 17). On March 12, 2020, a business colleague of Mr. Dunn, Kevin Kasha, emailed a two-page spreadsheet to Mr. Klassen, Mr. Wilson and Mr. Dunn. The judge found that this spreadsheet “accounted for RIP’s contributions” (at para 45). The RIP Plaintiffs’ claims for damages in the RIP Action and a set-off in the Dunn Action are based on this spreadsheet. They say it shows that RIP funds totalling \$1,168,604 were spent on the following non-Enterprise stores (see para 49):

- (a) \$828,565 on the Golden Mile store;
- (b) \$48,039 on the Brighton store;
- (c) \$160,000 on the Quance store; and
- (d) \$132,000 on the Whiskey Jacks store.

[16] As the judge summarized, Mr. Klassen, Mr. Wilson and Mr. MacDonald each “averred that they did not know that RIP’s funds that were intended for the Enterprise stores had been used for purposes other than the Enterprise stores, including the Golden Mile store, until receiving and reviewing the March 12, 2020 spreadsheet” (at para 47). It was a central issue before the judge whether this evidence was credible or if it was nonetheless a reasonable understanding on their part. The latter is important given the applicability of discoverability. In this regard, the Dunn Defendants contended that the RIP Plaintiffs ought to have known about the misappropriation of monies well before that spreadsheet was sent. Mr. Dunn contended the same about the RIP Defendants in his action against them.

## **B. Sale of interests in Cumberland and Market Mall**

[17] During the several months that followed the delivery of the March 12, 2020 spreadsheet, RIP negotiated with Mr. Dunn over the ownership of the Cumberland and Market Mall stores. These discussions culminated in a Share Purchase Agreement entered into as of November 13,

2020, between Mr. Dunn, Mr. Kasha, Mr. Wilson, Mr. MacDonald, Mr. Klassen, RIP, and various other corporations through which interests in the two stores were held. As summarized by the judge, the overall “effect of the agreement was to sell [Mr.] Dunn’s and [Mr.] Kasha’s interest in the Cumberland and Market Mall stores to RIP and its principals” (at para 51).

[18] Several other agreements were entered into contemporaneously with the Share Purchase Agreement. One was a mutual release whereby Mr. Wilson, Mr. MacDonald, Mr. Klassen, RIP and several other corporations, on the one hand, and Mr. Kasha, Mr. Dunn and a corporation, on the other hand, released the other side from certain causes of action.

[19] Another of the ancillary agreements was a Deferred Payout Agreement. Again, as summarized by the judge, it “required the sum of \$1,750,000 to be paid out in monthly payments, commencing six months from the closing date, based on the sales generated by the Cumberland and Market Mall stores” (at para 51). The Deferred Payout Agreement granted Mr. Dunn’s investment companies access to sales records to verify what payments were due under it.

[20] Finally, Mr. Wilson, Mr. MacDonald and Mr. Klassen each provided a limited guarantee of one-third of the total amount payable by RIP under the terms of the Deferred Payout Agreement.

[21] The share sale closed in November of 2020. RIP delivered one payment under the Deferred Payout Agreement in 2021 but has refused access to information about the sales at the Cumberland and Market Mall stores.

### **C. The actions**

[22] As mentioned, the RIP Action was commenced on March 2, 2022. The statement of claim asserts several causes of action, including conversion, breach of contract, civil fraud, breach of trust and unjust enrichment. It identifies the damages alleged to have been suffered by the RIP Plaintiffs, as well as the unjust enrichment of the Dunn Defendants, as being equivalent to the sum of RIP monies that had been used to develop non-Enterprise liquor stores.

[23] In their statement of defence, the Dunn Defendants deny any wrongdoing and assert that the RIP funds were used in non-Enterprise stores with Mr. Wilson’s knowledge and approval. They also plead that the sale of the Cumberland and Market Mall stores “was intended to be a

settlement of all outstanding issues”. Finally, they maintain that the RIP action is barred by *The Limitations Act* because Mr. Klassen and RIP “were fully aware of all expenditures and the approximate allocation of the RIP contributions by April 6, 2019 and in any event no later than June 29, 2019”.

[24] As has been noted, the Dunn Action was commenced on May 17, 2022. It concerns Mr. Dunn’s efforts to collect monies he claims to be owed by the RIP Defendants under the share sale arrangement entered into by the parties in November of 2020. In their statement of defence, the RIP Defendants plead, as a set-off, the same facts that the RIP Plaintiffs rely upon to ground the RIP Action. The RIP Defendants also raise other defences to the Dunn Action.

#### **D. The summary judgment applications**

[25] The Dunn Defendants applied for summary judgment dismissing the RIP Action. While they did not agree that it was improper for them to have spent RIP funds on non-Enterprise stores, for the purposes of their summary judgment application only, they accepted that the RIP Plaintiffs would succeed in proving that the expenditure of RIP funds in this way was actionable (see *Decision* at para 60). On this premise, the Dunn Defendants asked for summary judgment dismissing the RIP Action, based on their contention that the action was statute-barred under *The Limitations Act*.

[26] Mr. Dunn asked for summary judgment in the Dunn Action, in the amount of his claim, based on his assertion that the RIP Defendants had not pleaded a reasonable defence as their claimed right of set-off did not exist “under the contract or at common law”.

[27] The summary judgment applications proceeded in tandem. The parties agreed that the evidence given in the context of each application could be considered for the purposes of the other (see *Decision* at para 6).

#### **E. The Decision**

[28] The judge summarised the actions and the applications and the events leading to them (at paras 1-53). He next reviewed the general legal principles that govern the grant of summary

judgment (at paras 54-59). Against this background, the judge turned to consider whether summary judgment should be granted in the RIP Action and the Dunn Action based on *The Limitations Act*.

[29] The judge found, based on the evidence, that the RIP monies had been spent on non-Enterprise stores well in advance of two years before the RIP action was commenced. Accordingly, he determined that “as of April 2019 the loss grounding the allegations in the RIP action had occurred” (at para 73). He also held that each of the elements necessary for the RIP Plaintiffs to have discovered their claim were present more than two years before March 2, 2020. For this reason, he found the continuation of the RIP Action and the assertion of a defence of equitable set-off in the Dunn Action to be barred pursuant to s. 19 of *The Limitations Act* (see para 142). The judge’s reasons for finding that *The Limitations Act* applied to the defence of set-off were expressed in the following single paragraph:

[142] The RIP action was commenced over two years after the RIP Plaintiffs’ claim was discovered or discoverable. Accordingly, pursuant to s. 19 of *The Limitations Act*, the RIP action is barred and cannot be maintained. Similarly, the set-off claimed in the Dunn action is barred pursuant to s. 19 of *The Limitations Act* and cannot be maintained.

[30] Section 19, which is referred to by the judge, states as follows:

**19** If, after the commencement of a proceeding, it is established that a limitation period applicable to the claim had expired before the commencement of the proceeding, the claim is barred and the proceeding shall not be maintained.

[31] In substance, I take the judge to have concluded that, since the pleaded facts supporting the set-off asserted by the RIP Defendants in the Dunn Action were the same as those that served as the foundation for the time-barred RIP Action, the plea of set-off was similarly barred and could not be maintained.

[32] The judge turned to an issue that he observed was “unnecessary” for him to address, but which he would nevertheless decide. This issue was whether, even if the limitation period had not expired, summary judgment could be granted in the Dunn Action on the basis that the RIP Defendants have no claim to an equitable set-off. On this, he found that there was “a sufficient connection between the amounts claimed by [Mr.] Dunn and the amounts claimed as a set-off by the [RIP] Defendants, such that it would have been reasonable to permit the latter to proceed as a set-off”. This was because both claims “arise out of the parties’ dealings with respect to Urban Cellars liquor stores, including the Cumberland and Market Mall stores” (at para 158).

