

CITATION: Southside Construction v. City of Windsor, 2026 ONSC 1462
COURT FILE NO.: CV-07-CV009334-00D1
DATE: 20260310

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the *Construction Lien Act*, R.S.O. 1990, c. C.30

BETWEEN:)
)
Southside Construction (London))
Limited)
)
Plaintiff) *James A. LeBer and Eric A.F. Grigg, for the*
) *Plaintiff*
)
– and –)
)
)
The Corporation of the City of Windsor)
Defendant) *Sean Dewart and Brett Hughes, Agents for*
) *Borden Ladner Gervais LLP, for the*
) *Defendant*
)
)
)
) **HEARD:** July 18, 2024
) **(by videoconference)**

2026 ONSC 1462 (CanLII)

REASONS FOR DECISION

HOWARD J.

Overview

- [1] I was designated the case management judge for this matter in November 2015. I have released several decisions in connection with this matter since that time.
- [2] In February 2004, the City of Windsor (the “City”), as owner, entered into a construction contract with Southside Construction (London) Limited (“Southside”), as general contractor, for the construction of a 224-bed long-term care facility in Windsor, known as the Huron Lodge Home for Seniors (“Huron Lodge”). The contract named Montgomery Sisam Architects Inc. and J.P. Thomson Associates Ltd. as the architectural consultants (the “Architects”).

- [3] In 2013, the City entered into direct negotiations with a number of unpaid subtrades who worked on the Huron Lodge project and who were third parties in this litigation. The City reached conditional settlements with eight third party subtrades¹ (the “Settling Third Parties”) from August through to October 2013 (the “Eight Settlement Agreements”).
- [4] In January 2021, each of Southside and the Architects brought motions for mirror relief, seeking, *inter alia*, an order pursuant to s. 106 of the *Courts of Justice Act*² staying the City’s counterclaim against Southside, the City’s third party claim against the Architects, and the counterclaims, crossclaims, or other claims of the Settling Third Parties that were assigned to the City.
- [5] The moving parties argued that the continuation of the City’s claims constitutes an abuse of process by reason of the failure of the City to immediately and fully disclose the Eight Settlement Agreements, which altered the litigation landscape of the proceedings.
- [6] In my reasons for decision released April 11, 2022,³ I allowed the motions and permanently stay the impugned claims of the City, concluding that:
- ... the City’s failure to disclose immediately to the court and the non-settling parties the complete terms of the Eight Settlement Agreements that fundamentally altered the litigation landscape constitutes an abuse of process. I conclude further that the only appropriate sanction to remedy that abuse of process by the City is to stay its claims against Southside and the Architects.⁴
- [7] In coming to that conclusion, I held that, “the City is barred from prosecuting either its counterclaim or the assigned claims. Anything less rewards the City for its abuse of process.”⁵
- [8] I am advised by counsel that initially the City filed a notice of appeal in respect of the *Abuse of Process Decision*, but the appeal was subsequently abandoned.
- [9] In the aftermath of the *Abuse of Process Decision*, questions arose about, *inter alia*, the nature of the City’s set-off defence as it relates to performance and delay issues, the interplay between that defence and the court’s *Abuse of Process Decision*, and the consequences for the litigation.
- [10] In particular, the City continues to assert in its defences the right to set off the same amounts that it had pleaded as damages in its now-stayed counterclaim. Moreover, the City has

¹ The eight third party subtrades in issue are: JMR Electric Ltd., Forest City Forming Ltd., Jemini Construction Ltd., Plaza Ontario Marble and Tire Incorporated, Trend Millwork & Cabinets Inc., D&M Glass & Mirror Ltd., Flynn Canada Ltd., and Robson Acoustics & Drywall (2002) Inc.

² *Courts of Justice Act*, R.S.O. 1990, c. C.43.

³ *Southside Construction v. City of Windsor*, 2022 ONSC 2241 (S.C.J.) [*Abuse of Process Decision*].

⁴ *Abuse of Process Decision*, at para. 96.

⁵ *Ibid.*, at para. 98.

amended its statement of defence to plead equitable set-off, in addition to the existing plea of legal set-off.

- [11] In response, Southside now moves for summary judgment dismissing the set-off defence pleaded by the City. In Southside’s view, the City is trying to use its set-off defence “as a vehicle to resurrect its stayed counterclaim with a view to obtaining a reduction of the amount due to Southside at trial.”⁶
- [12] The position of the City is that, *inter alia*, the remedy for the abuse of process is now *res judicata* and that the court should determine that, as a point of law, the City’s “set-off defences are unaffected by the abuse of process for which Southside sought and received a full remedy on its earlier motion.”⁷
- [13] For the reasons that follow, I grant Southside’s motion for summary judgment and summarily dismiss the City’s set-off defence.

Factual Background

- [14] I have had occasion to describe the factual background to this matter on at least three previous occasions.⁸ I repeat and rely upon the factual findings described in paras. 12-48 of the *December 2016 Decision*, paras. 8-27 of the *October 2018 Decision*, and paras. 10-58 of the *Abuse of Process Decision*.
- [15] I also essentially agree with the summary of facts set out in paras. 7-13 of *Southside’s Factum* and paras. 9-42 of the *City’s Factum*.
- [16] The construction contract between the City and Southside provided for a contract price of some \$29,478,000 (plus GST and before approved extras). Southside claims that it completed its obligations under the contract, but the City refused to pay the balance owing of \$4,677,391.37.
- [17] By statement of claim issued June 15, 2007, Southside sued the City for payment of the balance owing under the construction contract.
- [18] The City counterclaimed for deficiencies and delay, as set out in its statement of defence and counterclaim originally filed July 27, 2007. The City alleged that Southside was responsible for delays, deficiencies, and excess costs in the amount of \$1,561,200, in

⁶ *Factum of the Moving Plaintiff for Summary Judgment* dated June 28, 2024 [*Southside’s Factum*], at para. 3.

⁷ *Responding Factum of the Corporation of the City of Windsor (Summary Judgment motion of Southside)* dated July 12, 2024 [*City’s Factum*], at para. 7(d).

⁸ Apart from the *Abuse of Process Decision*, see also *Southside Construction v. City of Windsor*, 2016 ONSC 7860 (S.C.J.) [unreported] [the “*December 2016 Decision*”]; and *Southside Construction v. City of Windsor*, 2018 ONSC 6137 (S.C.J.) [unreported] [the “*October 2018 Decision*”], leave to appeal to Div. Ct. refused with costs (21 June 2019), Toronto file no. 697/18 [unreported], appeal to Ontario Court of Appeal by K. Bannon dismissed with costs, 2019 ONCA 787.

respect of which it pleaded both a set-off defence and sought damages by way of counterclaim.

- [19] As originally filed, the City’s statement of defence pleaded the set-off defence based only on legal set-off; para. 11 of the statement of defence relied on s. 111 of the *Courts of Justice Act* only.
- [20] As originally filed, beyond the allegations set out in the statement of defence, the City’s counterclaim did not contain any additional allegations of its own. Rather, in para. 14 of its counterclaim, the City merely “repeat[ed] and relie[d] upon the statements made in the statement of defence herein.”
- [21] Further, the \$1.56 million damages claimed in para. 13(a) of the City’s counterclaim was simply the total of all amounts claimed in subparagraphs (a) to (c) of para. 11 of the City’s set-off defence.
- [22] As such, I find there is merit in Southside’s observation that, in essence, the set-off defence was the counterclaim, and the counterclaim was the set-off defence.⁹
- [23] In response to the City’s counterclaim, given that Southside’s work on the Huron Lodge project was carried out by subcontractors, in each case of deficiency and delay alleged by the City against Southside, Southside issued third party claims on the City’s counterclaim against each respective subtrade that performed the actual work.
- [24] Southside also commenced third party proceedings against the Architects on the City’s counterclaim, seeking contribution and indemnity. The Architects defended the third party proceedings and cross-claimed against the subtrades, seeking contribution and indemnity for the claims of the City advanced against the Architects by counterclaim through Southside.¹⁰
- [25] Apart from the subject-matter of the instant proceeding, there were other lien claims arising out of the Huron Lodge project that were resolved by conventional agreements between the parties and/or were determined by the court.
- [26] For example, the Eight Settlement Agreements may be contrasted with previous settlement agreements negotiated jointly and directly with Southside and other subtrades¹¹ in a conventional manner that culminated in a settlement with the subcontractors being paid directly upon the consent and direction of Southside, in February 2012.
- [27] On the other hand, the claim for payment by the third party subcontractor Artisan Masonry Inc. (“Artisan”) for work done to construct the exterior brick veneer wall of the Huron Lodge facility proceeded to trial. That trial commenced on January 28, 2013, before

⁹ See *Southside’s Factum*, at para. 8.

