INEQUITY IN EQUITABLE SET-OFF: *TELFORD V HOLT* REVISITED*

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The doctrine of equitable set-off is significant across a broad array of legal arenas. To explore equitable set-off, this article revisits Telford v Holt*, a 1987 decision of the Supreme Court of Canada. A review of this seminal decision and its progeny assists in formulating the doctrine of equitable set-off in the modern age.* Telford v Holt *simultaneously: (i) furnishes the substantive juridical framework for assessing equitable set-off claims, and (ii) typifies the intractability of resorting to a residual fairness standard under the "close connection rule" of equitable set-off. This intractability is particularly pronounced where two or more pitiable parties, including an equitable set-off claimant, lay claim to the same asset.*

La doctrine de la compensation en equity a une incidence sur de nombreux domaines juridiques. Les auteurs du présent article se penchent sur cette doctrine à la lumière d'un réexamen de l'arrêt Telford c Holt*, décision rendue par la Cour suprême du Canada en 1987. L'examen de cet arrêt de principe et de la jurisprudence qui en découle permet de formuler la doctrine de la compensation en equity à l'ère moderne. De façon parallèle, l'arrêt* Telford c Holt*, (i) fournit un cadre juridique concret pour l'évaluation des demandes de compensation en equity, et (ii) illustre à quel point il est difficile de régler, les demandes de compensation en equity en ayant recours à une norme « d'équité résiduelle » en vertu de la « règle du lien étroit ». Cette difficulté est d'ailleurs plus prononcée dans les cas où au moins deux parties misérables, dont un réclame une compensation en equity, revendiquent le même bien*

1. Introduction

Set-off is instinctive; it is rooted in our intuitive notions of "fairness."[1] Broadly defined, set-off is the "discharge of reciprocal [monetary]

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* Special thanks to our anonymous reviewers.

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1 See Law Reform Commission of British Columbia, *Report on Set-Off*, LRC 97, (Vancouver: LRCBC, July 1988): "When one person attempts to enforce payment of a debt owing to him by another, it is regarded as fundamentally fair that the second person should be entitled to have taken into account any money he is owed by the first. This is usually referred to as the right of set-off."; also see Philip R Wood, *English and International Set-Off* (London, UK: Sweet & Maxwell, 1989) at para 1–95 [Wood].

obligations to the extent of the smaller obligation."[2] Imagine that Nick owes Jay $100, and that Jay owes Nick $60 in a related or unrelated transaction. Pursuant to set-off principles, Jay is entitled to extinguish his indebtedness to Nick; he may do so by using his property (i.e. his monetary claim against Nick) to reduce or retire Nick's reciprocal monetary claim. In technical parlance, Jay may "*set off*" his claim against—or, worded alternatively, "*assert his right of set-off against*"—Nick's claim. The reverse is also true; Nick may set off his $60 claim against Jay's $100 claim.

Few, if any, would argue it unfair for Nick to assert set-off to the extent of his $60 claim and tender a cash payment of $40 in full satisfaction of Jay's reciprocal claim. Indeed, as between two parties, the intuitive fairness of set-off is virtually unassailable; it simply requires a netting of accounts between mutually indebted parties. But when a third party, like an assignee, enters the fray, intuitive notions of fairness prove insufficient as a justification for the application of set-off. Indeed, when one of the mutual cross-claims is assigned, competing principles of fairness and commercial expediency become relevant, and the intuitive clarity we previously enjoyed morphs into haziness.

Nearly three decades ago, the Supreme Court of Canada enunciated the principles of equitable set-off in *Telford v Holt*.[3] Since then, numerous courts have cited and applied these principles. But the fog persists. As with other equitable doctrines, equitable set-off often hinges, fundamentally, on subjective notions of "fairness" and its logical counterpoint, "unfairness". According meaningful, coherent content to these concepts proves to be an intractable task. Yet because a right of equitable set-off is extraordinarily powerful, it is important that we understand as much as we can about where equitable set-off lies and does not lie.

A broad range of lawyers, engaged in an array of practice areas, must understand the contours of equitable set-off. Consider, for example, the arena of secured transactions. Ontario's *Personal Property Security Act* provides that a security interest in, or an absolute transfer of,[4] an account[5] is subject to the account debtor's right of equitable set-off.[6] Thus, in the secured transactions context, an equitable set-off claimant holds a superior position vis-à-vis competing secured creditors and purchasers. In the

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2 Wood, *supra* note 1 at paras 1-1 and 1-91.

3 [1987] 2 SCR 193, 81 AR 385 [*Telford*].

4 *Personal Property Security Act*, RSO 1990, c P-10, s 1(1): "“security interest” […] includes […] (a) the interest of a transferee of an account [...]" [*OPPSA*].

5 *OPPSA*, *ibid*: "“account” means a monetary obligation not evidenced by chattel paper or an instrument, whether or not it has been earned by performance, but does not include investment property."

6 *OPPSA*, *supra* note 4, s 40(1.1)(a).

banking industry, the potency of equitable set-off is accentuated since reciprocal debt obligations are endemic to the bank-customer relationship.[7] Indeed, a bank with a right of equitable set-off wields an enormously powerful realization tool as against its customer's deposit account(s).[8]

In light of the powerfulness and pervasiveness of equitable set-off, we undertake an investigation of its strictures using *Telford*, Canada's seminal decision on the subject, as our launching point. We aim to revisit *Telford*, with a critical eye, to detail the doctrine of equitable set-off, and to outline the case law that has emerged in the seminal decision's wake. Simultaneously, we demonstrate the intractability of resorting to a residual fairness standard under the "close connection rule" of equitable set-off, and posit that *Telford* typifies this intractability.

2. *Telford v Holt*

A) Facts

The decision emanated from an Alberta foreclosure action, brought by Holt against Telford, in respect of a mortgage originally granted to Canadian Stanley Development Ltd ("CSD") by Telford.[9] The factual background involved a complicated, though bizarre and crudely implemented, land-swap financing arrangement. Justice Wilson concisely described the initial transaction between Telford and CSD as follows:

> The Telford mortgage arose out of a real estate trade between the Telfords and Canadian Stanley. The Telfords sold their land (a domestic residence plus 40 acres) to Canadian Stanley. Canadian Stanley sold a parcel of land to the Telfords. The purchase price for the parcel of land sold by the Telfords to Canadian Stanley was $265,000. The purchase price for the piece of land sold by Canadian Stanley to the Telfords was also $265,000.
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> The transaction between the Telfords and Canadian Stanley required Canadian Stanley to pay the Telfords $165,000 for the Telford land and give a second mortgage back to the Telfords for $100,000 ("the Canadian Stanley mortgage"). The Telfords were to pay Canadian Stanley $115,000 for its parcel of land and give a first mortgage to Canadian Stanley for $150,000. The net effect of the combined transaction was that on closing Canadian Stanley would pay the Telfords $50,000

7 See Ronald CC Cuming, "Security Interests in Accounts and the Right of Set-Off" (1990–91) 6 BFLR 299.

8 See Clayton Bangsund, "PPSL Values" (2015) 57:2 Can Bus LJ 184 at 206.

9 The opposing parties in this dispute were actually married couples, Richard and Margaret Telford v Isaac and Edith May Holt. Both couples are referred to in the singular (and gender neutrally) throughout to avoid further complicating an already complicated state of affairs.