[33] In the overall result, the judge granted summary judgment dismissing the RIP Action. He also struck the plea of set-off from the statement of defence in the Dunn Action “on the basis that it is barred by s. 19 of *The Limitations Act*” (at para 162).

### III. ISSUES

[34] As I have noted, the appeal by the RIP Plaintiffs from the judge’s finding that their claim is statute-barred is rejected in the *RIP Action Appeal Judgment*, with the result that the RIP Action stands dismissed. The judge’s finding relating to the application of the same limitation period to set-off pleaded by the RIP Defendants in response to the Dunn Action is the subject of this appeal.

[35] Among other arguments, the RIP Defendants assert that *The Limitations Act* does not apply to pleadings in a statement of defence, in general. In the alternative, they submit that *The Limitations Act* does not apply to the defence of equitable set-off. They also say that, even if it was proper for the judge to strike their plea of equitable set-off, there were other issues that required a resolution before any judgment could be granted in the case.

[36] Mr. Dunn has cross-appealed. He contends that, if the RIP Defendants’ plea of equitable set-off is not barred by an applicable limitation period, the judge erred in his *obiter* finding that it was available to them to reduce the amount of his claim. He also seeks to justify the grant of summary judgment on other grounds not explored in the *Decision*.

[37] The appeal and cross-appeal are appropriately decided by answering the following questions:

- (a) Does *The Limitations Act* apply only to claims pursued in a statement of claim or an originating notice (or its equivalent)?
- (b) Is the assertion of equitable set-off in a statement of defence a *claim* within the meaning of *The Limitations Act*?
- (c) Can the applicability of equitable set-off be decided summarily?

## IV. ANALYSIS

### A. *The Limitations Act* is not restricted to claims pursued in statements of claim

#### 1. The parties' positions

[38] The first issue in this appeal is whether *The Limitations Act* is restricted to claims pursued in a statement of claim or an originating notice. This question emerges because of s. 3 of that Act, which sets out the circumstances in which the Act applies:

**3(1) Subject to subsections (2) to (5), this Act applies to claims pursued in court proceedings that:**

(a) are commenced by statement of claim; or

(b) are commenced by originating notice and are not proceedings in the nature of an application.

(2) This Act does not apply to court proceedings that are:

(a) proceedings in the nature of an appeal;

(b) proceedings in the nature of a judicial review;

(c) proceedings based on existing Aboriginal and treaty rights of the Aboriginal peoples of Canada that are recognized and affirmed in the *Constitution Act, 1982*; or

(d) proceedings for a writ of habeas corpus.

(3) Proceedings described in clause (2)(c) are governed by the laws respecting the limitation of actions that would have been in force if this Act had not been passed.

(4) This Act does not apply to a claim that is subject to a limitation provision in another Act or a regulation if that Act or regulation states that the limitation provision applies notwithstanding this Act.

(5) This Act does not apply to a claim that is subject to a limitation period in an international convention or treaty that is adopted by an Act.

(Emphasis added)

[39] As can be seen, s. 3(1) states that *The Limitations Act* applies to claims that are pursued in court proceedings commenced by either statement of claim or originating notice. In 2004, when the Act was enacted, Rule 13(1) of *The Queen's Bench Rules* required that, “[e]xcept as otherwise provided, every action shall be commenced by the issue of a Statement of Claim”. Rule 451 provided that “[w]here under any statute, proceedings are authorized to be commenced by originating summons or by chamber summons, such proceedings may be commenced by notice to be called an originating notice, as hereinafter set out”.

[40] Section 3(1) therefore ties the application of *The Limitations Act* to claims pursued in one of two documents by which civil proceedings could be commenced at the time the Act was passed.

[41] It should be observed that *The King's Bench Rules* now contemplate that an action may be commenced in several ways but continue to provide that “[a] statement of claim must be used to start an action, unless an enactment or these rules provide otherwise” (Rule 3-2(2)). The rules of court no longer refer to originating notices but do specify that “[a]n action may be started by originating application if these rules authorize the commencement of an action by originating application” (Rule 3-2(3)). However, since no party suggests that proceedings in this matter should have been pursued by, or within, proceedings commenced by way of originating application, this Court need not address the application of *The Limitations Act* to proceedings commenced in that way. Rather, the only issue that this Court needs to consider is whether *The Limitations Act* applies when equitable set-off is pleaded in a statement of defence delivered in response to a statement of claim.

[42] The RIP Defendants say that even if their plea of equitable set-off amounts to a *claim* within the meaning of *The Limitations Act* (a question considered in the discussion under subheading B), the Act does not apply because the set-off is not advanced in a statement of claim. The substance of their position is that the Act is intended to impose time limitations on causes of action advanced in a statement of claim or an originating notice (now originating application). They assert that, because they are pleading set-off in a statement of defence, the Act has no application whatsoever to the defence of set-off raised in their pleading.

[43] For his part, Mr. Dunn maintains that because the set-off is pleaded in a statement of defence to his action, that action itself being commenced by statement of claim, *The Limitations Act* applies.

**2. The correct interpretation of s. 3(1): *The Limitations Act* applies to pleadings in addition to statements of claim**

[44] The applicability of *The Limitations Act* depends on the correct interpretation of s. 3(1). I will, therefore, consider the issue of the application of *The Limitations Act* with a focus on the “text, context, and purpose” of the provisions at play in this appeal, to use the shortened paraphrase

of the modern approach to statutory interpretation referenced in *R v McColman*, 2023 SCC 8 at para 31, and as codified in s. 2-10 of *The Legislation Act*, SS 2019, c L-10.2.

**a. Text and context**

[45] The view promoted by the RIP Defendants is that, on a proper grammatical understanding of s. 3(1), “claims” is the relevant subject, and the disjunct predicates “are commenced by statement of claim” and “are commenced by originating notice and are not proceedings in the nature of an application”. Based on this understanding of the words of s. 3(1), to find that *The Limitations Act* applies to a claim requires an affirmative answer to one question: Does the claimant raise it in a statement of claim or an originating notice or its equivalent?

[46] Mr. Dunn ascribes a different ordinary meaning to the words used in s. 3(1). He says that the same disjunct predicates have as their subject “court proceedings”. Based on this construction, *The Limitations Act* applies to a claim if it is pursued in a pleading that is found within the procedural embrace of an action commenced by a statement of claim or an originating notice or its equivalent.

[47] The text of s. 3(1) is open to either interpretation. However, some clarity is added when s. 3(1) is viewed within the scheme of *The Limitations Act* and the context of the statutory regime it replaced.

[48] The 2004 statutory reform of limitation periods was portended by the change in legislative title; *The Limitations Act* replaced *The Limitation of Actions Act*, RSS 1978, c L-15. A key feature of the new statutory regime was that, instead of prescribing limitation periods with reference to causes of action, under the new regime, the focus was placed on *claims*.

[49] This change provided a universal framework for discoverability that transcends the requirements for particular causes of action (see generally *Kaynes v B.P. p.l.c.*, 2021 ONCA 36 at para 51 [*Kaynes*]). Importantly, for the purposes of this appeal, *The Limitations Act* distinguishes between claims and the proceedings in which those claims are asserted when defining its applicability and operation. Leaving aside s. 3(1), which is the focus of the interpretative exercise in this appeal, most centrally, this can be seen in the provisions that describe the operation of limitation periods themselves. Thus, s. 5 prescribes the basic limitation period under the Act by

reference to a *claim*, and not, directly at least, an action or proceeding. That provision states that, unless otherwise provided for in the Act, “no proceedings shall be commenced with respect to a *claim* after two years from the day on which the *claim* is discovered” (emphasis added). Likewise, s. 7(1), which establishes an ultimate limitation period, states that “with respect to any claim to which a limitation period applies, no proceeding shall be commenced after 15 years from the day on which the act or omission on which the claim is based took place”. Section 6 then describes the conditions for the discovery of a *claim*.