¹⁰ There are fourth, fifth, and sixth party claims in the litigation, but they are not germane for present purposes.

¹¹ Prestressed Systems Inc. and Williams Food Equipment Company (1998) Limited.

Carey J. of this court and proceeded for eight days of hearing. At trial, the City relied on allegations of improper masonry work to resist paying Southside for that portion of Artisan's masonry work. The positions taken by Southside and Artisan at trial were described by Carey J. in the following terms:

Southside and the subcontractors point to the history of the litigation to assert that The City has never had a real or valid complaint with Artisan's work on this project and has been "grasping at straws" to justify their non-payment of the monies being withheld. They argue that the issue was only raised three years after the building was complete and after the warranty period had passed and The City's agents had approved and signed off on all of the disputed work.¹²

- [28] It is fair to say that, in dismissing the City's allegations of improper work by Artisan, Carey J. was critical of the City's conduct and its positions taken during the litigation. In his reasons for judgment released April 26, 2013, Carey J. held that:

There was never any list of deficiencies set out by The City nor was Artisan or Robson [...] given an opportunity to dispute or fix any alleged deficiencies.

The tie connector issue first was raised in 2010. The history of The City's pleadings in relation to Artisan's alleged deficiencies make it clear that The City has moved through a series of allegations that have all fallen away except this one. It has been argued that The City has been desperately looking for some excuse to justify not paying Artisan. It should have been obvious that if The City really did think that walls were built improperly because of the ties on every second stud, that Artisan bore no responsibility for that. All Artisan did was hook the supplied V ties through the bayonets that had been installed by Robson and then apply the bricks and mortar.

There is no suggestion that the bricks and mortar were improperly or poorly installed. The contracts between Southside and Artisan and Southside and Robson set out that the responsibility for installing the bayonets was with Robson.

*After hearing the evidence here I cannot find any reason why Artisan would not have been paid some time ago. There has been a recalcitrance to pay demonstrated by The City here that is difficult to fathom.*¹³ [Emphasis added.]

- [29] In the same vein, Carey J. concluded that:

I agree with counsel for Southside. If this building's walls were unsafe and in danger of imminent collapse in high winds, it is difficult to believe that The City would allow it to continue to be used to house more than two hundred vulnerable senior citizens of this city.

¹² *Southside Construction Ltd. v. City of Windsor*, 2013 ONSC 2520 (S.C.J.) [unreported], at para. 8.

¹³ *Ibid.*, at paras. 30-33.

There have been no remedial steps to fix the construction decisions referred to as “disastrous” by counsel for The City.

The lack of any steps by The City to rectify the supposed problems, the fact that they have not put up protective barricades along with the history of The City’s changing its allegations about brick construction has led me to conclude that The City does not believe this building is unsafe.

*The City has failed to demonstrate good faith in its dealings with Artisan on this issue. They have gone looking for a problem to justify their non-payment until they found an opinion to support their position.*¹⁴ [Emphasis added.]

- [30] In the result, Carey J. found that Artisan’s work was not improperly performed, that the City had not suffered any damages for breach of contract, and that the amounts held back by the City from Southside relating to Artisan’s outstanding contract should be released for payment to Artisan.¹⁵
- [31] Following the successful suit by the subtrade Artisan in April 2013, the City entered into direct negotiations with a number of the unpaid subtrades who worked on the Huron Lodge project. Indeed, it was almost one month to the day following the release of Justice Carey’s decision that the then Mayor of the City, Mr. Eddie Francis, held a press conference on May 27, 2013, in which he invited Southside’s subcontractors to negotiate a resolution of their outstanding claims against the City on the Huron Lodge project over the next 45 days. The City’s efforts to settle the claims of the unpaid subtrades were widely reported by the local news media in Windsor.
- [32] It was against this background that the City reached conditional settlements with the eight Settling Third Parties from August through to October 2013. All of the Eight Settlement Agreements were conditional upon obtaining (a) the approval of Windsor city council, and (b) the appropriate orders to continue from the court. The conditional settlements were approved by city council, *in camera*, on October 21, 2013.
- [33] In the *Abuse of Process Decision*, I found that “the Eight Settlement Agreements entirely changed the adversarial relationship between the parties.”¹⁶ I found that when the City entered into the Eight Settlement Agreements with the Settling Third Parties, “it entirely changed both the adversarial relationship between the litigants and the adversarial landscape. It fundamentally altered the litigation landscape and thereby triggered the City’s obligation to make immediate disclosure of the agreements.”¹⁷

¹⁴ *Ibid.*, at paras. 44-47.

¹⁵ *Ibid.*, at paras. 51-52.

¹⁶ *Abuse of Process Decision*, at para. 75.

¹⁷ *Ibid.*, at para. 79.

- [34] I also found that the “Eight Settlement Agreements were not immediately disclosed to the court and the non-settling litigants, as required.”¹⁸
- [35] I concluded that “the City’s failure to disclose immediately to the court and the non-settling parties the complete terms of the Eight Settlement Agreements that fundamentally altered the litigation landscape constitutes an abuse of process.”¹⁹
- [36] In the result, I held that “the City’s claims against Southside for damages and delay during construction must be permanently stayed pursuant to s. 106 of the *Courts of Justice Act* by reason of the City’s abuse of process”²⁰ and that “the Settling Third Parties’ claims to payment, acquired by the City through the assignment pursuant to the Eight Settlement Agreements, must also be stayed by reason of the same abuse of process.”²¹
- [37] Following the release of the *Abuse of Process Decision*, on or about June 17, 2024, the City filed an amended pleading,²² on consent of Southside, in order to delete its counterclaim in its entirety in the wake of the *Abuse of Process Decision* and to amend its statement of defence to add additional allegations to plead in para. 11, *inter alia*, that its set-off defence would encompass not only the previously pleaded legal set-off defence based on s. 111 of the *Courts of Justice Act* but now also a claim for equitable set-off defence, as follows:

11. As a direct result of the plaintiff’s breaches of contract, aforesaid, the defendant has sustained and will sustain the following damages, which damages are pleaded in defence of the plaintiff’s claim both pursuant to s. 111 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43[,] and by way of equitable set-off: ... [Emphasis in original in underline indicating amendments.]

- [38] I pause here to address an argument made on behalf of the City regarding Southside’s consent to the proposed amendment to para. 11 (and other provisions) of the City’s amended pleading. It was suggested that Southside’s consent to the amended pleading should somehow be taken as an admission by Southside as to the viability of the City’s amended set-off defence on its merits.

¹⁸ *Ibid.*, at para. 90.

¹⁹ *Ibid.*, at para. 96.

²⁰ *Ibid.*, at para. 97. For similar reasons, I also held that the City’s claims against the Architects should also be stayed.

²¹ *Ibid.*

²² As of the date of argument before me, the actual amended pleading had not been approved by way of the equivalent to an issued and entered order. In short, the amended pleading had not been officially authorized. Hence the reference, for example, in footnotes 4 and 5 in para. 8 of *Southside’s Factum* to the “Proposed Amended Statement of Defence” [underline emphasis in the original]. However, argument before me proceeded on the basis that the “proposed” amendments had been or would be made presently. For present purposes, I have treated the “proposed” amended pleading of the City as if it has in fact been properly amended.