> which the Telfords would use for the purpose of financing the construction of a residence on their new land. The closing date was October 1, 1980.[10]

The $50,000 advance was used as bridge financing—to be repaid with interest on January 31, 1981—for the construction of a home on Telford's newly acquired land (referred to as "Whiteacre"; the land newly acquired by CSD is referred to as "Blackacre"). The net result, after closing, was that Telford held a $100,000 claim against CSD secured by a mortgage on Blackacre (the "Blackacre Mortgage") and CSD held a $150,000 claim against Telford secured by a mortgage on Whiteacre (the "Whiteacre Mortgage").[11] Interestingly, neither mortgage made reference to the other such that an independent observer viewing the Whiteacre Mortgage in isolation would have had no obvious way of discovering that it was connected to CSD's acquisition of Blackacre.[12]

Unbeknownst to Telford, CSD assigned its rights under the Whiteacre Mortgage to Holt as part payment of the purchase price for a third property CSD had acquired from Holt.[13] In early November 1980, Telford met with Outhwaite, CSD's principal. During this meeting, for reasons unexplained, Outhwaite persuaded Telford to postpone its priority position under the Blackacre Mortgage to another of CSD's lenders; payment terms were unaffected, but Telford's claim likely became undersecured as a result of the postponement.[14] At that time, Outhwaite did not notify Telford that the Whiteacre Mortgage had been assigned to Holt.

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10 *Telford*, *supra* note 3 at paras 3–4.

11 It appears to have been understood by Telford and CSD that the remaining scheduled payments, under both mortgages, would be set off as they came due (i.e. no further payments would actually be made after Telford's scheduled $50,000 payment on January 31, 1981); see *Telford*, *ibid* at para 21.

12 Although never stated in the decision, there is reason to believe that the initial land-swap transaction was tainted by manipulation or abuse. Why was the principal amount of the Whiteacre Mortgage set at $150,000, and the Blackacre Mortgage $100,000? If a principal purpose of the transaction was to furnish Telford with $50,000 in purchase money financing, and the properties were really of equivalent value, then why didn't the parties simply exchange land titles and Telford grant CSD a mortgage on Whiteacre securing the $50,000 principal amount? Tax reasons? Other commentators have pondered the bizarre structure of the transaction. See John AM Judge & Margaret E Grottenthaler, "Legal and Equitable Set-Offs" (1991) 70 Can Bar Rev 91 at 113 [Judge & Grottenthaler].

13 *Telford, supra* note 3 at paras 2, 7. The assignment took place several days prior to the transaction's effective closing date of October 1, 1980. There is no mention made by either the Alberta Court of Appeal or the Supreme Court of Canada of the value of the consideration furnished by Holt in exchange for the assignment of the Whiteacre Mortgage.

14 *Telford*, *ibid* at para 7. This also has a taint of manipulation or abuse. However, Telford had legal counsel who presumably could have been consulted prior to the postponement. Nonetheless, it is doubtful that Telford fully understood the legal implications of postponing its mortgage interest to another of CSD's creditors.

On November 13, 1980, Telford's legal counsel tendered payment of $50,000 to CSD's legal counsel. As reflected in trust conditions, Telford's counsel invoked set-off in respect of the parties' remaining reciprocal cross-claims of $100,000 and requested a discharge of the Whiteacre Mortgage.[15] Shortly thereafter, Telford's counsel was advised that the Whiteacre Mortgage had been assigned to Holt.[16] In early February 1981, Holt's legal counsel entered the picture, demanding payment of $50,000 plus interest, representing the first scheduled payment under the Whiteacre Mortgage.[17] Holt soon filed a statement of claim against Telford demanding $150,000 plus costs and interest on the basis that, under the terms of the Whiteacre Mortgage, Telford's act of default—in failing to make the scheduled payment to Holt on or before January 31, 1981—permitted Holt to accelerate and demand repayment of the entire principal.[18] Telford's counsel responded by paying the first scheduled payment into court.[19] Litigation ensued.

B) Decision

After Telford was denied set-off by both the Alberta Court of Queen's Bench[20] and the Alberta Court of Appeal,[21] the Supreme Court of Canada allowed a final appeal and ruled that Telford was entitled to set off its $100,000 claim against Holt's $150,000 claim under equitable set-off principles.[22] In rendering this unanimous decision, Justice Wilson articulated the basic Canadian principles of legal and equitable set-off.[23]

1) Legal Set-Off

Justice Wilson began by articulating the two basic requisites for legal set-off, quoting approvingly from the British Columbia Court of Appeal decision in *Canadian Imperial Bank of Commerce v Tuckerr Industries Inc*.[24]

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15 *Ibid* at para 8.

16 *Ibid* at para 10.

17 *Ibid*.

18 *Ibid* at para 11.

19 *Ibid* at para 12.

20 *Holt v Telford*, (ABQB), Foisy J [unreported].

21 *Telford v Holt*, 1984 ABCA 355, 37 Alta LR (2d) 399.

22 *Telford*, *supra* note 3 at para 43.

23 Contractual set-off was not discussed in any detail, but Justice Wilson agreed with the lower courts that contractual set-off was unavailable since the Whiteacre Mortgage and Blackacre Mortgage did not cross-reference each other (i.e. both transactions appeared to stand alone on the face of the governing documentation); *ibid* at para 21.

24 (1983), 46 BCLR 8, 1983 CanLII 302 (BCCA).