[50] Returning then to the language of s. 3(1), when *The Limitations Act* was passed, *The Queen’s Bench Rules* recognized several different ways in which a claim (meaning a “claim to remedy an injury, loss or damage that occurred as a result of an action or omission” (at s 2(a) of *The Limitations Act*) could be pursued. The methods by which a defendant could seek a positive remedy for an injury, loss or damage without issuing a statement of claim or originating notice included (a) a counterclaim (Rule 105, now Rule 3-46 of *The King’s Bench Rules*), (b) a cross-claim (Rule 106, now Rule 3-30 of *The King’s Bench Rules*), and (c) a third party claim (Rule 107, now Rule 3-31 of *The King’s Bench Rules*). Under the former rules of court, counterclaims, cross-claims and third party claims were all pursued within the context of an existing action. The same is true under *The King’s Bench Rules*.

[51] Thus, the direction found in s. 3(1), namely that *The Limitations Act* applies to *claims pursued* in a court proceeding that is commenced by a statement of claim, can easily be understood to be deliberately worded so that claims that are advanced in counterclaims, cross-claims and third party claims will all be subject to the Act’s time prescriptions. Indeed, had the Legislature intended that limitation periods would only apply to claims asserted in a statement of claim or an originating notice, I see no obvious reason why it would not have simply said, in s. 3(1), that the Act applies to claims that are commenced by statement of claim or an originating notice, since they are self-evidently court proceedings.

[52] I find additional support for the conclusion that limitation periods apply to claims advanced in pleadings other than statements of claim in s. 3(2). That provision describes the inapplicability of *The Limitations Act* “to court *proceedings*” in certain contexts, without making any reference to claims. One would expect that s. 3(2) would have been worded similarly to s. 3(1) if the

distinction between claims and the proceedings in which they are pursued was not a meaningful one.

[53] This interpretation of s. 3(1) finds at least some further support in s. 14 of *The Limitations Act*, which prescribes a special rule governing claims for contribution and indemnity:

**14(1)** In the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim with respect to which contribution and indemnity is sought is deemed to be the day on which the act or omission on which that alleged wrongdoer's claim is based took place.

(2) Subsection (1) applies whether the right to contribution and indemnity arises with respect to a tort or otherwise.

[54] Section 14 would serve no purpose if *The Limitations Act* were to be found to be inapplicable to third party claims, except for those instances where claims for contribution and indemnity are pursued in a separate action.

[55] In short, taken as a whole, the text and statutory context of s. 3(1) of *The Limitations Act* supports the conclusion that the Act applies to claims pursued in any form of pleading that is within an action that is commenced by statement of claim (or originating notice). The Act does not apply only to claims asserted in the statement of claim itself.

#### **b. Statutory purpose**

[56] This interpretation of s. 3(1) is in keeping with the purpose of *The Limitations Act*.

[57] In *M.(K.) v M.(H.)*, 1992 CanLII 31, [1992] 3 SCR 6 at para 21 (SCC) [*M.(K.)*], LaForest J. identified the three rationales for limitations of actions legislation to be “certainty, evidentiary, and diligence”. In his explanation of the first of these, he observed that statutes of limitation “have long been said to be statutes of repose”, meaning that there comes a time “when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations” (at para 22). The second rationale, grounded in evidentiary concerns, reflects “the desire to foreclose claims based on stale evidence” (at para 23). The third, grounded in due diligence, reflects that “plaintiffs are expected to act diligently and not ‘sleep on their rights’; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion” (at para 24).

[58] These three justifications for statutory limitation periods, weighed against the need to treat plaintiffs fairly, having regard to their specific circumstances, have served as a consistent touchstone for the interpretation of limitations legislation in the Supreme Court jurisprudence. Thus, in *Novak v Bond*, 1999 CanLII 685, [1999] 1 SCR 808 (SCC), McLachlin J. (as she then was) said this for the majority:

[67] The result of this legislative and interpretive evolution is that most limitations statutes may now be said to possess four characteristics. They are intended to: (1) define a time at which potential defendants may be free of ancient obligations, (2) prevent the bringing of claims where the evidence may have been lost to the passage of time, (3) provide an incentive for plaintiffs to bring suits in a timely fashion, and (4) account for the plaintiff's own circumstances, as assessed through a subjective/objective lens, when assessing whether a claim should be barred by the passage of time. To the extent they are reflected in the particular words and structure of the statute in question, the best interpretation of a limitations statute seeks to give effect to each of these characteristics.

See also *Grant Thornton LLP v New Brunswick*, 2021 SCC 31 at para 29 [*Grant Thornton*].

[59] Except to the extent that a counterclaim, cross-claim or third party claim is brought only because of the corresponding plaintiff's claim, potentially implicating the due diligence rationale, the remaining reasons for why limitation periods exist apply equally to these other procedural vehicles by which a claim may be initiated. More specifically, "the guarantee of repose, the desire to foreclose claims based on stale evidence and the expectation that a plaintiff will start a claim in a timely manner" justify the imposition of a time bar to a claim advanced in one of these three ways, as much as when a plaintiff issues a statement of claim (*Grant Thornton* at para 29).

### **c. This Court's previous jurisprudence**

[60] Although this Court has not decided the question of whether *The Limitations Act* is restricted to claims pursued in a statement of claim or originating notice, several of its previous decisions can only be explained on the basis that the Act is not limited in this way.

[61] In *Casbohm v Winacott Spring Western Star Trucks*, 2013 SKCA 88 [*Casbohm CA*], this Court dismissed an appeal from an order that struck a third party claim because it was statute-barred. As described by Herauf J.A. in *Casbohm CA*, "a third party claim is a separate, distinct, and independent proceeding grafted onto the original proceedings" (at para 27, making reference to *A.P. Green Fire Brick Co. v Interprovincial Steel Corporation Ltd.*, 1963 CanLII 390 at para 10,

39 DLR (2d) 692 (SKCA), and *The Insurance Company of the State of Pennsylvania v Cameco Corporation*, 2008 SKCA 54 at para 38 [*Cameco*]).

[62] The Court in *Casbohm CA* found the term “claims” as including both claims by a plaintiff and claims by a defendant, including claims for contribution and indemnity made against a third party (see paras 28-31). There would have been no basis to strike the third party claim because of the expiration of a limitation period if *The Limitations Act* did not apply to claims advanced in a third party claim.

[63] *Casbohm CA* also considered whether, on the facts, s. 20 of *The Limitations Act* might apply to allow the third party claim to proceed notwithstanding that the applicable limitation period had expired. That provision reads as follows:

**20** Notwithstanding the expiry of a limitation period after the commencement of a proceeding, a judge may allow an amendment to the pleadings that asserts a new claim or adds or substitutes parties if:

- (a) the claim asserted by the amendment, or by or against the new party, arises out of the same transaction or occurrence as the original claim; and
- (b) the judge is satisfied that no party will suffer actual prejudice as a result of the amendment.