- [39] In short, for present purposes, I place no reliance on the fact that Southside consented to the amendment to the City’s pleading in determining Southside’s motion for summary judgment.
- [40] First, as I suggested in my remarks in oral argument to Mr. Dewart on behalf of the City, Southside’s consent to the City’s amended pleading may well have simply been a function of the eminently reasonable recognition by Southside’s experienced counsel of the well-established jurisprudence surrounding the amendment of pleadings, as captured in rule 26.01 of the *Rules of Civil Procedure*.²³ In other words, Southside likely consented to the motion to amend the City’s pleading because they recognized that the amendment surely would have been granted in any event – and so what is the point in needlessly increasing their client’s costs of the litigation by resisting the inevitable outcome?
- [41] Second, I am advised by Mr. Grigg, counsel for Southside, and I accept, that counsel for Southside consented to the amendments to the City’s pleading on a without prejudice basis. As such, I would have thought it plain that a without prejudice concession to the amendment of a pleading cannot be construed as bearing any agreement with or comment upon the merits of the proposed pleading.
- [42] For these reasons, I give no weight – at all – to the City’s argument on this particular point that Southside somehow should be taken to have consented to the viability of the City’s amended defence based on its consent to the City amending its pleading.
- [43] In closing off my summary of the relevant factual background, I would also note that while this decision was under reserve, the court received, on consent, email correspondence dated April 8, 2025, from counsel for the City, advising that:
- The Court of Appeal recently agreed to strike a five-judge panel to hear four appeals relating to the immediate disclosure rule described in *Handley Estate v DTE Industries Limited*, 2018 ONCA 324. As noted in the attached endorsement, the Court of Appeal will hear submissions on “whether the settlement disclosure remedy described in *Handley*, amongst others, should be overruled”.
- [44] Counsel for the City respectfully requested that the instant summary judgment decision should be held under reserve until the Court of Appeal releases its reasons in the above-noted appeals. Southside, in short, opposed that request.
- [45] I am advised that, as of the date of writing, the Court of Appeal has not released any decision in relation to the above-referenced four appeals.

²³ Rule 26.01 of the *Rules of Civil Procedure*: “On motion at *any stage* of an action the court *shall* grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.” [Emphasis added.]

[46] In the circumstances, given the length of time that the parties have been awaiting upon a decision on the summary judgment motion, I do not believe it to be in the interests of justice to further delay the release of the instant decision.

Issues

[47] I agree with Southside’s perspective that the central issue on this motion for summary judgment is the availability to the City of the defences of legal and equitable set-off in circumstances where the City’s counterclaim has been stayed and its right to prosecute the counterclaim or the claims assigned to it as part of the Eight Settlement Agreements has been barred.²⁴

[48] To similar effect is the position of the City on the issues before the court:

Windsor agrees that on this motion, the court can determine whether its previous order granting a stay of Windsor’s claims affects the “availability” of its legal and equitable set-off defences, and in particular whether those defences can or should be dismissed based on the abuse of process addressed in the earlier motion. Windsor also agrees that this motion can also determine whether these are otherwise legally available defences in this case.²⁵

[49] Thus, the specific issues for consideration on this motion are as follows:

- a. Is the issue of the availability of the City’s set-off defences *res judicata*?
- b. Should the City’s set-off defences be summarily dismissed on the basis that they raise no genuine issue requiring a trial?

Analysis

Is the issue of the availability of the City’s set-off defences res judicata?

[50] The City argues that the question of the remedy for the City’s abuse of process is *res judicata*, that this court has already determined that the appropriate remedy for the City’s abuse of process was a permanent stay of the City’s claims, and that it is now not open to Southside “to re-litigate and expand the remedy it sought and obtained on its previous motion.”²⁶

[51] Respectfully, I find no merit in the City’s argument.

²⁴ *Southside’s Factum*, at para. 18.

²⁵ *City’s Factum*, at para. 49. See also para. 90: “Windsor accepts that this motion can determine whether the stay motion order affects the “availability” of Windsor’s pleaded legal and equitable set-off defences ...” In fairness to the City, I read the submissions in both paras. 49 and 90 as being subject to the City’s argument on *res judicata*.

²⁶ *City’s Factum*, at paras. 7(a), and 60-64, quoting *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19, [2013] 2 S.C.R. 125, at para. 88 per Lebel and Abella JJ., dissenting.

[52] The City relies on the doctrine of issue estoppel, which seeks to protect the finality of litigation by precluding the relitigation of issues that have been conclusively determined in a prior proceeding.²⁷

[53] In oral argument, Mr. Hughes referred me to para. 25 of the Court of Appeal’s decision in *National Industries Inc. v. Kirkwood*,²⁸ as follows:

In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 24, Binnie J. quoted, with approval, the description provided by Middleton J.A. in *McIntosh v. Parent*, [1924] 4 D.L.R. 420 (Ont. C.A.), at p. 422 as to the reach of issue estoppel, as follows:

Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. *The right, question, or fact, once determined*, must, as between them, be taken to be conclusively established as long as the judgment remains. [Emphasis in original.]²⁹

[54] In my view, the City’s argument does not survive the very first line of the quoted passage from *McIntosh v. Parent* as to the reach of issue estoppel; it applies to any right, question, or fact *distinctly put in issue and directly determined by the court*.

[55] The impact of the City’s abuse of process on its set-off defence was not “distinctly put in issue” in the previous motions that were determined in the *Abuse of Process Decision*. The impact of the City’s abuse of process on its set-off defence was not “directly” determined by the court in the *Abuse of Process Decision*.

[56] The fact is that no one raised the issue of the set-off defence in the previous stay motions. The City is quite correct (and Southside admits) that “Southside did not seek to strike out Windsor’s statement of defence in whole or in part, nor did it seek to dismiss any of its defences.”³⁰

[57] By the same token, it is also true that the City did not raise any of the implications for its set-off defence in argument of the previous motions. That is, in both its written factum and oral argument before me, the City took some time to highlight how, it says, it would be “manifestly unjust” if the City were not permitted to advance its set-off defence, if Southside were entitled to reap a “substantial windfall,” etc.³¹

²⁷ *Ibid.*, at para. 61.

²⁸ *National Industries Inc. v. Kirkwood*, 2023 ONCA 63, 30 C.C.L.I. (6th) 248.

²⁹ *Ibid.*, at para. 25.

³⁰ *City’s Factum*, at para. 36.

³¹ See, for example, *City’s Factum*, at paras. 83-86.

- [58] But counsel for the City made no such arguments whatsoever on the previous stay motions. And the reason counsel did not, in my view, is because the City did not believe (correctly) that the availability of its set-off defence was “distinctly put in issue” on the previous stay motions. They were (correctly) not of the view that the issue would be “directly determined” by the court on the stay motions. Put differently, I have no doubt that if counsel for the City believed that the availability of its set-off defence was “distinctly put in issue” on the previous stay motions and would be “directly determined” by the court in the context of those motions, counsel for the City would have advanced on those motions the same arguments as to the implications for their set-off defence that counsel did here.
- [59] I would also note that the City has not referred me to any passage in any of the motion materials filed on the previous stay motions that would establish (or even suggest) that the question of the availability of the City’s set-off defence was “distinctly put in issue” on the previous stay motions.
- [60] By its reliance on the doctrines of *res judicata* and issue estoppel, the City seeks to preclude this court from ruling on the merits of the availability of the City’s set-off defence. The City says the issue has already been decided. The City says it would be an improper attempt at relitigating an issue already conclusively determined. For the reasons explained above, based on the City’s own authorities, its argument must fail.
- [61] But obviously a key variable inherent in this exercise is the scope of definitions. How does one properly define “the question” or the issue that is said to have been conclusively determined by the previous decision? How wide does one cast the net? In my view, the City’s argument depends on a very widely-cast definition, and an inappropriately over-broad one. For the City’s argument to succeed, it must be said that “the question” that was conclusively determined by the previous decision would have to be something very broad, akin to “what is the appropriate remedy for the City’s abuse of process?” If one casts the net that broadly, then it might appear that there is some semblance of merit in the City’s *res judicata* argument.
- [62] The difficulty with that argument – with the City’s widely-cast definition – is that it proves too much.
- [63] That is, if the City’s argument is correct and if the scope of the definition of “the question” or the issue that is said to have been conclusively determined by the previous definition is to be cast that widely, then the result would be that, on the City’s view, even the City’s equitable set-off defence would be a matter of *res judicata*.
- [64] But the equitable set-off defence was not even in existence – it had not yet been pleaded by the City – at the time of the release of the *Abuse of Process Decision*.
- [65] In all of this, what is certain, to my mind, is that the question of the availability of the City’s equitable set-off defence cannot be said to be a matter of *res judicata*. The *Abuse of Process Decision* was released in April 2022. It was not until June 2024 that the City’s statement of defence was amended to include for the first time the plea of equitable set-off. It simply

cannot be said the *Abuse of Process Decision* “conclusively determined” anything to do with the equitable set-off defence when that defence was not even pleaded until two years after the decision was released.