> 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."[25]

Noting that the second element, mutuality, was not satisfied since CSD had assigned its claim to Holt, Justice Wilson held that legal set-off was unavailable to Telford.[26] Thus, if Telford were to succeed in asserting set-off against Holt, it would have to do so under equitable principles.[27]

2) Equitable Set-Off

Justice Wilson next turned her attention to the principles of equitable set-off [citations omitted]:

> Equitable set-off is available where there is a claim for a money sum whether liquidated or unliquidated: see *Aboussafy v Abacus Cities Ltd.* More importantly in the context of this case, it is available where there has been an assignment. There is no requirement of mutuality. The authorities to be reviewed indicate that courts of equity had two rules regarding the effect of a notice of assignment on the right to set-off. First, an individual may set-off against the assignee a money sum which accrued and became due prior to the notice of assignment. And second, an individual may set-off against the assignee a money sum which arose out of the same contract or series of events which gave rise to the assigned money sum or was closely connected with that contract or series of events.[28]

Justice Wilson then articulated two rules regarding the effect of a notice of assignment on equitable set-off rights; a general rule (hereafter the "unconnected claims notification rule") and an exceptional rule (hereafter the "close connection rule") [citations omitted]:

> In *Canadian Admiral Corp v LF Dommerich & Co*, this Court affirmed the rule that a debt which has accrued due before a notice of assignment is received may be set off against the assignee. In that case an assignee sought to claim money from a corporation. The corporation sought to set-off a debt owed to it by the assignor. This debt had accrued due prior to the notice of assignment. The Court allowed the set-off stating at p. 240: "There is no doubt as to the general rule. The debtor has as against the assignee the same right of set-off as he would have had against the assignor at the time at which he receives notice of the assignment".
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> Thus, cases involving debts that arise from the same contract or closely inter-related contracts form an exception to the general rule. In these cases a debt arising out of

25 *Telford*, *supra* note 3 at para 25.

26 *Ibid* at para 26.

27 *Ibid.*

28 *Ibid* at para 27.

> the contract or closely inter-related contracts may be set- off against the assignee even if the debt accrues due after the notice of the assignment. The issue in our case therefore turns on whether the debt assigned and the liability sought to be set-off against it were so connected as to fall within the principle of the *Newfoundland Railway* case.[29]

a) Unconnected Claims Notification Rule

Under the unconnected claims notification rule, an account debtor can set off a money sum against the assignee which accrued and became due (i.e. was existing and payable) prior to the notice of assignment.[30] Under this rule, an account debtor is entitled to assert equitable set-off against an assignee to the same extent that it would have been able to assert legal set-off against the assignor immediately prior to receiving notice of the assignment.

b) Close Connection Rule

The close connection rule is more liberal than the unconnected claims notification rule. Under the close connection rule, debts accrued but not due at the time of notice of the assignment (i.e. debts existing but not payable) can nonetheless be set off by the account debtor against the assignee if the contracts to which the debts relate are closely connected and it would be manifestly unjust to refuse set-off in the circumstances.[31] Thus, unlike the unconnected claims notification rule, the close connection rule incorporates the *debitum in praesenti solvendum in futuro* principle (i.e. immediate set-off of an existing debt that becomes payable at a future date due to the effluxion of time). Additionally, the close connection rule applies, not only where the account debtor's claim is for a liquidated debt, but also where the account debtor's claim is unliquidated.[32]

3) Disposition

Ultimately, Justice Wilson concluded that equitable set-off was unavailable to Telford under the unconnected claims notification rule, but available under the close connection rule:

> The debts which the Telfords are seeking to set-off did not accrue due before the date of the notice of assignment. Thus, the debts can be set-off only if the Telfords

29 *Telford*, *supra* note 3 at paras 32–33.

30 *Ibid* at para 27.

31 *Ibid* at paras 33, 38.

32 *Ibid* at para 27. This demonstrates that there are also non-temporal reasons why one might assert the close connection rule of equitable set-off; see Benjamin Geva, "Rights in Bank Deposits and Account Balances in Common Law Canada" (2012) 28:1 BFLR 1 at 11–12.

> can demonstrate that they arise out of the same contract or closely inter-related contracts. In my view, the Telfords have succeeded in demonstrating this. In essence, what happened here was that the Telfords and Canadian Stanley "swapped" parcels of land. […] Because the Telford mortgage and the Canadian Stanley mortgage are part of the land exchange deal, being part of the consideration for the reciprocal transfers, they are, in my view, closely connected and meet the requirements for an equitable set-off. They were made with reference to one another.[33] It would be unfair to enforce only one side of the land exchange agreement.[34]

In allowing Telford's appeal, Justice Wilson held that equitable set-off was available and that the payment of $50,000 (plus interest) from Telford to Holt, along with the immediate set off of the future instalments under both mortgages, entitled Telford to a discharge of the Whiteacre Mortgage.[35]

3. Close Connection Rule

A) Examining the Relationship Between Close Connection & Manifest Injustice

Justice Wilson rationalized her decision, in part, on grounds of unfairness; indeed, unfairness was her closing argument.[36] However, based on the wording of the *Telford* decision alone, it is open to interpretation precisely *how* the concept of unfairness—and its logical counterpoint, fairness—is to be employed in the close connection rule's technical juridical analysis.

1) Coordinate Relationship Interpretive Approach[37]

Does unfairness—arriving at the conclusion that it would be manifestly unjust to refuse set-off—*naturally flow* from a finding that the cross-claims are closely connected? In other words, is there a coordinate one-to-one relationship between close connection and unfairness such that the former is a proxy for the latter? Restated more precisely and technically, is there a necessary and sufficient nexus between closely connected claims and unfairness, such that a finding of a close connection *irrefutably connotes*

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33 This statement contradicts the established facts, which clearly provide that the Whiteacre Mortgage and Blackacre Mortgage made no reference to each other; see *Telford*, *supra* note 3 at para 21. What Justice Wilson seems to be describing here is the parties' alleged understanding of how the transaction would be effected, namely, that the two sets of payments due under the mortgages would be set off against each other in due course.

34 *Ibid* at para 38.

35 *Ibid* at para 43.

36 *Ibid* at para 38.

37 We coined the descriptive terms "coordinate relationship interpretive approach" and "discrete interpretive approach" (*infra*) for ease of reference to the two competing interpretive approaches to the close connection rule of equitable set-off.

unfairness and thus legitimizes the allowance of set-off? An affirmative answer to each of these questions lends itself to the "coordinate relationship interpretive approach."