[64] As Herauf J.A. observed, s. 20 “is only considered if the relevant limitation period has expired” (at para 43). He went on to find the proposed third party claim in that case did not constitute an amendment to the existing pleadings. Referring to *Cameco*, he found that “commencing a third party claim against a new party in a new proceeding unrelated to the plaintiff’s claim against Winacott, cannot be considered to be an ‘amendment’” thus taking it outside of the scope of s. 20(a) (at para 46). There would have been no need for the Court to discuss s. 20 if *The Limitations Act* was limited to claims advanced in a statement of claim or originating notice. Indeed, as noted, there would have been no basis for the third party claim to have been struck at all.

[65] A similar understanding of the applicability of *The Limitations Act* appears in *Direct General Partner Corporation v Canadian Pacific Railway Company*, 2025 SKCA 29 [*Direct General*]. There, this Court held that the Chambers judge should have allowed the counterclaim to proceed pursuant to s. 20 despite the expiry of the limitation period. This finding is *obiter* because the Court also found that “the limitation period is ultimately moot” as the allegations pleaded in

support of the counterclaim were summarily dismissed (at para 56). Nonetheless, *Direct General* is strongly supportive of the conclusion that *The Limitations Act* is not limited to the assertion of claims in statements of claim.

### **3. Conclusion on Issue A: *The Limitations Act* can apply to claims pursued in pleadings other than statements of claim**

[66] *The Limitations Act* is not restricted to claims pursued in a statement of claim. Rather, the Act applies to claims advanced in other forms of pleadings, if the overall proceeding in which the claim is pursued was commenced by statement of claim. Thus, *The Limitations Act* applies to counterclaims, cross-claims and third party claims if (a) those pleadings are in an action that was commenced by statement of claim, and (b) those pleadings advance a *claim* within the meaning of *The Limitations Act*. In stating this conclusion, I leave to the side the question whether *The Limitations Act* can apply to an issue raised in a statement of defence, where the only relief claimed is the diminution or elimination of the plaintiff's claim. This issue is better addressed in the context of the next section of this judgment.

[67] I turn now to the question of whether the equitable set-off that the RIP Defendants have raised in their statement of defence is a *claim* within the meaning of *The Limitations Act*.

### **B. A plea of equitable set-off is not a *claim* within the meaning of *The Limitations Act***

#### **1. Refining the issue**

[68] In their statement of defence, the RIP Defendants plead that “any monies due or payable to [Mr. Dunn] under the Share Purchase Agreement as set out in the Deferred Payment Agreement must be reduced by way of legal or equitable set-off in an amount no less than the Misappropriated Funds”.

[69] Canadian law has long distinguished legal set-off, also often called statutory set-off, from equitable set-off. The origins of both, and the distinction between them, is explored in *Holt v Telford*, 1987 CanLII 18, [1987] 2 SCR 193 (SCC) [*Holt*]. See also, *Saskatchewan Wheat Pool v Feduk*, 2003 SKCA 46 at para 67.

[70] Legal set-off originated in ancient English statutes. As reviewed in *Holt*, the “right conferred by the Statutes of Set-Off was a right to set off mutual debts arising from transactions of a different nature which could be ascertained with certainty at the time of pleading” (at para 25, quoting from *Halsbury’s Laws of England*, 4th ed, at vol 42, para 421). For this reason, “no legal set-off could exist against a claim which sounded in damages, nor could a claim which sounded in damages be set off at law against a plaintiff’s claim” (*Holt* at para 25, quoting *Halsbury’s* at para 421).

[71] In some jurisdictions, the statutory basis for legal set-off no longer exists but, instead, rests simply in a rule of court that allows a defendant to plead in a statement of defence that a claim be set off against the claim of a plaintiff, if there are mutual debts between the parties. This is the case in Alberta, where *Holt* arose (see para 24). It is also the situation in this province. Here, the matter is dealt with in Rule 3-47(2) of *The King’s Bench Rules* (Rule 104A(1) of *The Queen’s Bench Rules* when *The Limitations Act* was enacted). This rule entitles a defendant to assert a set-off against the claim of the plaintiff when there are mutual debts between the plaintiff and the defendant, as well as in other circumstances:

**3-47(2) A defendant may plead that a claim be set-off against the claim of the plaintiff if:**

- (a) there are mutual debts between the plaintiff and the defendant;
- (b) in the case where either party sues or is sued in a representative capacity, there are mutual debts between the person represented and the other party; or
- (c) a claim, whether of an ascertained amount or not, by the defendant arises out of the same dealings, transactions or occurrence giving rise to the claim of the plaintiff.

(Emphasis added)

[72] Legal set-off is to be distinguished from equitable set-off. Equitable set-off did not originate in statute. Instead, as its name suggests, it is a doctrine that was developed by the courts of equity. The strictures of equitable set-off are less onerous than those attached to legal set-off, and the courts have ascribed a different legal character to it. Most materially, equitable set-off can apply where mutuality is lost or never existed. It can also apply where the cross obligations are not debts (see *Holt* at para 27, referring to *Canadian Imperial Bank of Commerce v Tuckerr Industries, Inc.*, 1983 CanLII 302, [1983] 5 WWR 602 at p 605 (BCCA)). Thus, equitable set-off is available where there is a claim for a money sum whether liquidated or unliquidated, or where there has been an assignment (see *Holt* at para 27).

[73] Notwithstanding that their statement of defence referred to both forms of set-off, before the judge, the RIP Defendants agreed that they were not asserting legal set-off. Instead, they said that if they were to succeed in their plea they must establish that the conditions for equitable set-off were met (see *Decision* at para 145).

[74] The *Limitations Act* operates to bar claims. In this regard, as already discussed, s. 3(1) directs that “this Act applies to *claims* pursued in court proceedings” that are commenced by statement of claim or originating notice (emphasis added). Similarly, s. 5 of the Act states that, unless otherwise provided for in it, “no proceedings shall be commenced with respect to a *claim* after two years from the day on which the claim is discovered” (emphasis added). Thus, the issue considered under this heading is whether the RIP Defendants’ plea of equitable set-off is a *claim* within the meaning of these provisions.

## 2. The parties’ positions

[75] As has been noted, *The Limitations Act* provides the following definition of *claim*:

2 In this Act:

(a) “claim” means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission[.]

[76] The RIP Defendants take the position that their plea of equitable set-off is not a claim because they are not seeking a remedy for an injury, loss or damage. Instead, the RIP Defendants point out that they are raising equitable set-off to defeat Mr. Dunn’s action against them. Even more specifically, the RIP Defendants argue that, because they are pleading equitable set-off as a *defence* to Mr. Dunn’s claim, the conditions for the application of *The Limitations Act* as found in s. 3(1) are not met, and therefore their plea should not have been struck by the judge. To advance this position, they rely on *Henriksens Rederi A/S v T.H.Z. Rolimpex*, [1974] QB 233 (ICLR) (EWCA) [*Henriksens*], and cases that have followed that decision in a Canadian context, most notably *Canada Trustco Mortgage Company v Pierce*, 2005 CanLII 15706, 254 DLR (4th) 79 (ONCA) [*Pierce*].

[77] Mr. Dunn disagrees. He responds by saying that what is being mounted by the RIP Defendants is in the nature of a counterclaim that seeks to diminish the plaintiff’s remedy, with such diminution being “its own remedy”, with the result that a limitation period applies. Relatedly,

he asserts that this kind of set-off does not arise unless the defendant has antecedently proven their own claim to a remedy based on some injury, loss or damage. Mr. Dunn seeks to distinguish *Henriksens* and the cases that have followed it.