[66] In my view, the absurdity of that logical conclusion of the City’s argument demonstrates why that argument and its assumptions are flawed, and why it must be rejected.

[67] I dismiss the City’s arguments based on the doctrine of issue estoppel and *res judicata*.

Should the City’s set-off defences be summarily dismissed on the basis that they raise no genuine issue requiring a trial?

Summary Judgment Principles

[68] The legal principles governing a motion for summary judgment are not in issue and are canvassed in paras. 15-17 of *Southside’s Factum* and paras. 47-48 of the *City’s Factum*. In short, the question is whether there is a genuine issue requiring a trial about a claim or a defence. If there is not, then the court shall grant summary judgment.³² Where the only genuine issue is a question of law, a judge may determine the question and grant judgment accordingly.³³

[69] A case is appropriate for summary judgment and there will be no genuine issue requiring a trial where the process allows the judge to make the necessary findings of fact, apply the law to the facts, and where summary judgment is a proportionate, more expeditious, and less expensive means to achieve a just result.³⁴

[70] As I have said, the City has conceded that the issue of whether the *Abuse of Process Decision*, which ordered a permanent stay of the City’s claims, affects the availability of the City’s set-off defences is amenable for summary judgment.³⁵

[71] I agree with the City’s submission that the instant summary judgment motion brought by Southside seeks partial summary judgment only; Southside does not seek an actual monetary judgment on its claims against the City.³⁶

[72] Further, I am mindful of the caution that our Court of Appeal has repeatedly expressed regarding the granting of partial summary judgment, in cases like *Butera v. Chown, Cairns LLP*,³⁷ where the Court of Appeal ruled that “[t]he caution expressed pre-*Hryniak* in *Corchis* is equally applicable in the post-*Hryniak* world. In addition to the danger of duplicative or inconsistent findings considered in *Baywood* and *CIBC*, partial summary

³² *Rules of Civil Procedure*, r. 20.04(2)(a).

³³ *Ibid.*, r. 20.04(4).

³⁴ *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 4 and 49.

³⁵ See *City’s Factum*, at paras. 49 and 90.

³⁶ *Ibid.*, at para. 48.

³⁷ *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, 418 D.L.R. (4th) 657 [*Butera*].

judgment raises further problems that are anathema to the stated objectives underlying *Hryniak*.”³⁸

[73] Indeed, I have canvassed those same concerns in previous decisions of mine.³⁹

[74] Bottom line, our Court of Appeal has said that:

A motion for partial summary judgment should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost-effective manner. Such an approach is consistent with the objectives described by the Supreme Court in *Hryniak* and with the direction that the *Rules* be liberally construed to secure the just, most expeditious, and least expensive determination of every civil proceeding on its merits.⁴⁰

[75] I am guided by all of these fundamental legal principles here.

The City’s Set-Off Defences

[76] Again, the legal principles governing the defence of set-off are not in issue between the parties. They are canvassed in more detail below.

[77] I accept as correct the City’s summary submission⁴¹ that there are two forms of set-off in Canadian law, legal and equitable, both of which are defences. The Supreme Court of Canada has held that “set-off at law operates as a defence,”⁴² and the Court of Appeal for Ontario has accepted that “equitable set-off is a substantive defence.”⁴³

[78] I accept the City’s characterization of its set-off defences that:

Windsor’s set-off defences fall into two categories. Windsor pleads that (1) Southside was responsible for delays, deficiencies, and excess costs, the value of which should be deducted from any amounts that it is found to owe Southside; and (2) it should receive a credit for the settlement amounts that it paid to Southside’s subtrades.⁴⁴

³⁸ *Butera*, at para. 29, citing, *inter alia*, *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2016 ONCA 922, 133 O.R. (3d) 561, 404 D.L.R. (4th) 534.

³⁹ See, for example, *Villanueva v. Sarnia Fine Cars*, 2018 ONSC 4949 (S.C.J.), at paras. 124-126; and *Forton v. Forton*, 2022 ONSC 6957 (S.C.J.), at paras. 65-70.

⁴⁰ *Butera*, at para. 34.

⁴¹ See *City’s Factum*, at para. 52.

⁴² *Holt v. Telford*, [1987] 2 S.C.R. 193, at pp. 202(i)-203(b) (para. 25), quoting *Halsbury’s Laws of England*, 4th ed., vol. 42, para. 421.

⁴³ *Pierce v. Canada Trustco Mortgage Co.* (2005), 254 D.L.R. (4th) 79, 2005 CarswellOnt 1876, 197 O.A.C. 369 (Ont. C.A.) [*Pierce*], at para. 43, application for leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 336, 2005 CarswellOnt 5203, and [2005] S.C.C.A. No. 337, 2005 CarswellOnt 5204 (S.C.C.).

⁴⁴ *City’s Factum*, at para. 72.

[79] I also accept Southside’s characterization of the City’s set-off defences, providing some chronological context:

Following release of the decision staying its counterclaim and the assigned claims [i.e., the *Abuse of Process Decision*], Windsor continued to assert its right to set off the amounts set out in paragraph 11 of its defence against any amounts that may be found owing to Southside. And it amended its defence to plead (i) specifically equitable set off in addition to legal set off and (ii) entitlement to a “credit” for amounts Southside “would have been obliged to pay to” the Settling Third Parties had Windsor not paid the Settling Third Parties as part of the Eight Settlement Agreements.⁴⁵

Does the City’s Legal Set-Off Defence Raise Any Genuine Issue for Trial?

[80] Historically, there was no right of set-off at common law. What we recognize as set-off in law is a creature of statute. It originated with two 18th century statutes in England,⁴⁶ which conferred the right to set off mutual debts arising from transactions of a different nature that could be ascertained with certainty at the time of pleading.

[81] In *Holt v. Telford*, the Supreme Court of Canada explained the statutory right of set-off in the following terms:

The English common law interpretation of the statutory right of set-off is neatly summarized in *Halsbury’s Laws of England*, 4th ed., vol. 42, para. 421:

421. Nature of the right. 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. Thus, 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. The fact that a claim was framed in damages precluded the raising of a set-off at law, notwithstanding that the claim might have been differently framed in a way which would have permitted such a set-off. Where a claim for a liquidated debt was joined by a plaintiff with a claim for damages, set-off at law might only be pleaded in defence to the former claim. Set-off at law operates as a defence.⁴⁷

⁴⁵ *Southside’s Factum*, at para. 13.

⁴⁶ The *Insolvent Debtors Relief Act*, 1728 U.K. (2 Geo. 2, c. 22), and the *Set-off Act*, 1734 U.K. (8 Geo. 2, c. 24): see *Telford v. Holt*, at p. 202(i) (para. 23).

⁴⁷ *Telford v. Holt*, at p. 204(c) (para. 25).