Conceptualize the coordinate relationship interpretative approach in action. Drawing on our example involving reciprocal account debtors, Nick and Jay, suppose that Jay assigns his account on which Nick is liable (the "impugned account") to Tom, and that Tom presents Nick with evidence of the assignment. Application of the coordinate relationship interpretive approach entitles Nick to assert equitable set-off against the impugned account if he can demonstrate a close connection between his claim against Jay and the impugned account. In order to invoke the close connection rule under the coordinate relationship interpretive approach, Nick need not establish, as a discrete matter, the fairness of the rule's application (or, more accurately, the unfairness of its refusal). Instead, under the coordinate relationship interpretive approach, close connection is a proxy for the fairness of the rule's application.

One might conclude that, in *Telford*, Justice Wilson adopted the coordinate relationship interpretive approach based on: (i) her articulation(s) of the close connection rule without explicit reference to unfairness,[38] and (ii) her fleeting mention of unfairness in the matter's disposition.[39] Respecting the latter point, if there is indeed a coordinate one-to-one relationship between close connection and unfairness, then a finding that claims are closely connected obviates the need to address unfairness as part of the analysis. Hence, one might point to Justice Wilson's cursory mention of unfairness—arguably a clinching afterthought—as evidence of her embrace of the coordinate relationship interpretive approach.

2) Discrete Interpretive Approach

However, there are also compelling reasons why one might reject the above interpretation, and instead read Justice Wilson's decision as an embrace of the "discrete interpretive approach." Under the discrete interpretive approach, unfairness is a discrete element that must be satisfied as a prerequisite to the application of the close connection rule of equitable set-off. To engage the close connection rule under the discrete interpretive approach, one (Nick, using our example) must establish both: (i) a close connection between cross-claims, and (ii) that it would be manifestly unjust to refuse set-off in the circumstances.

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38 *Telford*, *supra* note 3 at paras 27, 33 (text reproduced above at footnotes 28–29).

39 *Ibid* at para 38 (text reproduced above at footnote 34).

Since Justice Wilson quoted directly from at least three authorities that explicitly identify manifest injustice (or unfairness) in their articulations of the close connection rule,[40] one can surmise that Justice Wilson implicitly adopted the discrete interpretive approach. Consider, for example, this quoted excerpt from *Coba Industries Ltd v Millie's Holdings (Canada) Ltd*, per British Columbia Court of Appeal Justice Macfarlane:

> 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.[41]

Cited in support of British Columbia Court of Appeal Justice Macfarlane's synthesized excerpt was *Federal Commerce*.[42] An excerpt from Lord Denning's reasons in that decision was also quoted favourably by Justice Wilson:

> 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.[43]

Upon review of the two excerpts above, one might deduce that unfairness is indeed a discrete element of the close connection rule, and thus embrace a two-stage analytical approach. In order to apply the close connection rule of equitable set-off, the court must additionally conclude that it would be manifestly unjust, under *all the attendant circumstances*—beyond the mere presence of closely connected claims—to refuse set-off.

The discrete interpretive approach is coherent, but its correctness is debatable. For instance, the quoted excerpts above, from *Coba* and *Federal Commerce*, could plausibly be interpreted in a manner consistent with the coordinate relationship interpretive approach. The correct interpretation, assuming there is one,[44] seems to hinge, at least in part, on a proper

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[40] *Newfoundland v Newfoundland Railway Co* (1888), LR 13 App Cas 199, 1888 CarswellNfld 1 (WL Can) [*Newfoundland Railway Co*]; *Federal Commerce and Navigation Ltd v Molena Alpha Inc*, [1978] QB 927, [1978] 3 All ER 1066 (WL) [*Federal Commerce*]; *Coba Industries Ltd v Millie's Holdings (Canada) Ltd*, 65 BCLR 31, 1985 CarswellBC 214 (WL Can) (CA) [*Coba*].

[41] *Coba*, *supra* note 40 at para 25.

[42] *Supra* note 40.

[43] *Federal Commerce*, *supra* note 40 at 1078, as cited in *Telford*, *supra* note 3 at para 37.

[44] See Ronald Dworkin, *Law's Empire* (Cambridge, Mass: Harvard University Press, 1986).

construal of the words "that it would be." Does this phraseology suggest that a close connection *necessarily connotes,* in a causal manner, manifest injustice [coordinate relationship interpretive approach]? Or, alternatively, does the phraseology differentiate these concepts such that it recognizes the distinctness of closely connected claims and manifest injustice [discrete interpretive approach]? What answers does the case law furnish in response to these questions?

B) Close Connection: Authorities Before and After Telford v Holt

Since there is ambiguity in the Supreme Court of Canada's articulation of the precise analytical relationship between close connection and unfairness, it is worthwhile examining the judicial authorities—before, after, and including *Telford*—to aid in ascertainment and articulation of the contemporary analytical approach to applying the close connection rule of equitable set-off. As a preliminary task—before attempting to expound upon the precise relationship between the close connection rule and unfairness—it is helpful to gain a clearer understanding of the types of cross-claims that have, and have not, been characterized as "closely connected". The jurisprudence furnishes limited general guidance; for example, courts have held that both the timing and purpose of the contracts giving rise to the cross-claims are relevant considerations in determining whether a close connection exists.[45] The following is a sampling of impugned cross-claims that *have satisfied* the close connection requirement:

- In the context of a commercial property sale and leaseback transaction, a mortgagor landlord's monetary claim against the tenant seller under the lease agreement, and the tenant seller's monetary claim against the mortgagor landlord under the mortgage (assigned to a third party): *Coba*, British Columbia Court of Appeal, 1985.[46]

- In the context of a residential real estate development land swap, one party's monetary claim against its counterparty mortgagor under Mortgage A, and the counterparty mortgagor's monetary claim against the first party under Mortgage B (assigned to a third party): *Telford*, Supreme Court of Canada, 1987.[47]

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45 *Citibank Canada v Confederation Life Insurance Co*, 42 CBR (3d) 288 at para 40, 1996 CanLII 8269 (ON SC) [*Citibank*]: "The Term Deposit transaction was entered into between Citibank and Confederation Life on May 23, 1984, at a different time, and for entirely different purposes than the bond agreement and swap agreement transactions later and separately agreed to between the parties."; see also *Baxter v West Coast Air Ltd*, 2012 BCSC 1097 at para 37, [2012] BCWLD 8555 [*Baxter*].

46 *Supra* note 40 at para 33.

47 *Supra* note 3 at para 38.