### 3. The correct interpretation of s. 3(1): Equitable set-off is not subject to a limitations defence

[78] An examination of the text, context and purpose of *The Limitations Act* convinces me that *The Limitations Act* is correctly interpreted to have no application to substantive defences to claims and that, for this purpose, a plea of equitable set-off is the assertion of a substantive defence against a plaintiff's claim. Thus, a plea of equitable set-off cannot be defeated on the basis that it was not advanced within the time strictures prescribed in *The Limitations Act*. This is the case even though equitable set-off must be grounded in one or more causes of action, which may also be a basis upon which the person asserting the set-off might be able to seek a remedy against the plaintiff and even though the person raising the equitable set-off might be precluded from seeking a monetary judgment based on the same facts. Indeed, this is the precise situation in the present circumstances.

#### a. Text and context

[79] I turn first to the text. As I have observed at several junctures, s. 2(a) defines *claim* as a “claim to remedy an injury, loss or damage”.

[80] The first part of this definition is self-referential; a “claim is a claim”.

[81] In *Grant Thornton*, the Supreme Court considered the meaning of “claim” under the *Limitations of Actions Act*, SNB 2009, c L-8.5. That Act contains an almost identical definition of the word as found in s. 2(1) of this province's Act (“claim means a claim to remedy the injury, loss or damage that occurred as a result of an act or omission”). In the context of the New Brunswick statute, Moldaver J. wrote as follows:

[37] I recognize that the distinction between “claim” and “*cause of action*” could be meaningful in some circumstances; but in my view, it is not so here. In fact, the *LAA*'s own wording shows that the use of “claim” does not rule out a shared meaning with “*cause of action*”. Section 1(1) defines a claim as a “claim to remedy the injury, loss or damage that occurred as a result of an act or omission”. In short, s. 1(1) indicates that the legislature's

use of the term “claim” focuses on a *set of facts giving rise to a remedy*, which is the same meaning that *Grant Thornton* attributes to the term “cause of action”.

(Emphasis added)

[82] In *Gordon Dunk Farms Ltd. v HFH Inc.*, 2021 ONCA 681 at paras 26-27 [*Gordon Dunk Farms*], Feldman J.A. relied upon this passage to equate *claim* with *cause of action* for the purposes of Ontario’s *Limitations Act*.

[83] It can be confidently stated, based on *Grant Thornton* and *Gordon Dunk Farms*, that a plea of equitable set-off fulfils the first part of the definition of a *claim*, because it must be grounded in a cause of action. In this regard, the parties agree that the requirements for asserting an equitable set-off are established in *Holt* (at para 34):

1. The party relying on a set-off must show some equitable ground for being protected against his adversary’s demands: *Rawson v. Samuel*, [1841] Cr. & Ph. 161, 41 E.R. 451 (L.C.).
2. The equitable ground must go to the very root of the plaintiff’s claim before a set-off will be allowed: [*Br. Anzani (Felixstowe) Ltd. v. Int. Marine Mgmt (U.K.) Ltd.*, [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063].
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 to enforce payment without taking into consideration the cross-claim: ... [*Fed. Commerce and Navigation Co. v. Molena Alpha Inc.*, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066].
4. The plaintiff’s claim and the cross-claim need not arise out of the same contract: *Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.); *Br. Anzani*.
5. Unliquidated claims are on the same footing as liquidated claims: *Nfld. v. Nfld. Ry. Co.*, [1888] 13 App. C. 199 (P.C.).

[84] It is foundational that, for a right of set-off of any type to arise, the defendant must be asserting the existence of an enforceable obligation owed to it by the plaintiff. In other words, a plea of set-off must be grounded in a cause of action that the defendant possesses against the plaintiff. Underscoring this point, Rule 3-47(3) requires that a “defendant’s claim pursuant to subrule (2) must be pleaded in accordance with the principles that would govern the pleading of the defendant’s claim if the defendant were a plaintiff”. (See, formerly, Rule 104A(1) of *The Queen’s Bench Rules*.)

[85] While the first part of the definition of *claim* found in s. 2(a) of *The Limitations Act* is self-referential, the latter part, the words “*to remedy an injury, loss or damage*” (emphasis added), is not. The addition of these words into the definition implies that not every claim (i.e., not every

assertion of a cause of action) is a “claim” within the meaning of the statute. Instead, only claims that seek to remedy an injury, loss or damage fall within the definition of *claim*; only this sub-category of claims is therefore subject to the limitation periods that are prescribed in *The Limitations Act*.

[86] Justice Feldman made the same point, albeit somewhat in passing, in *Kaynes*:

[40] I agree that the *Limitation Act*’s introduction of discovery of a “claim” as the triggering mechanism for the commencement of the limitation period has not done away with any role for causes of action. As I will explain, under s. 5(1)(a)(ii) of the *Limitations Act*, one of the matters that is required for the discovery of a “claim” is: “that the injury, loss or damage was caused by or contributed to by an act or omission” (emphasis added). *Because a claim necessarily involves seeking a legal remedy in a court proceeding*, the act or omission that must be discovered is one that will give rise to a legal remedy, *i.e.*, a cause of action. In the case of a fraudulent misrepresentation, the act or omission is a knowing misrepresentation.

(Underlined emphasis in original, italicized emphasis added)

[87] As expanded upon in these reasons, properly understood, equitable set-off does not provide a *remedy* for an injury, loss or damage on behalf of the defendant asserting it. Rather, equitable set-off simply serves to defeat, or limit, the plaintiff’s own claim. In this regard, the reduction of a plaintiff’s claim by the amount of a proven equitable set-off does not provide a remedy for any loss that the defendant has suffered, except in an indirect way.

[88] The intent of the legislative drafters to recognize that at least some types of set-off are not subject to a limitations defence provides a possible reason why, when *The Limitations Act* repealed *The Limitations of Actions Act*, it did not include s. 11 of the latter Act, which provided as follows: “This Part applies to the case of a claim of the nature hereinbefore mentioned, alleged by way of counterclaim or set-off on the part of a defendant”.

[89] Section 11 was included in *The Limitation of Actions Act* when it was first introduced in 1932, in replacement of the English statutes that were part of the received law of this province: see *The Limitation of Actions Act, 1932*, SS 1932, c 18 at ss 11 and 45. According to the logic of *Henriksens*, discussed later in these reasons, it is possible that s. 11 applied only to legal set-off. However, even if s. 11 was simply omitted from *The Limitations Act* because it was unnecessary, the deliberate decision of the Legislature not to include a provision such as s. 11 in *The Limitations Act* supports an interpretation that would render it inapplicable to at least some pleas of set-off.

**b. Statutory purpose**

[90] As just explained, when given their ordinary meaning, the words used in *The Limitations Act* can be easily understood to support the conclusion that the Act does not apply when, as here, a defendant is asserting equitable set-off to defeat a plaintiff's claim because the defendant is not seeking to remedy an injury, loss or damage. If this interpretation is accepted, it means that a litigant's ability to pursue stale-dated allegations may depend on the procedural context in which they are raised. Indeed, this is the outcome here, since the RIP Plaintiffs are precluded from seeking damages in the RIP Action based on the same facts that this judgment allows the RIP Defendants to raise to defeat the Dunn Action. In both scenarios the RIP parties potentially benefit: in the first it is the prospect of a judgment for a sum of money, in the second it is the reduction of the debt, if any, owed to Mr. Dunn.

[91] Nonetheless, there is a strong justification for allowing limitation periods to apply to bar the claim for damages but not the assertion of a defence of equitable set-off, which as noted depends on the assertion of a cause of action that goes to "the very root of the plaintiff's claim" (*Holt* at para 34). I say this because the close connection that must exist between a plaintiff's claim and the assertion of an equitable set-off undercuts each of the three rationales for the existence of statutory limitation periods.