- [82] The Supreme Court emphasized that statutory set-off (or set-off at law) “requires the fulfilment of two conditions. The first is that both obligations must be debts. The second is that both debts must be mutual cross obligations.”⁴⁸
- [83] In Ontario, legal set-off has been codified in s. 111 of the *Courts of Justice Act*, which maintains these two requirements in its current iteration, as follows:
- 111 (1) In an action for payment of a debt, the defendant may, by way of defence, claim the right to set off against the plaintiff’s claim a debt owed by the plaintiff to the defendant.
- (2) Mutual debts may be set off against each other even if they are of a different nature.
- [84] In my view, the City’s legal set-off defence fails on the first requirement that it must be “debts” that are sought to be set off. The City cannot bring itself within the requirements of s. 111(1) of the *Courts of Justice Act*.
- [85] Our Court of Appeal has confirmed that there is a clear distinction between a claim for damages on the one hand and a debt or liquidated amount on the other. The debts must be either liquidated sums or money demands that can be ascertained with certainty.⁴⁹
- [86] In *Marketing Products Inc. v. 1254719 Ontario Ltd.*, the plaintiff was a U.S. company that distributed satellite equipment for consumer television reception. The defendant was a lower-level distributor that purchased satellite equipment from distributors like the plaintiff and then resold same to retail dealers that in turn sold to the public. The plaintiff entered into a business relationship with the defendant, pursuant to which it sold satellite equipment to the defendant and also paid commissions to the defendant for certain equipment and sales of related television programming.
- [87] The defendant purchased some \$50,000 worth of satellite equipment from the plaintiff, providing the plaintiff with a cheque in payment of same. The plaintiff was subsequently notified by its bank that the cheque had been dishonoured by reason of a stop payment placed by the defendant. The plaintiff terminated its relationship with the defendant and commenced an action, suing the defendant on the dishonoured cheque.

⁴⁸ *Ibid.*, quoting the British Columbia Court of Appeal in *C.I.B.C. v. Tuckerr Indust. Inc.*, [1983] 5 W.W.R. 602 at 604, 46 B.C.L.R. 8, 48 C.B.R. (N.S.) 1, 149 D.L.R. (3d) 172, at p. 174 [cited to D.L.R.].

⁴⁹ *Marketing Products Inc. v. 1254719 Ontario Ltd.*, 2000 CarswellOnt 4710, 11 C.P.C. (5th) 201, 142 O.A.C. 61 (Ont. C.A.) [*Marketing Products*], at para. 18. See also, for example, *Kal-Trading Inc. v. Plastics Processing Inc.*, 2006 CarswellOnt 3218 (S.C.J.), at para. 8; *Montel Inc. v. Kipawa Sales & Services Inc.*, 2014 ONSC 83 (S.C.J.), at paras. 40-43; *Tupperware Canada Inc. v. 1196815 Ontario Ltd.*, 2008 CarswellOnt 778, [2008] O.J. No. 532 (S.C.J.) [*Tupperware Canada*], at paras. 26-31; and *Brompton Corp. v. Tuckamore Holdings LP*, 2017 ONSC 775 (S.C.J.) [*Brompton*], at paras. 39-40, affirmed on other grounds 2017 ONCA 594, 136 O.R. (3d) 465.

- [88] The defendant defended the action and brought a counterclaim for, *inter alia*, commissions it claimed the plaintiff owed it in relation to sales, activations, and renewals of satellite equipment.
- [89] At first instance, the motion judge granted the plaintiff’s motion for summary judgment on the cheque. On appeal, the Ontario Court of Appeal upheld the motion judge and dismissed the appeal. Writing for the unanimous panel of the Court of Appeal, MacPherson J.A. explained that:

The motions judge determined that Tech’s claim for legal set-off did not meet these conditions. He reasoned:

Tech has not pleaded any liquidated sum or any amount which can be ascertained with certainty. Rather, it has asked for an accounting, reimbursement and damages. Such claims can only be asserted in a counterclaim and not as a set-off. The terms of the agreement between the parties, respecting payment of commissions and dealing with warranty claims are themselves in dispute, rendering it impossible at this stage to ascertain any amount with certainty.

I agree with this analysis. Tech’s pleadings are fatal to its claim for legal set-off. In its counterclaim Tech seeks “an accounting”, “reimbursement” and “damages” relating to rebates or commissions. *This language is far removed from the specificity mandated by the “fixed” or “ascertainable” language of the case law.*⁵⁰ [Emphasis added.]

- [90] MacPherson J.A. concluded that:

In my view, Tech’s pleadings run afoul of this clear definition of the nature of the right of legal set-off. Tech has framed its purported set-off in accounting, reimbursement and damages. It is entitled to pursue these remedies, but by way of a counterclaim, not legal set-off.⁵¹

- [91] As this court said, in *obiter*, in *Brompton Corp. v. Tuckamore Holdings LP*:

[The defendant’s] claim for damages for [the plaintiff’s] breach of its representation and warranty regarding the future use of the tax pools is not a debt but a claim for an unliquidated amount of damages. [The defendant’s] damages would have to be assessed before they could become a liquidated debt. Legal set-off is, therefore, not available.⁵²

⁵⁰ *Marketing Products*, at paras. 19-20.

⁵¹ *Ibid.*, at para. 21.

⁵² *Brompton*, at para. 40.

[92] In the case at bar, the City did not even plead that there is a debt or liquidated amount owed by Southside to the City.

[93] On the contrary, in para. 11 of its amended statement of defence, the City pleads that the City has suffered “damages” only – it does not plead any “debt” or “liquidated amount” – as follows:

As a direct result of the plaintiff’s breaches of contract, aforesaid, *the defendant* has sustained and *will sustain the following damages*, which *damages* are pleaded in defence of the plaintiff’s claim both pursuant to s. 111 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43[,] and by way of equitable set-off: ... [Emphasis added.]

[94] And again, in para. 11B of the statement of defence, in addressing the City’s claim that “it should receive a credit for the settlement amounts that it paid to Southside’s subtrades,”⁵³ the City did not plead any “debt” or “liquidated amount”; again, its own pleading spoke in the language of “damages” to be assessed, as follows:

If the plaintiff is entitled to any recovery from the defendant, which is denied, *the measure of damages* is equal to the actual losses sustained by the plaintiff after applying a credit *inter alia* for the amounts it would have been obliged to pay to the Paid Subcontractors and Acknowledged Paid Subcontractors, but for the defendant’s satisfaction of those obligations.

[95] Clearly, on its face, this is not a plea of a debt or any liquidated amount. The City’s pleading indicates that “damages would have to be assessed before they could become a liquidated debt.” “It does not seek payment of a sum that can be ascertained with certainty.”⁵⁴

[96] To repeat, the City has said that its set-off defence fall into two categories. The first category relates to the City’s allegations that “Southside was responsible for delays, deficiencies, and excess costs, the value of which should be deducted from any amounts that it is found to owe Southside.”⁵⁵

[97] There can be no doubt that this first category of the City’s set-off defence clearly cannot be said to constitute a “debt” or “liquidated amount.” At the time of pleading (or even today), the City cannot tell this court what the “value” of those allegations is or ought to be. Those are clearly allegations of unliquidated damages that would have to be assessed.

[98] To my mind, that reality is reflected (and almost conceded) in the submissions of the City:

Windsor pleads that “As a direct result of the plaintiff’s breaches of contract”, it incurred *damages*, which *damages* it relied on in defence to Southside’s claim. The *alleged damages* include the costs of rectifying deficiencies, maintaining

⁵³ *City’s Factum*, at para. 72.

⁵⁴ *Tupperware Canada*, at para. 31

⁵⁵ *City’s Factum*, at para. 72.

the previous retirement home that was to be replaced, and increased lifecycle costs for the new Huron Lodge. *These allegations support Windsor's first category of set-off defence*, though they also support Windsor's defence of non-performance or inadequate performance of the contract, distinct from set-off.⁵⁶ [Emphasis added.]

[99] Turning to the second category of the City's set-off defence, that is, the City's allegations that "it should receive a credit for the settlement amounts that it paid to Southside's subtrades,"⁵⁷ I also do not accept that these alleged "credits" constitute "a debt owed by the plaintiff to the defendant" within the meaning of s. 111(1) of the *Courts of Justice Act*.

[100] I tend to agree with Southside's submissions that:

Unlike in paragraph 11 [of the City's amended statement of defence], new paragraphs 11A and 11B do not plead the basis on which Windsor would be entitled to a "credit" against amounts otherwise owed to Southside. Neither is the amount of that "credit" pleaded. But if it is not a contractual right claimed, then it must be a form of unjust enrichment that is asserted by Windsor in these paragraphs. Whatever the legal basis for the right to a "credit", it is not asserted to be a debt owed by Southside to Windsor. Rather, it too is a claim to set off unascertained and unliquidated damages.⁵⁸

[101] Again, the Supreme Court of Canada has said that legal set-off is available for debts or liquidated amounts that "could be ascertained with certainty at the time of pleading."⁵⁹ As Southside submits, the amounts of the alleged "credits" are not pleaded in the City's amended statement of defence. The amount of the alleged "credits" is not ascertainable from a review of the City's pleading.

