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## CASE SUMMARY: THE DEFENCE OF SET-OFF NOT SUITABLE FOR DETERMINATION BY SUMMARY TRIAL

**Insurance law – Subrogation – Apportionment and contribution of claims – Set-off;  
Practice – Summary judgments, availability**

[Larry's Refrigeration & Appliance Repairs Inc. v. Woodward's Oil Ltd.](#)

In defence to a subrogated claim, a defendant raised the defence of set-off in relation to monies owed to it by the insured. Whether this was a valid defence in a subrogated action was a complex legal issue which raised triable issues and was not suitable for determination on summary trial.

[2016] N.J. No. 322

2016 NLTD(G) 152

Newfoundland and Labrador Supreme Court – Trial Division – General Division

September 21, 2016

D.F. Hurley J.

While delivering gasoline to the insured's gas station, the defendant spilled approximately 1,400 litres of oil. The defendant admitted negligence, but raised the defence of set-off in relation to monies owed to it by the insured. The insurer brought a subrogated action and the insured brought an action in its own right for the uninsured portion of the loss. A consent order was filed wherein it was agreed that the set-off defence would apply in both actions.

The insurer brought an application for summary judgment. The issue was whether the set-off defence was a bone fide defence in the subrogated claim. The insurer relied on decision from Ontario and the defendant relied on a decision from British Columbia in which the courts had reached opposite conclusions. The two jurisdictions recognized that their respective decisions were not reconcilable and the Supreme Court of Canada had not considered the issue.

In view of the complex question of law raised by the set-off defence, the Court held that the triable issues existed that were not suitable for determination by summary trial. In parting, the Court encouraged the parties to consider making an application for a determination of a point of law under Rule 38 of the Rules of Supreme Court, 1986, c. 42, Sch. D, as determining the set-off issue would substantially dispose of the action.

This case was digested by [Michael J. Robinson](#) and edited by [David W. Pilley](#) of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact them directly at [mrobinson@harpergrey.com](mailto:mrobinson@harpergrey.com) or [dpilley@harpergrey.com](mailto:dpilley@harpergrey.com) or review their biographies at <http://www.harpergrey.com>.