[92] As has been discussed, the first justification for the existence of limitation periods is certainty. However, because, by its very nature, equitable set-off can only be successfully pleaded to defeat a plaintiff's claim if it is connected to the facts grounding the equitable set-off, there is less need to be concerned that its assertion disturbs a person's expectation that they "will not be held to account for ancient obligations" (*M.(K.)* at para 22).

[93] The second justification for limitation periods is evidentiary. However, there is far less need to be concerned over the possibility that the Court is being called to adjudicate a claim based on stale evidence when equitable set-off is raised since the set-off is only material if the plaintiff's own claim is not stale-dated. Again, the existence of a close factual connection to a non-time-barred claim makes it less likely that there are evidentiary concerns associated with the set-off claim.

[94] Finally, the due diligence rationale provides a less compelling reason to deny a defendant the right to raise an equitable set-off when compared to a situation where that party is seeking a positive remedy. The law can justify requiring an injured party to sue for damages in a timely fashion yet accept that, if they do not do so, they are still entitled to raise their complaint if the overall peace between the parties is disturbed by the suit brought by the person who has caused them harm.

[95] In these ways, the conclusion that a plea of equitable set-off is not a *claim* within the meaning of *The Limitations Act* is not only supported by the ordinary meaning of the words used in the Act but it is also consonant with its purposes.

### c. Case law

[96] This interpretation of *The Limitations Act* is consistent with the approach taken by Courts in relation to limitations of actions legislation more generally. Most of the case law on this subject can be traced to *Henriksens*.

[97] *Henriksens* involved a claim for unpaid freight charges for cargo that had been damaged in transit. After the limitation period for recovery of damages to the cargo had expired, the owners of the ship instituted an action (through arbitration) for recovery of the unpaid freight charges. The issue became whether they could set-off their damage to defeat or diminish the owner's claim. Lord Denning held that equitable set-off is a true substantive defence that is not subject to a limitation period.

[98] When *Henriksens* was decided, s. 28 of *The Limitation Act, 1939*, 2 & 3 Geo 6, c 21 (United Kingdom) provided as follows: "For the purposes of this Act, any claim by way of set off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set off or counterclaim is pleaded" (quoted in *Henriksens* at note 1). In the context of interpreting this provision, Denning L.J. found that statutory limitation periods did not apply to matters of equitable set-off raised by way of defence. He said as follows (*Henriksens* at p 245):

In point of principle, when applying the law of limitation, a distinction must be drawn between a matter which is in the nature of a *defence* and one which is in the nature of a *cross-claim*. When a defendant is sued, he can raise any matter which is properly in the

nature of a *defence*, without fear of being met by a period of limitation. No defence, properly so-called, is subject to a time-bar.

[99] Lord Denning contrasted matters which could be raised as a defence with those that which were “properly the subject of a cross-claim”. A cross-claim, he explained, “may be made in a separate action, or it may be made by way of set off or counterclaim”, but in any circumstance “on principle it is always subject to a time bar” (at p 245). This, he said, was important on the facts of *Henriksens* because, if such a matter was raised by way of set-off or counterclaim, “the law is governed by section 28 of the Limitation Act 1939” (at p 246). He then interpreted s. 28 in this way (at p 246):

The word “set off” is not defined in this section 28: but I think it is used to denote a legal set off and not an equitable set off. That is, a legal set off as permitted by the statutes of set off. ...

[100] Thus, s. 28 was only relevant when a legal set-off was claimed. In so concluding, Denning L.J. distinguished equitable set-off, which he found amounted to a substantive defence to a plaintiff’s claim and not subject to a limitation period, from legal set-off, which could be met with a limitation defence (at pp 246-247):

Where the plaintiff owes the defendant a *debt arising from a separate transaction*, the defendant can raise it by way of set off. If it is time-barred at the date when the plaintiff issues his writ, it is time-barred still. But if it is not time-barred at the time when the plaintiff issues his writ, the defendant can raise it in opposition to the plaintiff’s claim without being affected by any intervening running of time.

(Emphasis in original)

[101] Lord Denning found justification for the conclusion that a plea of equitable set-off cannot be defeated by a limitation period in the close connection that must exist between the plaintiff’s claim and the facts grounding the plea of equitable set -off (at pp 248-249):

Although it is often described as an “equitable set-off”, it would, I think, be more accurately stated to be an “equitable defence”.... When the contractor sues for the contract price, the employer can say to him: “You are not entitled to that sum because you have yourself broken the very contract on which you sue, and you cannot fairly claim that sum unless you take into account the loss you have occasioned to me”. It is on a par with the case of a defendant who says that the plaintiff has repudiated the contract by an anticipatory breach, or that the plaintiff has been guilty of a breach going to the root of the contract. On accepting it, the defendant is discharged from further performance and can set up the breach as a defence. So also with any breach by the plaintiff of the selfsame contract, the defendant

can in equity set up his loss in diminution or extinction of the contract price. It is in the nature of a defence. As such it is not subject to time-bar.

[102] Lord Denning’s judgment in *Henriksens* was one of three in that decision. The other two judges did not adopt his reasons. However, Denning L.J.’s judgment has been widely relied upon as authority for the proposition that limitation periods do not apply to substantive defences and that, for this purpose, a plea of equitable set-off asserts such a defence. In addition to being followed by many other courts, Denning L.J.’s judgment in *Henriksens* has also been cited with approval in leading academic authorities on both the law of set-off (see, e.g., R. Derham, *Derham on the Law of Set-off*, 4th ed (Oxford University Press, 2010) at s 4.52), and the law of limitations (see, e.g., G. Mew, D. Rolph & D. Zacks, *The Law of Limitations*, 4th ed (LexisNexis, 2023) at p 231 [Mew]).

[103] The applicability of limitation periods to a defence of equitable set-off was considered in *Pierce*. In that case, a lender commenced an action to recover a debt owed by an estate. The estate sought an amendment to its statement of defence to plead equitable set-off. The motions judge refused to allow the amendment because s. 38(3) of the *Trustee Act*, RSO 1990, c T 23, which required that an action “shall not be brought after the expiration of two years from the death of the deceased”, applied and rendered the proposed pleading out of time. The Ontario Court of Appeal upheld the judge’s decision to refuse to allow some of the amendments. It found that these amendments did not assert a reasonable cause of action. It also concluded that some causes of action were raised that could ground a plea of equitable set-off, and the proposed amendment must be allowed to permit those to proceed, even though the causes of action could not be pursued as a basis for a claim for damages because of the applicable limitation period.

[104] The foundation for the Ontario Court of Appeal’s decision in *Pierce* was that equitable set-off is a substantive defence to a plaintiff’s claim, and therefore is not subject to a limitation period. In so holding, the Court followed what it described as “clear authority in the United Kingdom” (at para 43), quoting several of the passages from the judgment of Denning L.J. in *Henriksens* that are reproduced earlier in these reasons. The Ontario Court of Appeal observed that Denning L.J.’s judgment in that case had been approved and adopted by the English Court of Appeal, the House of Lords, and widely in the Commonwealth and that his reasons were consistent

with the way the law of set-off has developed in this country in *Holt* and the decisions that have applied and interpreted it:

[44] Lord Denning’s view was approved by the English Court of Appeal in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, [1994] 4 All E.R. 890 at 945 and applied in *Filross Securities Ltd. v. Midgeley*, (1999) 31 H.L.R. 465 (C.A.). This position has also been adopted in Australia in *Australian Mutual Provident Society v. Specialist Funding Consultants Pty Ltd.* (1991), 24 N.S.W.L.R. 326 (S.C.) and *Sidney Raper Pty Ltd. v. Commonwealth Trading Bank of Australia* (1975), 2 N.S.W.L.R. 277 (C.A.).