[102] Further, it is instructive to consider the nature of those alleged "credits."

[103] The City submits that:

... Southside retained the subtrades specifically to perform its obligations to Windsor under the general contract and incurred debts to the subtrades under the subcontracts, which debts Windsor satisfied. ... These claims are liquidated debts, at least in part, and thus amenable to legal setoff, in addition to being subject to equitable set-off.⁶⁰

[104] Respectfully, I disagree with the submission that such amounts are properly characterized as "debts."

⁵⁶ *Ibid.*, at para. 77.

⁵⁷ *Ibid.*, at para. 72.

⁵⁸ *Southside's Factum*, at para. 27.

⁵⁹ *Telford v. Holt*, at p. 204(c) (para. 25).

⁶⁰ *City's Factum*, at para. 80.

- [105] It will be remembered that Southside issued third party claims against its subcontractors for contribution and indemnity for the alleged deficiency and delay claims made by the City in its counterclaim against Southside. In response, the subcontractors delivered statements of defence and several also served counterclaims, crossclaims or other pleadings (such as fourth party claims or separate actions). Generally speaking, the subcontractors pleaded that they had provided all services required under their respective subcontracts, and that any delays or deficiencies were caused by other parties. In their counterclaims (or other pleadings), the subcontractors sought payment from Southside for unpaid amounts allegedly owing under their subcontracts. In short, the subcontractors alleged a breach of contract by Southside and sought damages for Southside's breach.
- [106] To emphasize, the claims of the subcontractors – including the eight Settling Third Parties – were claims for damages for Southside's alleged breach of contract, which claims for damages would have to be assessed.
- [107] The City then purchased those claims of the Settling Third Parties, who agreed to assign their claims to the City, pursuant to the Eight Settlement Agreements, concluded without Southside's knowledge in 2013.
- [108] In my view, the purchase of those claims by the City and their assignment to the City did not change the nature of those claims. They remained claims for unliquidated damages that would require assessment. They were not transformed into debts.
- [109] Put differently, the "credits" that the City now seeks to claim are the amounts that the City decided to pay to the Settling Third Parties in order to purchase and assign their claims to the City.
- [110] In this regard, I note the chart set out in para. 31 of the *City's Factum* (which is not found in the City's amended statement of defence), which sets out the value of the claims of each of the Settling Third Parties against Southside and the "settlement amount" that the City paid to each of those eight subtrades to purchase their respective claims and have them assigned to the City.
- [111] Upon review of that chart, the first thing that one observes is that the City was not consistent in the relative amounts that it paid to acquire the various claims of the Settling Third Parties. In the case of only three of the Settling Third Parties did the City pay more than 90 percent of the subcontractor's claim against Southside to acquire their claim. In one case, the City paid the subtrade 69 percent of its claim. In another case, the City paid roughly 35 cents on the dollar. And in one case, it paid less than one cent on the dollar – on a claim against Southside that was alleged to amount to \$592,774.04 in damages.
- [112] These are the amounts in respect of which the City now claims a "credit" against Southside.
- [113] Clearly, the amount of these various claims was not "a debt owed by the plaintiff to the defendant" within the meaning of s. 111(1) of the statute; rather, it was simply an amount that the City decided, for its own reasons, to pay to each of these eight subtrades in order

to purchase and assign their respective unliquidated claim for damages against Southside to the City.

[114] For all of these reasons, I conclude that there is no merit in the City's legal set-off defence based on s. 111 of the *Courts of Justice Act* or otherwise.

[115] In the result, I am satisfied that there is no genuine issue requiring a trial with respect to the City's set-off defence at law, and I summarily dismiss that defence.

Does the City's Equitable Set-Off Defence Raise Any Genuine Issue for Trial?

[116] Once again, the legal principles governing the defence of equitable set-off are not in dispute between the parties.⁶¹ They were well summarized by, among others, the Ontario Court of Appeal in *Algoma Steel Inc. v. Union Gas Ltd.*,⁶² as follows:

Equitable set-off is available where there is a claim for a sum whether liquidated or unliquidated. In *Telford v. Holt* (1987), 41 D.L.R. (4th) 385 (S.C.C.) at 398-99, Wilson J., speaking for the court, approved a statement of the applicable principles for equitable set-off found in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 20 D.L.R. (4th) 689 (B.C. C.A.) at 696-97. Those principles can be summarized as follows:

1. The party relying on a set-off must show some equitable ground for being protected against the adversary's demands.
2. The equitable ground must go to the very root of the plaintiff's claim.
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.
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.⁶³

[117] Writing for the unanimous court in *Algoma*, Rosenberg J.A. went on to observe that:

It seems to me that a very helpful test is set out in a passage from the reasons of Lord Denning in *Federal Commerce* at p. 1078 and which was quoted with apparent approval by Wilson J. in *Telford* at p. 400:

⁶¹ See *Southside's Factum*, at paras. 29-31, and *City's Factum*, at para. 55.

⁶² *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78, 2003 CarswellOnt 115, 39 C.B.R. (4th) 5 (C.A.) [*Algoma*].

⁶³ *Ibid.*, at para. 26. See also *Pierce*, at paras. 38-41.

*We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties? ... This question must be asked in each case as it arises for decision; and then, from case to case, we shall build up a series of precedents to guide those who come after us. But one thing is quite clear: it is not every cross-claim which can be deducted. 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 cross-claim. [Emphasis in original].*⁶⁴

- [118] In my view, in the instant litigation, there is no issue with respect to the second, fourth, and fifth elements of the claim for equitable set-off defence.
- [119] As well, to my mind (and apparently counsel for Southside is of the same view), while Mr. Dewart for the City asserts that the critical factor here is the first consideration, – “the party relying on a set-off must show some equitable ground for being protected against the adversary’s demands”⁶⁵ – my own view, is that the first factor is not really in dispute here. The City relies on the principle (in equity and otherwise) that a claimant should be prohibited from double recovery, that is, from benefitting from a “windfall.”
- [120] For my myself, I agree with the submission of Mr. Grigg for Southside that the focus of the inquiry here is the third factor (and, as such, I necessarily disagree with the submission of Mr. Dewart before me that there “is no serious dispute” as to the third factor).
- [121] Again, the third constituent factor of the defence of equitable set-off asks if the defendant’s “cross-claim [is] 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.”⁶⁶
- [122] Neither party provided me with any judicial decision or any other authority on point that has considered the specific context before the court here, that is, whether, and to what extent, the permanent stay of a defendant’s counterclaim for abuse of process pursuant to the *Aecon – Handley Estate* principle⁶⁷ has impacted a set-off defence of that defendant based on the very same allegations underlying its stayed counterclaim.

⁶⁴ *Ibid.*, at para. 29, citing *Federal Commerce & Navigation Co. v. Molena Alpha Inc.* (1978), [1979] A.C. 757, [1979] 1 All E.R. 307, [1979] 1 Lloyd’s Rep. 201 (U.K. H.L.), and *Holt v. Telford*, at pp. 213(i)-214(b) (para. 37).

⁶⁵ *Algoma*, at para. 26.

⁶⁶ *Ibid.*

⁶⁷ See *Aecon Buildings v. Brampton (City)*, 2010 ONCA 898, 328 D.L.R. (4th) 488, 98 C.L.R. (3d) 1, at paras. 14-16, leave to appeal to the S.C.C. refused, 425 N.R. 400 (note); and *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324, 421 D.L.R. (4th) 636, 17 C.P.C. (8th) 271, at paras. 45-46. See also the summary of the law in *Waxman v. Waxman*, 2021 ONSC 2180, 69 C.P.C. (8th) 411 (S.C.J.), at paras. 26-27, affirmed 2022 ONCA 311, 471 D.L.R. (4th) 52, 83 C.P.C. (8th) 1, leave to appeal to the S.C.C. refused with costs, [2022] S.C.C.A. No. 188, 2022 CarswellOnt 14979.