- In the context of insurance industry corporate family cross-debt, one insurance company's monetary claim against a second insurance company on account of unremitted insurance premiums, and the second insurance company's monetary claim against the first insurance company on account of shared operating expenses incurred by the second insurance company: *A & E Capital Funding Inc v Maplex General Insurance Co*, Ontario Court of Appeal, 1999.[48]

- In the context of agricultural grain sales, a grain broker's monetary claim against a farmer under a future grain delivery contract, and the farmer's reciprocal monetary claim against the grain broker under another future grain delivery contract: *Saskatchewan Wheat Pool v Feduk*, Saskatchewan Court of Appeal, 2003.[49]

- In the accounts factoring context, a bank's monetary claims against a subcontractor service provider under assigned consultant claims, and the subcontractor's monetary claim against the bank on account of services provided (assigned to an account factoring company): *Commercial Factors of Seattle LP v Canadian Imperial Bank of Commerce*, Ontario Superior Court of Justice, 2010.[50]

- In the aviation industry context, a purchaser's monetary claim against the seller arising from the seller's breach of the sale agreement, and the seller's reciprocal monetary claim against the purchaser under retirement allowance provisions in an executive employment agreement entered into concurrently with the sale agreement: *Baxter*, British Columbia Supreme Court, 2012.[51]

- In the professional legal services context, a lawyer's monetary claim against his client for legal services rendered, and the client's reciprocal monetary claim against the lawyer on account of monies advanced for investment in an ultimately unsuccessful business

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48 10 CBR (4th) 225 at para 15, 1999 CanLII 18717 (ON CA) [*A&E*]. Interestingly, the Court of Appeal held, implicitly, that York's monetary claim against Maplex on account of outstanding reinsurance premiums was not closely connected with Maplex's reciprocal monetary claim against York on account of unremitted insurance premiums.

49 2003 SKCA 46 at para 86, 232 Sask R 161 [*Saskatchewan Wheat Pool*]. But the grain broker was unable to establish a close connection between its monetary claim against the farmer under a future grain delivery contract, and the farmer's monetary claim against it on account of his equity stake in the grain broker (see para 98).

50 2010 ONSC 3516 at para 52, 16 PPSAC (3d) 181 [*Commercial Factors*].

51 *Supra* note 45 at para 41.

venture: *Nicolou v McLennan & Associates*, Ontario Superior Court of Justice, 2013.[52]

Next, consider this sampling of cross-claims that <u>have failed to satisfy</u> the close connection requirement:

- In the agricultural context, a mortgagor farmer's damages claim against a mortgagee credit union stemming from the credit union manager's fraud, and the mortgagee credit union's monetary claim against the mortgagor farmer under another valid mortgage: *Landis Credit Union Ltd v Wirachowsky*, Saskatchewan Court of Queen's Bench, 1991.[53]

- In the agricultural context, a mortgagor farmer's compensatory and punitive damages claims against a mortgagee bank arising from the bank's misconduct during the realization process, and the mortgagee bank's monetary claim against the mortgagor farmer under the mortgage: *Royal Bank v Wilton*, Alberta Court of Appeal, 1995.[54]

- In the derivatives industry context, a bank's monetary claim against an insurance company counterparty under derivatives contracts (options and swaps), and the insurance company counterparty's reciprocal monetary claim against the bank under a term deposit: *Citibank*, Ontario Superior Court of Justice, 1996.[55]

- In the context of corporate family cross-debt in the commercial real estate investment industry, one company's monetary claims against related companies under inter-family loans, and *other distinct* related companies' monetary claims against the first company under inter-family loans: *China Dragon Fund Ltd v FIC Real Estate Fund Ltd*, British Columbia Supreme Court, 2010.[56]

Although these samplings furnish insight into the types of claims that satisfy the close connection requirement, it is difficult to discern commonalities,

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52 2013 ONSC 1622 at para 17, 307 OAC 56 [*Nicolou*].

53 (1991), 98 Sask R 274 at paras 14, 16, 1991 CanLII 7625 (SKQB).

54 (1995), 28 Alta LR (3d) 1 at paras 35, 37, 123 DLR (4th) 266 (CA), overruling *Wilton v Royal Bank*, 82 Alta LR (2d) 237, (1991) 83 DLR (4th) 568 (QB).

55 *Supra* note 45 at paras 27, 40, aff'd (1998), 37 OR (3d) 226, 1 CBR (4th) 206 (CA). Citibank conceded that there was not a close connection. The trial and appellate courts accepted the concession, and consequently did not examine the matter closely. The trial court also accepted Confederation's concession of a close connection between its term deposit and Citibank's credit card debt claims, thus set-off was allowed to that limited extent (see para 12).

56 2010 BCSC 1698 at para 42, 73 CBR (5th) 140 [*China Dragon*].

beyond timing and purpose, connotative of a close connection. Justice Jackson of the Saskatchewan Court of Appeal, notes this difficulty, suggesting that a review of authorities may be largely unhelpful since these matters are so context specific that it "is not always apparent what the result will be in any particular case."[57] Simply put, context matters.[58] Equity's subjective, discretionary nature makes it problematic to pluck "equitable principles" from judicial decisions in an attempt to apply them broadly on a go-forward basis.

C) Articulating the Relationship Between Close Connection and Manifest Injustice Under the Close Connection Rule of Equitable Set-Off

Having completed the preliminary task of identifying the types of cross-claims that attract characterization as closely connected, we now return to the more important task of identifying and expounding upon the role of unfairness in the application of the close connection rule of equitable set-off. In particular, we undertake to determine whether unfairness naturally flows from a finding of close connection [coordinate relationship interpretive approach], or whether unfairness must be considered discretely [discrete interpretive approach].

A case law review reveals instances of judicial language usage that lends itself to the coordinate relationship interpretive approach. Consider, for example, the words of Justice Bruce in *China Dragon*:

> The fact that all the loans were for the common purpose of real estate development is clearly not a substantial connection and not one that would render it, (sic) "manifestly unjust" to enforce one debt without considering the cross-claim. Put another way, the evidentiary underpinning in this case is insufficient to establish the requisite close connection between the cross-claims.[59]

This excerpt seems to suggest that manifest injustice flows from a close connection, consistent with the coordinate relationship interpretive approach. It intimates a causal link (not a mere correlative link) between close connection and manifest injustice.

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57 *Saskatchewan Wheat Pool*, *supra* note 49 at para 84.

58 Recall that equitable set-off arises in innumerable contexts, and that the close connection rule may assist an equitable set-off claimant on a number of accounts including where there is lack of mutuality, unliquidated debt and/or unmatured debt. The close connection rule encapsulates more than mere temporal relief. See note 32.

59 *Supra* note 56 at para 42. Note that had the Court adopted the discrete interpretive approach, it could have concluded that there was a close connection yet still concluded that it would not have been manifestly unjust to refuse set-off in the circumstances.