[45] In my view, the English and Australian authorities are particularly persuasive in light of Wilson J.’s judgment in *Holt v. Telford*. In that judgment, Wilson J. synthesized the principles developed by the English courts of equity over the last 200 years. Thus, it is entirely appropriate to have regard to English cases in order to interpret the law of set-off in Canada. Similarly, the Australian case law is drawn directly from the jurisprudence of the English courts and is, therefore, also persuasive in this domain. Finally, I note that in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at 70, La Forest J. cited s. 2 of the *Limitations Act*, R.S.O. 1980, c. 240, and observed that it “gives rise to the inference that there is a category of equitable claims not subject to the Act at all, and that the equitable defences survive in those cases.”

[105] For these reasons, the Ontario Court of Appeal in *Pierce* concluded that “the proposed defence of equitable set-off is not subject to the two-year limitation period in s. 38(3) of the *Trustee Act*” (at para 46).

[106] The statute in play in *Pierce* was different than *The Limitations Act*. However, *Pierce* has been followed in statutory contexts that are much closer to this province’s limitations legislation. In this regard, *The Limitations Act* is closely modeled on Ontario’s *Limitations Act, 2002*, SO 2002, c 24, Sch B, which in turn can be seen to have been influenced by Alberta’s *Limitations Act*, SA 1996, c L-15.1 (now, the *Limitations Act*, RSA 2000, c L-12): see Mew at pp 228-229. The courts in both provinces have applied *Pierce* in the context of those provinces’ *Limitations Act*.

[107] Like this province’s limitations statute, the Ontario *Limitations Act, 2002* states that it “applies to claims pursued in court proceedings” (at s 2(1)), and it contains a definition of claim that is identical to that found in s. 2(1) of our province’s Act. Ontario’s *Limitations Act* states as follows:

**Definitions**

1 In this Act,

...

“claim” means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission[.]

[108] One of the issues in *Tarantino v Galvano*, 2017 ONSC 3535, aff'd 2019 ONCA 699, was whether a plea of equitable set-off, grounded in a cause of action based in *quantum meruit*, could be defeated by an expired limitation period. Justice Kristjanson held that “[c]laims in equity are subject to the *Limitations Act, 2002*” and “counterclaims are subject to the statutory limitations period”. However, she held that “a plea for equitable set-off is a defence rather than a claim or counterclaim and is not subject to a limitation period” (at para 117).

[109] Section 1 of the Ontario *Limitations Act* was also addressed in *1309489 Ontario Inc. v BMO Bank of Montreal*, 2015 ONSC 1063 [*Xincon Technology*], and *Fram Elgin Mills 90 Inc. v Romandale Farms Limited*, 2019 ONSC 5322 [*Fram Elgin Mills*], rev'd on other grounds 2021 ONCA 201. In both cases, the plaintiffs alleged that a defence based on the expiry of the plaintiff's claim pursuant to Ontario's *Limitations Act* was itself a claim within the meaning of s. 1 of that legislation. The plaintiff in *Xincon Technology* rested this allegation upon the premise that a limitations defence is a substantive right, while the plaintiff in *Fram Elgin Mills* submitted that the defence consisted of a claim for declaratory and other remedial relief. The judges in both cases rejected these arguments. In *Xincon Technology*, Boswell J. held that a “right to advance a defence based on the passage of time is not a claim to remedy an injury, loss or damage. It is a defence against such a claim....The [*Limitations Act*] does not bar the advancement of a defence” (at para 17; see also *Fram Elgin Mills* at paras 357-358). In *Fram Elgin Mills*, Spies J. specified that the defendant remained “entitled to assert substantive defences” (at para 357, emphasis added, citing *Pierce*).

[110] The Alberta *Limitations Act* states that it “applies where a claimant seeks a remedial order in a proceeding commenced on or after March 1, 1999, whether the claim arises before, on or after March 1, 1999” (at s 2(1)). That Act then defines claim to mean “a matter giving rise to a civil proceeding in which a claimant seeks a remedial order” (at s 1(a)). A remedial order is defined, subject to exceptions, to mean, a “judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right” (at s 1(i)). These provisions were considered in *Harvest Operations Corp. v Obsidian Energy Ltd.*, 2022 ABKB 848 [*Harvest Operations*].

[111] *Harvest Operations* involved an appeal from the decision of an applications judge who had held that a party could set-off what had been found to be a limitation-barred claim against a counterclaim. Justice Romaine dismissed the appeal, finding that the party asserting the set-off “is not seeking relief from Court, and the immunity from claims under the *Limitations Act* is only immunity from court action” (at para 54). She further endorsed the applications judge’s analysis which rested on *Henriksens*, as endorsed in *Pierce*.

[112] *Rotor Maxx Support Limited v Air Palace Co., Ltd.*, 2023 BCSC 170 [*Rotor Maxx*], was decided under the *Limitation Act*, RSBC 1996, c 266. That Act’s regime has features that are similar to *The Limitation of Actions Act*. In *Rotor Maxx*, Baker J. followed *Pierce* to hold that a “defence of equitable set off is not generally subject to a statutory limitation period” (at para 67). Although Baker J. found the set-off to be statute-barred, it was because it did not meet the requirements of a properly pled equitable set-off (see paras 71-72) and the party opposite would suffer prejudice were the pleadings to be allowed.

[113] For the purposes of determining its statutory jurisdiction, the Federal Court has also adopted the view that equitable set-off is a substantive defence, not subject to a limitation period (*Eli Lilly and Company v Apotex Inc.*, 2009 FC 991 at para 636, and *Apotex Inc. v Sanofi-Aventis*, 2010 FC 182 at para 40 [*2010-Apotex*], both of which rely on *Pierce*).

[114] Mr. Dunn has not identified any case in which a Canadian court, in any statutory context, has found that a defence of equitable set-off can be defeated by an expired limitation period. He has, however, attempted to limit the application of the aforementioned cases. Most centrally, he suggests that, when *Henriksens* is examined more closely, Denning L.J.’s decision was that only some claims capable of grounding a plea of equitable set-off were immune from the application of limitation periods. In this regard, Mr. Dunn relies on the following lengthy passage from it, which discusses s. 28 of *The Limitation Act, 1939* (*Henriksens* at pp 246-247):

Where the defendant has a cross-claim for damages arising from a separate transaction, he can either bring a separate action for it: in which case he is subject to the ordinary time-bar. Alternatively, he can raise it by way of counterclaim. Before 1939, if he was time-barred for a separate action, he was time-barred for a counterclaim: because the counterclaim only dated from the time of its delivery: see *Lowe v. Bentley* (1928) 44 T.L.R. 388. But by section 28 a counterclaim, which arises out of a separate transaction, is on the same footing as a set off. If it is not time-barred at the time when the plaintiff issues his writ, the defendant can raise it in opposition to the plaintiff’s claim without being affected by any intervening running of time.

All this is when the set off or counterclaim arises out of a separate transaction. When it does not arise out of a separate transaction, but out of the same transaction, then it is not within section 28 at all. It can be raised, as I will soon show, as matter of defence, either legal or equitable, so as to reduce or extinguish the claim and, being matter of defence, it is not subject to a time-bar. Such is the law in the United States, where a cross-claim arising out of the same transaction is described as a right of recoupment.

[115] In his attempt to apply these words to the facts of this case, Mr. Dunn argues that the plea of set-off should be viewed to be the equivalent of a cross-claim, to which a limitation period would apply. In substance, therefore, his submission reduces to the proposition that *Henriksens*, and the cases that have followed it, should be interpreted in a way that exempts only a sub-set of equitable set-off claims from the application of limitation periods.