- [123] In that specific context, and in the particular circumstances before me, while there can be no question that the City’s set-off defence (and counterclaim) arose out of the same “transaction” as and were “closely connected” with Southside’s claims, I am not satisfied that it would be manifestly unjust to allow Southside to enforce payment of its claim without taking into consideration the set-off defence of the City.
- [124] Indeed, on the contrary, I am satisfied that the reverse is true. In my view, in the specific context before me, I am satisfied that it would be manifestly unjust to give effect to the City’s set-off defence. The City’s set-off defence fails on the third element.
- [125] In my view, it is instructive to return to the admonition of Lord Denning in *Federal Commerce*, as quoted with approval by the Supreme Court of Canada in *Holt v. Telford* and the Ontario Court of Appeal in *Algoma*: “[w]e have to ask ourselves: what should we do now so as to ensure fair dealing between the parties?”
- [126] To ensure the fair dealing between the parties, it needs to be remembered that the City was found to have engaged in a particular type of misconduct here; the City was found to have engaged in an abuse of process; and in order to remedy the City’s abuse of process, the court ordered a permanent stay of the City’s counterclaim. (And the court awarded more than \$145,000 in costs, on a substantial indemnity basis, against the City for the costs of the abuse of process motions.)⁶⁸
- [127] However, in the face of those repeated findings and orders by the court, to now permit the City to turn around and assert by way of a set-off defence the very same allegations that were permanently stayed when asserted in the City’s counterclaim would defeat the fair dealing between the parties. It would result in a manifest unfairness to Southside. And just as importantly, it would effectively undermine the court’s remedy for the City’s abuse of process.
- [128] In colloquial terms, it would permit the City to do through the backdoor what the court permanently prohibited through the front door. The City should not be permitted to sidestep a permanent stay of proceedings because of the nimbleness of its pleadings’ draftsman.
- [129] As such, I view the matter somewhat differently than both Mr. Grigg and Mr. Dewart. On behalf of Southside, Mr. Grigg argues that the City cannot maintain an equitable set-off defence because, by reason of the stay of proceedings of the counterclaim, the City has no “cross-claim” to set off.⁶⁹ Mr. Dewart, for the City, clarifies that the court’s stay of

⁶⁸ See *Southside Construction v. Windsor (City)*, 2023 ONSC 2090, 2023 CarswellOnt 17843 (S.C.J.), at paras. 56 and 64.

⁶⁹ See *Southside’s Factum*, at paras. 5 and 35-40.

proceedings did not extinguish the City's claim; he argues that the claim continues to exist, but it is simply stayed.

[130] For my part, the point is that, even if one says the City's claim is not extinguished, one cannot *give effect* to the City's claim; otherwise, one undermines the efficacy of the court's order and permits a manifest injustice to Southside.

[131] As I have said, neither party was able to provide me with any judicial decision that has considered whether the permanent stay of a defendant's counterclaim for abuse of process pursuant to the *Aecon – Handley Estate* principle should impact a set-off defence by that defendant.

[132] However, in my view, our Court of Appeal considered a roughly analogous situation in *Pierce v. Canada Trustco Mortgage Co.*,⁷⁰ a case relied upon by the City in argument before me. In *Pierce*, a deceased investment advisor and his wife had entered into a loan agreement with the respondent Canada Trustco. The bank commenced an action against the estate of deceased to collect the defaulted debt. The deceased's wife brought a separate action against the bank, claiming damages for negligent misrepresentation, breach of contract, loss of support and income provided by husband, as well as punitive damages. In other motions that were not the subject of the appeal before the Court of Appeal, a motion judge struck out the deceased wife's claims against the bank. However, in response to the action brought by the bank, the deceased wife raised those same claims through an alleged equitable set-off defence.

[133] In dismissing the equitable set-off defence, the Court of Appeal held as follows:

Second, Canada Trustco points out that the equitable set-off defence is anchored in several causes of action – breach of fiduciary duty, negligent misrepresentation and breach of contract. The first of these, breach of fiduciary duty, was struck out as a cause of action in Mrs. Pierce's action by the motions judge in his decision of May 20, 2004. This decision was not appealed and breach of fiduciary duty was not pleaded in Mrs. Pierce's Fresh As Amended Statement of Claim. The second and third proposed anchors for the equitable set-off defence, negligent misrepresentation and breach of contract, were struck out as causes of action in Mrs. Pierce's action by the motions judge in his decision on October 5, 2004. Mrs. Pierce appealed, but for the reasons set out in the previous section her appeal should fail. The result of all this, submits Canada Trustco, is that, putting aside the limitation period issue, there is still no substantive basis for the Estate's equitable set-off defence.

I agree with this submission. Nancy Pierce's claims under these headings, which have been struck out, cannot be resurrected, with identical content, through a claim for equitable set-off mounted by the Estate.⁷¹

⁷⁰ *Pierce, supra*, fn. 43.

⁷¹ *Ibid.*, at paras. 49-50.

[134] For present purposes, I see no principled distinction in law between the situation in *Pierce*, where the defendant estate was not permitted to anchor an equitable set-off defence in claims that had been struck out, and the situation here, where the City seeks to anchor its equitable set-off defence in claims that have been permanently stayed. I conclude that the allegations of the City, which formed the basis for its counterclaim and have been permanently stayed, “cannot be resurrected, with identical content, through a claim for equitable set-off.”

[135] However, Mr. Dewart argues that, as a matter of equity, the court cannot countenance the double recovery by Southside of those amounts paid to the eight Settling Third Parties in respect of which the City seeks a “credit.” The City argues that:

The equitable ground goes to the root of Southside’s claim against Windsor, and it would be manifestly unjust to enforce payment without taking the settlement payments into account. Southside seeks \$4.68 million in damages against Windsor pursuant to the general contract, which includes amounts that Southside owed to its subtrades under its subcontracts with them, that it has not paid, and never will. Windsor paid these amounts, relieving Southside of its obligation to do so. Without the set-off, Southside would receive a substantial windfall to which it is not entitled.⁷²

[136] That said, I agree with Mr. Grigg that an answer to this concern was available to the City, assuming they gave proper notice to Southside, by reason of s. 28 of the *Construction Act*,⁷³ as follows:

Where an owner, contractor or subcontractor makes a payment without obligation to do so to any person having a lien for or on account of any amount owing to that person for services or materials supplied to the improvement and *gives written notice of the payment or the intention to pay to the proper payer of that person*, the payment shall be deemed to be a payment by the owner, contractor or subcontractor to the proper payer of that person, but no such payment reduces the amount of the holdback required to be retained under this Part or reduces the amount that must be retained in response to a written notice of lien given by a person other than the person to whom payment is made. [Emphasis added.]

[137] Section 28 provides an owner with a mechanism to make a payment to a subcontractor and obtain a credit for that amount *vis-à-vis* the general contractor – provided that the owner provides notice of such payments to the general contractor.

[138] As this court has observed, “[i]t is not uncommon for an owner to make direct payments to subcontractors with prior approval or notice to the contractor. Such payments are expressly

⁷² *City’s Factum*, at para. 83.