However, there is an abundance of judicial authority that incontrovertibly embraces the discrete interpretive approach and suggests that it is preferred to the coordinate relationship interpretive approach. For example, historical support for the discrete interpretive approach is found in the crucial penultimate sentence of an oft-quoted passage from *Newfoundland Railway Co*, where the Privy Council recognized that a universal rule of fairness cannot be abstracted from a finding of close connection:

> It would be a lamentable thing if it were found to be the law that a party to a contract may assign a portion of it, perhaps a beneficial portion, so that the assignee shall take the benefit, wholly discharged of any counter-claim by the other party in respect of the rest of the contract, which may be burdensome. There is no universal rule that claims arising out of the same contract may be set against one another in all circumstances. But their Lordships have no hesitation in saying that in this contract the claims for subsidy and for non-construction ought to be set against one another.[60] [emphasis added]

Next consider *Coba*, where the British Columbia Court of Appeal identifies manifest injustice as a distinct pre-condition to the application of equitable set-off under the close connection rule:

> I do not think that there will be many cases in which a court will allow equitable set-off. The cases will be confined to those where it would be manifestly unjust to refuse the relief.[61]

Also consider *A&E*, where the Ontario Court of Appeal, accepting that a close connection existed between the impugned cross-claims, addressed fairness as a separate matter:

> We accept this description of equitable set-off. In our view, the claims are very closely connected. It would also be unfair to allow Maplex to claim the full operating debt when it paid a portion of [...] those expenses with money belonging to York. York should be allowed to set-off the amount of the shared operating expense debt attributable to the relevant period ($29,920.00) against the unremitted premium debt owed to it by Maplex.[62]

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60 *Supra* note 40 at 212, as cited in *Telford*, *supra* note 3 at para 29.

61 *Coba*, *supra* note 40 at para 47.

62 *A&E*, *supra* note 48 at para 15; For other instances in which unfairness is discussed seemingly discretely, see *Algoma Steel Inc v Union Gas Ltd*, 63 OR (3d) 78 at para 30, 2003 CanLII 30833 (ON CA): "Accepting the correctness of the motion judge's determination that the 1998 and 2000 gas services contracts exhibit a sufficient degree of connection to justify equitable set-off, it seems to me that it would be manifestly unjust to allow Algoma to insist on payment of the rebate arising under the former without allowing Union to set-off all the amounts owing under the 2000 arrangement." See also *Nicolou*, *supra* note 52 at para 17: "In the present appeal, I find that the two transactions entered into by the appellant/

The discussion in the above excerpt would have been superfluous had the Court adopted the coordinate relationship interpretive approach. The mere fact that the Court's discussion of unfairness exists is evidence of its adoption of the discrete interpretive approach.

Finally, a recent judicial pronouncement, furnished in *Green v Mirtech International Security Inc*, clearly demonstrates that unfairness is regarded as a discrete prerequisite to the application of the close connection rule of equitable set-off:

> It is said that the opposing claims must flow from the same transaction or relationship between the parties. If such is the case, there is the final requirement that it would be unconscionable to allow the plaintiff to proceed without permitting a set-off.[63]

4. Reflection & Critical Examination

A) General Assessment

The discrete interpretive approach is sensible. Unlike the coordinate relationship interpretive approach, it recognizes the critical importance of claim interconnectedness while simultaneously recognizing that something beyond a close connection is required in order to attract application of the close connection rule. It is indubitably true that a close connection between cross-claims militates in favour of the conclusion that it would be manifestly unjust to refuse set-off in the circumstances. Moreover, it is likely true that close connection is a necessary condition for manifest injustice. But that is as far as it goes. Close connection is not a sufficient

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defendant and plaintiff were between the same parties at the same time that the parties were in a business relationship to each other. The connection is sufficiently close to warrant the exercise the equitable jurisdiction of this court. The remedy of set-off will not result in any form of inequity. It is my opinion that the appellant's cross-claim is so closely connected to the general business dealings of the parties that it would be manifestly unjust to allow the plaintiff to enforce re-payment of McLennan's debt without taking into account the cross-claim by the appellant McLennan. The plaintiff's claim and the cross-claim, according to the authorities, need not arise out of the same contract. These two claims are closely connected in time, in the context of business dealings between the same parties and I am of the opinion that it would be manifestly unjust to allow the cross-claim of the appellant/defendant."

[63] 49 ETR (3d) 94, 2009 CanLII 2905 (ONSC) at para 17.

condition for application of the rule.[64] What is unfair, or manifestly unjust, is rightly a discrete and contextual determination.[65]

Closeness of connection between cross-claims only speaks to unfairness from the set-off claimant's perspective.[66] A proper unfairness assessment also requires consideration of the matter from the point of view of the assignee (i.e. Tom, or some other intervener). What factors speak to unfairness from the assignee's perspective? Consider the following non-exhaustive list of questions, which may assist in this assessment: Was the assignee aware of the closely connected cross-claim when he acquired the chose in action? Did the assignee engage in any deceptive behaviour, or otherwise collude with the assignor in an effort to undermine the rights of the set-off claimant? What value did the assignee furnish for the chose? Is there any prevailing policy reason why the particular claim sought to be set off against should be treated as freely tradable, unencumbered property, such that this recognition overwhelms the justification for set-off?

The close connection rule is immensely powerful. It effectively permits a successful claimant to accelerate a debt that would otherwise mature in the future. Its application requires forceful justification, even if the justificatory reasons are nuanced, highly contextual and difficult to articulate. The

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[64] One might be tempted to point out that this renders the label "close connection rule" a misnomer, since its application ultimately hinges on fairness considerations. One might ask, "Why do we call it the 'close connection rule' if a finding of close connection does not necessarily attract its application?" But, of course, the air in this balloon rapidly dissipates when one recalls that we, not the courts, coined the descriptive term "close connection rule".

[65] In the bankruptcy and insolvency context, competing notions of fairness inherently arise since there is, by definition, a scarcity of assets available for satisfaction of all the bankrupt's creditors. Permitting equitable set-off against the bankrupt estate has the effect of preferring a set-off claimant over the general body of creditors in violation of the *pari passu* principle. See e.g. *Citibank*, *supra* note 45 at para 30: "In insolvency situations, set-off provides a creditor with an advantage which other creditors, ranking *pari passu* except for the setoff (sic), do not have. It puts the advantaged creditor in what is tantamount to a secured position, something which was not a part of the bargain with the insolvent company in the first place. On the other hand, there is an inherent unfairness where a debtor/creditor is required to pay the liquidator everything that is legitimately owed to the insolvent company but is only able to collect a fraction of what is equally legitimately owing by the insolvent company, if anything."