[116] I do not interpret *Henriksens* in this way. I also do not see the argument that Mr. Dunn makes to be reflected in the Canadian case law that has applied Denning L.J.'s judgment in that case.

[117] One of the scenarios Denning L.J. described to illustrate the operation of the substantive equitable defence was “where a contractor who is employed to clean windows negligently breaks the leg of a chair” (at p 248). Plainly, the defendant’s set-off claim based on the damage to the chair in that situation does not arise from the contract to clean windows from which the plaintiff’s claim is founded—that is, unless this contract was so prescient as to prohibit damage to the furniture. Lord Denning was not alluding to that far-fetched possibility, as his conclusion regarding the substantive equitable defence confirms: “It is available whenever the cross-claim arises out of the same transaction as the claim; *or out of a transaction that is closely related to the claim*” (emphasis added, *Henriksens* at p 248).

[118] If any doubt remains, Denning L.J.'s judgment in *Federal Commerce & Navigation Co. Ltd v Molena Alpha Inc.*, [1978] QB 927 (ICLR) (United Kingdom CA), provides further corroboration of his view that he intended to hold that a substantive equitable defence is available where the opposing claims arise from distinct but closely related transactions (at pp 974-975):

It is not every cross-claim which can be deducted [by equitable set-off]. It is only cross-claims that arise out of the same transaction *or are closely connected with it*. And it is only cross-claims which go directly to impeach the plaintiff’s demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the crossclaim.

[119] This description of equitable set-off largely corresponds to the criteria for equitable set-off adopted by the Supreme Court in *Holt*. In any event, the widespread understanding by Canadian courts is that Denning L.J. intended to remove all pleas of equitable set-off from the application of statutory limitation periods.

[120] Mr. Dunn’s argument has merit to the extent that *Henriksens*, and the cases that followed it, generally accept that a plea of legal set-off can be met with a limitations defence. The cases generally ground this conclusion in the fact that legal set-off was created and continued to evolve as a procedural means to enable the resolution in a single hearing and a single judgment of separate monetary claims, mutually asserted between parties, so as to prevent multiplicity of proceedings, much like the procedural right to assert a reciprocal claim by way of counterclaim. Overall, the proposition is that to permit a reciprocal monetary claim to be advanced in defence to an action, when it could not be advanced were it to be the subject of a separate action, would allow a court to do indirectly what it cannot do directly.

[121] Ultimately, while this reasoning may help explain why limitation periods can, at least sometimes, apply to pleas of legal set-off – a point to which I will return – it ignores that “the requirement that the equitable ground go to the very root of the Plaintiff’s claim is what raises equitable set-off to the level of a substantive defence, allowing it to be asserted even where the cross-claim is not otherwise enforceable by reason of limitations” (*2010-Apotex* at para 40).

[122] In summary, the cases I have reviewed, decided in many different statutory contexts, consistently distinguish between claims, to which a limitation period may apply, and substantive defences, to which limitation periods are inapplicable. They also uniformly hold that, for this purpose, a plea of equitable set-off is the assertion of a substantive defence against a plaintiff’s claim, even though, as I have noted, it must be grounded in a cause of action that the defendant has against the plaintiff.

#### **4. The implications of this judgment to other types of set-off not decided in these reasons**

[123] I have based the conclusion that a plea of equitable set-off, raised in a statement of defence to defeat a plaintiff’s claim, in the definition of *claim* as set out in s. 2(1) of *The Limitations Act*.

More specifically, when equitable set-off is asserted in a statement of defence to defeat a plaintiff's claim, the plea cannot be said to be one that is seeking "to remedy an injury, loss or damage".

[124] It might be argued that, by the same logic, no allegation that can be pleaded in a statement of defence to deprive a plaintiff of the right to a judgment can be subject to a limitations defence. If this position were to be adopted, it would mean that pleas that did not meet the conditions for an equitable set-off would not be subject to a limitations defence, since Rule 3-47 recognizes the ability to plead set-off as a defence in circumstances that would not meet the conditions for establishing equitable set-off within the principles established in *Holt*. More specifically, this would mean that so-called legal set-off would not be subject to a limitations defence.

[125] Of course, this possible view is inconsistent with the case law I have reviewed. It would mean that the applicability of the limitation periods prescribed by *The Limitations Act* would be left to the decision of the judges who make procedural rules that define how claims may be asserted and the defendant's choice to invoke those rules. More substantively, it would allow a claimant to revive an ancient obligation that is unconnected to the plaintiff's own claim, justified solely because the plaintiff has first commenced litigation with the defendant, disturbing the peace between the parties.

[126] Ultimately, it is not necessary for this Court to decide this issue, which I would leave to a future case. At present, these reasons decide nothing more than that *The Limitations Act* does not apply to the defence of equitable set-off.

**5. Equitable set-off is not subject to statutory limitation periods under  
*The Limitations Act***

[127] A plea of equitable set-off does not assert a *claim* within the meaning of *The Limitations Act*. For this reason, that Act has no application to the RIP Defendants' plea of equitable set-off, and their plea cannot be met by Mr. Dunn asserting that the set-off was raised as a defence outside of a prescribed limitation period.

**C. The applicability of equitable set-off on these facts cannot be decided in this appeal**

[128] Mr. Dunn applied for summary judgment in the amount of his claim (\$1,750,000) or, alternatively, in the amount equal to what he was owed under the agreements governing the sale of shares of the companies holding the Cumberland and the Market Mall stores. Before the judge, Mr. Dunn represented that the only relief he was seeking was an order striking the RIP Defendants' equitable set-off defence (see *Decision* at para 162). I have found that the pleaded defence of equitable set-off should not have been struck.

[129] As noted earlier, Mr. Dunn has cross-appealed the judge's *obiter* finding that equitable set-off had been established should be upheld by this Court. In their factum, the RIP Defendants defended this conclusion. However, they had not applied for summary judgment on this issue. Instead, they took the position before the judge that Mr. Dunn's application for summary judgment should be dismissed, and his action should continue in the usual way including with an evaluation of their defences, which included, but was not limited to, the plea of equitable set-off. At the outset of oral argument in this Court, the RIP Defendants abandoned their request that this Court uphold the judge's *obiter* comments.

[130] Given all of this, the appropriate relief in this appeal is to set aside the orders made by the judge and return the case for determination by the Court of King's Bench in the usual course.

**V. CONCLUSION**

[131] The judge erred in law in finding that *The Limitations Act* applied to the pleaded defence of equitable set-off. For this reason, the RIP Defendants' appeal must be allowed. Since the judge's finding that equitable set-off had been established was *obiter*, it was not reduced to a judgment and there is no foundation for Mr. Dunn's cross-appeal. In overall result, the judgment in favour of Mr. Dunn must be set aside and the Dunn Action must be remitted to the Court of King's Bench for adjudication.

[132] In the ordinary course, the RIP Defendants would be entitled to the costs of this appeal. However, those costs are offset by the costs awarded in favour of the Dunn Defendants in their

appeal from the *Decision* so far as it related to the RIP Action. Although there is not a complete coincidence between the RIP Defendants and the RIP Plaintiffs, they were represented by the same counsel. As well, except for the possibility that this difference might affect the availability of equitable set-off (a point not decided in these reasons), the distinction between the two groups was not brought into issue in this appeal. For these reasons, I would order no costs in this appeal.

“Leurer C.J.S.”

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Leurer C.J.S.

I concur.

“Bardai J.A.”

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Bardai J.A.

I concur.

“Kilback J.A.”

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Kilback J.A.