⁷³ *Construction Act*, R.S.O. 1990, c. C.30. The same provision was in effect in October 2013 when the City approved the Eight Settlement Agreements.

contemplated by s. 28 of the *Construction Act*, which deems a direct payment by an owner to a subcontractor to be a payment by the contractor.”⁷⁴

- [139] But the City did not do that. The City, for its own reasons, decided not to give notice (written or otherwise) to Southside of its payment or intention to pay Southside’s subtrades pursuant to the Eight Settlement Agreements. The City does not plead or rely upon s. 28 of the *Construction Act* in its amended statement of defence. It is now not open to the City to attempt to recharacterize the amounts paid under the Eight Settlement Agreements as payments made under s. 28 of the *Construction Act*, for which it could have legitimately claimed a credit of any amount owing to Southside.
- [140] To my mind, such conduct goes back to the original misconduct of the City that led to the finding of abuse of process – that is, the failure of the City to give notice or make timely disclosure to Southside of its direct negotiations and settlement agreements with Southside’s subtrades.
- [141] In the circumstances, it is difficult to have a great deal of sympathy for the City in its claim that, in fairness and equity, they should receive credit for the “gratuitous”⁷⁵ payments they made to Southside’s subtrades (without notice to Southside) when there was a mechanism available to them – s. 28 of the *Construction Act* – that would provide them with their desired credit, as long as they gave notice to Southside, which the City chose not to use.
- [142] Moreover, I find there is merit in Mr. Grigg’s observation that while the City complains that it would be unfair for the City to be denied a credit for the gratuitous payments it made to Southside’s subtrades, given that, as a result of the *Abuse of Process Decision*, Southside has “derivatively” been left without recourse to its subtrades, which, Southside alleges, ought to bear responsibility for the City’s claims, it is not clear how it is any less unfair for Southside to bear responsibility for any default by those subtrades than it is for the City to bear responsibility – especially since it was the City who decided to purchase the subtrades’ claims in the absence of notice to Southside or its approval. In short, as the City reached out to Southside’s subtrades and made its private deals with Southside’s subtrades without notice to Southside or its approval, then it is the City that should bear the consequences of the City’s decisions.

⁷⁴ *Hannan Custom Building Ltd. v. Irwin*, 2024 ONSC 7230, 2024 CarswellOnt 20249 (S.C.J., per A.J. Robinson), at para. 27.

⁷⁵ I use the word “gratuitous” in the sense of, as reflected in s. 28 of the *Construction Act*, there being no privity of contract between the City, as owner, and Southside’s subcontractors, the City made these payments “without obligation to do so” to Southside’s subtrades – without notice “to the proper payer of that person,” i.e., Southside.

- [143] That said, I also acknowledge Mr. Dewart’s point that, given “the extreme nature of the [stay] remedy”⁷⁶ under the *Aecon – Handley Estate* principle, the courts should guard against any “dramatic and unwarranted expansion.”⁷⁷
- [144] However, the specific context here, involving an equitable set-off defence by the City that relies on the very same allegations underlying its stayed counterclaim, requires a more nuanced approach and distinguishes the instant case from cases like *Bennington Financial*. In other words, in my view, this motion is not about expanding the remedy for abuse of process; rather, this is about ensuring that the remedy that the court provided in response to the City’s abuse of process remains an effective remedy – and not a hollow pronouncement.
- [145] The final point I would make is that, while this is certainly not determinative of the issue before the court (as all parties recognize), it remains the case that the defence of equitable set-off is a matter of equity and, as such, it remains subject to other equitable principles, like the “clean hands” doctrine.
- [146] On this particular point, I agree with the submissions of Southside, which I adopt for my own reasons, as follows:

Here, Windsor does not come with clean hands. To the contrary, Windsor has been caught abusing the court’s process in an effort to defeat or frustrate Southside’s claims in this proceeding. The consequence of that abuse was that Windsor’s counterclaim and the assigned claims were permanently stayed and it was barred from advancing its claims against Southside in this action. Windsor does not accept that consequence. But rather than challenge that consequence on appeal, Windsor would prefer to sidestep the issue by amending its defence to assert an equitable set off for the same amounts and on the same grounds as those claims that were permanently stayed and which it was barred from prosecuting in this action.⁷⁸

- [147] While I acknowledge that “the ‘clean hands’ doctrine does not automatically disentitle a party with ‘unclean hands’ from obtaining any relief,” I have explained above why, in my view, having regard for the specific circumstances of the instant case, the arguments of the City must fail.⁷⁹

⁷⁶ See, generally, *City’s Factum*, at paras. 67-71 and cases cited therein.

⁷⁷ See, for example, *City’s Factum*, at para. 68, quoting *Bennington Financial Corp. v. Medcap Real Estate Holdings Inc.*, 2024 ONCA 90 [*Bennington Financial*], at para. 15: “[e]xpanding the rule to settlement contexts of the kind at issue in this litigation would represent a dramatic and unwarranted expansion of the properly narrow rule.”

⁷⁸ *Southside’s Factum*, at para. 45.

⁷⁹ *Hrvoic v. Hrvoic*, 2023 ONCA 508, 2023 CarswellOnt 11298 [*Hrvoic*], at para. 18: “[i]n any event, the ‘clean hands’ doctrine does not automatically disentitle a party with ‘unclean hands’ from obtaining any relief. Equitable principles are not based on the application of strict rules but are applied at the judge’s discretion and are ‘crafted in accordance with the specific circumstances of each case.’” That said, I would also note that the first reason given by the Court of Appeal for finding that the “clean hands” doctrine did not apply to the circumstances of that particular case is because “the trial judge did not grant equitable relief”: see *Hrvoic*, at para. 16.

[148] I would close with the observation that it is often said that there is no right without a remedy.⁸⁰ This case presents the reverse. This case is about there being no remedy if there continues to be the right. In this case, in my view, there is no effective remedy or sanction for the City's abuse of process misconduct if the City continues to have the right to assert by way of its set-off defence the very same allegations and claims that the City pleaded in support of its counterclaim and that were required to be permanently stayed by reason of the City's abuse of process.

[149] For all of these reasons, I conclude that there is no merit in the City's equitable set-off defence.

[150] In the result, I am satisfied that there is no genuine issue requiring a trial with respect to the City's equitable set-off defence, and I summarily dismiss that defence.

Conclusion

[151] For all of these reasons, Southside's motion for summary dismissal is allowed, and the City's set-off defences, as set out in paras. 11, 11A, 11B, and 11D of its amended statement of defence, are summarily dismissed.

[152] Southside was successful on the motion before me and is presumptively entitled to its costs of the motion.

[153] To their credit, counsel for the parties advised me at the conclusion of the oral argument before me that they had engaged in discussions to attempt to resolve the question of costs of the motion before me, and while they were not able to come to an agreement on *quantum*, they were able to agree that costs should be awarded on the partial indemnity scale.

[154] In the circumstances, I feel obliged to respect counsel's agreement on the partial indemnity scale of the award.

[155] Both parties filed a detailed bill of costs. Southside claims partial indemnity costs in the total amount of \$24,236.46 The City claims partial indemnity costs in the total amount of \$18,646.62.

[156] Upon review of each party's respective bill of costs, it appears that the parties essentially agree upon the amount of work or total hours required for the motion. Southside's bill of costs indicates its counsel spent 67.2 hours on the motion, while the City's bill of costs indicates that its counsel spent 66.6 hours. This speaks to the alignment of the reasonable expectation of the parties for the purposes of clause 57.01(1)(0.b) of the *Rules of Civil Procedure*.

⁸⁰ See, for example, *R. v. Rahey*, [1987] 1 S.C.R. 588, 39 D.L.R. (4th) 481, 33 C.C.C. (3d) 289, at p. 630(c) [cited to S.C.R.] (para. 87) per LaForest J. (McIntyre J. concurring).

- [157] As such, the difference between the parties' bill of costs is primarily a function of the lawyers' hourly rates. Upon review of Southside's bill of costs, I cannot say that the rates charged by its lawyers are unreasonable or disproportionate to the lawyers' years of experience. Thus, I approve of the hourly rates claimed.
- [158] Having considered, *inter alia*, the bills of costs and submissions of the parties, the relevant factors enumerated in subrule 57.01(1) of the *Rules of Civil Procedure*, and the principles that should guide the court's exercise of its discretion under s. 131 of the *Courts of Justice Act* to award costs, I find that the total amount of \$24,000, all inclusive, represents a fair, reasonable, and proportionate costs award to Southside in the circumstances of the instant motion.
- [159] Accordingly, there shall be an order that the City shall pay Southside its costs of this motion, fixed on a partial indemnity basis, in the amount of \$24,000, all inclusive, within 30 days of the date of this ruling.

"Justice J. Paul R. Howard"

J. Paul R. Howard
Justice

Date: March 10, 2026

CITATION: Southside Construction v. City of Windsor, 2026 ONSC 1462
COURT FILE NO.: CV-07-CV009334-00D1

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Southside Construction (London) Limited

Plaintiff

– and –

The Corporation of the City of Windsor

Defendant

REASONS FOR DECISION

Howard J.

Released: March 10, 2026