[66] Note that close connection is not the only factor that speaks to unfairness from the set-off claimant's perspective. Other pertinent questions include: Was the set-off claimant privy to, aware of, or acquiescent to, the assignment? For example, was the set-off claimant aware that the assignor, as part of its business, regularly assigned claims to third parties? Or rather, was the set-off claimant of the understanding, or led to believe, that the cross-claim would not be assigned by the assignor, but rather held and extinguished in due course by way of set-off?

problem with the coordinate relationship interpretive approach is that it only considers matters from the set-off claimant's perspective, using close connection as a proxy for manifest injustice. In equating close connection with manifest injustice, the coordinate relationship approach only considers half of the relevant picture. The discrete interpretive approach considers the whole picture, and is thus more coherent as a framework for the close connection rule of equitable set-off.

The close connection rule of equitable set-off is one that ultimately hinges on, or reduces to, a question of fairness. As such, the discrete interpretive approach, though sensible, is no panacea. As discussed below, concepts such as *fairness*, *justice* and *equity* only make sense in context and do not appear susceptible to judicial or statutory predefinition. However, even in light of this truth, at least it can be said that the discrete interpretive approach mitigates these difficulties. By adopting a two-stage process and filtering out cases that do not involve closely connected claims, the discrete interpretive approach narrows, to a degree, the class of cases that require resort to a "fairness assessment". Close connection continues to play a critical role in the second stage of the assessment, but not a dispositive one.

B) The Problem with Fairness

As with all equitable doctrines, a key object of the close connection rule of equitable set-off is to mitigate the severity of strict legal rules and produce fair outcomes.[67] However, like beauty, fairness lies in the eyes of the beholder. Our notion of what is *fair*, *just* and *equitable* is highly subjective, much like our "notion[s] of what is genuine, tall or warm."[68] The inherently subjective nature of these concepts makes defining them, in any meaningful fashion, especially arduous. In circular fashion, Lord Denning defined "justice" as "the solution that the majority of right-minded people consider fair."[69] This nebulous standard, articulated by equity's champion, affords judges considerable discretion to decide cases according to their own proclivities. John Selden captured this idea nicely:

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[67] John McGhee, ed, *Snell's Equity*, 30th ed (London, UK: Sweet & Maxwell, 2000); Sarah Worthington, *Equity* (New York: Oxford University Press, 2006); *Telford* is a textbook example of equity in action. While legal set-off was unavailable to Telford, the Supreme Court of Canada, on grounds of fairness and to mitigate the perceived severity of the strict legal rule, allowed Telford an equitable set-off against Holt.

[68] HLA Hart, *The Concept of Law* (London, UK: Oxford University Press, 1961) at 156.

[69] Charles Stephens, *The Jurisprudence of Lord Denning*, *A Study of Legal History*, *Volume III: Freedom Under the Law: Lord Denning as Master of the Rolls*, *1962–1982* (Newcastle upon Tyne, UK: Cambridge Scholars Publishing, 2009) at 2.

> Equity is a Roguish thing: for Law we have a measure, know what to trust to; Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the Standard for the measure, we call a Foot, a Chancellor's Foot; what an uncertain Measure would this be? One Chancellor has a long Foot, another a short Foot, a Third an indifferent Foot: 'Tis the same thing in the Chancellor's Conscience.[70]

Fairness is particularly difficult to adjudge when two innocent, afflicted parties advance competing claims against the same property. One must win, one must lose. Accordingly, difficulties will inevitably arise in applying the close connection rule of equitable set-off. If equitable set-off is about demanding fairness, the question becomes—fairness for whom?

C) Fairness for Whom? Critically Examining Justice Wilson's Application of the Close Connection Rule of Equitable Set-Off in Telford v Holt

Recall Justice Wilson's brief mention of unfairness in her disposition of the matter in *Telford*:

> Because the Telford mortgage and the Canadian Stanley mortgage are part of the land exchange deal, being part of the consideration for the reciprocal transfers, they are, in my view, closely connected and meet the requirements for an equitable set-off. They were made with reference to one another. It would be unfair to enforce only one side of the land exchange agreement.[71]

At first glance, the unfairness explanation is rather pleasing. It is undeniably accurate; after all, it seems unfair—perhaps even manifestly unjust—that Telford, given its understanding of the land-swap transaction mechanics from the outset, should be liable to Holt for the entire $150,000 while holding a potentially worthless claim against CSD. Without looking deeper, this appears to be a persuasive ground for allowing Telford to set off under the close connection rule.

However, consider the situation from Holt's perspective. There is nothing in the text of the decisions that suggests that Holt was involved in any of CSD's dealings with Telford, or that Holt behaved inappropriately in acquiring the Whiteacre Mortgage from CSD.[72] Indeed, on the face of the decisions, Holt appears to have been an arm's length party who acquired,

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[70] SW Singer, ed, *The Table-Talk of John Selden*, 2nd ed (London, UK: John Russell Smith, 1856) at 49.

[71] *Telford*, *supra* note 3 at para 38.

[72] One wonders whether the Court concluded, beneath the surface, that Holt was less "innocent" than Telford. It simply is not clear.

for valuable consideration,[73] a secured asset from CSD on the basis of legal documents (and, presumably, land titles records) that made *absolutely no mention* of any land-swap arrangement involving Blackacre. Assuming this was the case (i.e. that Holt was not involved in any nefarious activity), is it fair that Holt, after having reviewed the Whiteacre Mortgage and acquiring it for valuable consideration, should have its claim reduced by virtue of the set-off of an unpublicized cross-debt?[74] Since Holt had no notice of the closely connected contract and no sure method of discovering such connection, the decision seems decidedly unfair—perhaps even manifestly unjust—from Holt's perspective, just as it did from Telford's.[75]

An obvious question arises. As between the two seemingly unfair outcomes described above—one unfair to Telford, the other unfair to Holt—does (or should) the resolution of the matter depend on which of the two outcomes is *less unfair*? We think it must. Yet how does one measure this without the benefit of some predefined conception of relative injustice? The problem, when scarcity is involved, is that there is no fair choice; one is forced to select between two unfair choices.[76] It is therefore interesting to observe that equitable set-off, like the application of any priority rule, is a zero-sum game,[77] and ironically, is inherently incompatible with some of

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[73] Again, it would be very interesting to know the value allocated to the Whiteacre Mortgage in the transaction between CSD and Holt. Was it an amount approaching $150,000 (perhaps discounted slightly)? Or was it an amount nearer $50,000 (the amount it turned out to be worth)?

[74] Rhetorical question. See Judge & Grottenthaler, *supra* note 12 at 113, where the authors make a similar point.

[75] Consider a similar scenario in a different context. In *National Provincial Bank Ltd v Ainsworth*, [1964] Ch 665 at 676–77, [1965] 1 All ER 688 (CA) (WL), Lord Denning was left to decide who, as between a deserted wife and an unpaid mortgage lender, was entitled to possession of a family home after the husband left his wife and defaulted on loan payments. Relying on principles of fairness, Lord Denning concluded that the law of equity recognizes a "deserted wife's equity" over the interest of the mortgage lender. Although his decision has been celebrated for producing a just outcome and advancing women's rights, it leaves unaddressed the relative unfairness of the outcome from the mortgage lender's perspective. Since the husband granted a mortgage in return for valuable consideration (i.e. a loan for his business), Lord Denning's decision seems decidedly unfair from the lender's perspective, much as it did from Holt's in *Telford*. It is noteworthy that Lord Denning's decision was overturned by the House of Lords, see *National Provincial Bank Ltd v Ainsworth*, [1965] AC 1175, [1965] 2 All ER 472 (HL) (WL).

[76] See *Muscat v Smith*, [2003] EWCA Civ 962 at para 27, [2003] 1 WLR 2853 (WL) per Lord Justice Sedley: "These principles appear to me to be as sound today as they were a century and more ago, and to be dispositive of the problem before the court. Equally, if not more important, they seem to me to produce the least unjust outcome." [emphasis added]

[77] Set-off is binary, all or nothing. Either the claimant sets off the entire amount, or it sets off none of it. Should courts of equity impose equitable sharing principles outside of the bankruptcy and insolvency context?

our intuitive notions of equity and fairness (in the strict moral sense) which might suggest, for example, that we "split it down the middle."[78]

We do not suggest that *Telford* was wrongly decided because Justice Wilson appealed to notions of unfairness (to Telford) in support of her disposition of the matter. Rather, we question her assessment of fairness in context. Justice Wilson did not give adequate consideration to competing claims of fairness and commercial expediency, which become acutely relevant when mutual cross-claims are subject to assignment. As between Telford and Holt, it may have been more appropriate (or less unfair) to impose the loss on Telford since it was in a position, from the outset, to negotiate assignment restrictions and contractual set-off provisions into the mortgage documents it executed with CSD. Moreover, at one stage of dealings, Telford voluntarily postponed its priority position on the Blackacre Mortgage—a huge mistake. But for the postponement, Telford would not have been prejudiced by the unavailability of equitable set-off. The allowance of equitable set-off essentially *reversed* the effect of the postponement from Telford's perspective, or, in other words, *rescued Telford from itself,* at Holt's expense.

Holt almost certainly overpaid for the Whiteacre Mortgage on account of a latent defect. It is therefore arguable that the close connection rule of equitable set-off ought not to have applied on the basis that, having regard for all the circumstances, it would not have been manifestly unjust to refuse Telford set-off. Along this line of reasoning, refusing equitable set-off to Telford would have been less unfair (to Telford) than the unfairness (to Holt) produced by the Supreme Court of Canada's allowance of equitable set-off.

Of course, one could counter, in support of Justice Wilson's reasoning, that Holt rightly bore the loss in this situation because it could have inquired with Telford, the account debtor on its newly acquired mortgage claim, about the state of accounts from the outset. Moreover, Holt could have requested an explicit waiver of Telford's set-off rights before acquiring the Whiteacre Mortgage, but did not do so.[79] In any event, regardless of one's preference of outcome, it must be recognized that allowing equitable set-off in *Telford*

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78 *Popov v Hayashi*, 2002 WL 31833731 (Ca Sup Ct).

79 *Commercial Factors*, *supra* note 50 at para 54; *Coba*, *supra* note 40 at paras 48–49. See also *Sun Life v Yellow Pages*, 2011 ONSC 4184 at paras 59, 64–67, 2011 CarswellOnt 6612 (WL Can), where the Court upheld, in favour of an assignee, the account debtor's waiver of set-off rights.

merely shifted the loss from one innocent party (Telford) to another (Holt) thereby forcing the unfortunate loser to pursue CSD for recompense.[80]

5. Conclusion

The close connection rule of equitable set-off ultimately hinges on fairness.[81] Rules of this nature are inherently difficult to apply given their subjective nature. Since these types of rules do not appear to be avoidable, the best we can do—if we hope to maintain a modicum of coherency and predictability in the law—is limit the number of instances in which the residual question, "what is fair?", arises and becomes dispositive. One may quibble over the niceties of the close connection rule of equitable set-off and/or its articulation, but one cannot deny that it performs a limiting function. The close connection rule may not overcome the intractability of the fairness standard, but neither does it exacerbate that intractability.

The brief synopsis of the case law since *Telford,* undertaken above, demonstrates the pervasiveness of equitable set-off in a broad array of circumstances. As noted in the introduction, the secured transactions arena presents but one unique context.[82] Others include, for instance, judgment enforcement[83] and bankruptcy & insolvency.[84] Since equitable set-off is a powerful right that may be asserted in a multitude of contexts, it is important that we understand the strictures of equitable set-off as clearly as possible. Accordingly, we have reviewed *Telford* and its progeny in an effort to explore and explicate the principles of equitable set-off including, most notably, the close connection rule. Simultaneously, we have presented *Telford* as a textbook example of the inherent inequities of equitable set-off, and demonstrated why resort to a residual fairness standard can pose intractable problems for an arbiter. The inequity in equitable set-off becomes readily apparent when the answer to the residual fairness question resolves a dispute between two pitiable parties—a Telford and a Holt—vying for a finite and scarce resource in the all-or-nothing world of law and equity.

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[80] Holt could have pursued CSD since CSD's cross-indebtedness to Telford was extinguished by virtue of the set-off against Holt. We conducted a case law review, and found no reported decision in which Holt and CSD were litigants.

[81] Not every equitable rule hinges on fairness. The unconnected claims notification rule of equitable set-off, for example, does not resort to the residual fairness question. Instead, its applicability or inapplicability is determined on the basis of the objective criteria outlined above.

[82] See e.g. *OPPSA*, *supra* note 4, s 40(1.1)(a).

[83] See e.g. *The Enforcement of Money Judgments Act*, SS 2010, c E-9.22, s 65(3).

[84] See e.g. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 97(3).