

# LAW REFORM COMMISSION OF BRITISH COLUMBIA

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## Backgrounder

### LRC 97—Report on Set-Off

Date: July 1998

Set-off is in effect a defence based on the view that the court should look at the net effect of cross-claims between parties. Counterclaim is a more modern procedure that involves each party bringing separate proceedings that are heard at the same time. Any cross-claim can be brought by counterclaim where as set-off is more limited in its application.

The rules of set-off can be very complex, being made up of legislative, common law, and equitable principles. The aim of the report is to evaluate the role that set-off plays in the modern legal system with particular reference to whether it still retains a useful purpose in the light of the introduction of counterclaim.

The report begins by explaining when set-off can be raised. Essentially, a defendant may raise set-off against a claim of a plaintiff in three distinct situations: (1) where there are mutual debts to be set-off, a claim can be made under statute; (2) the common law permits set-off, known as “abatement,” in limited situations and (3) equity allows set-off where it is equitable to intervene. Modern courts have tended to permit set-off in equity where the claims are sufficiently related.

As a means of assessing whether set-off retains any useful purpose, the report examines situations where in practice the right is still asserted. It looks first at set-off between the original parties and then as against a successor in title. The conclusion drawn is that for the most part rights of counterclaim have largely removed the need for set-off between the original parties. Where it does play a more significant role is where a third party acquires the right to proceed on a claim, as a counterclaim cannot be made against a successor in title. This situation leads to unfairness as it limits claims that can be raised against a successor in title, effectively putting them in a better position than the original plaintiff. The report considers possible justifications for this before examining arguments in favour of having wider rights of set-off. The conclusion reached is that no convincing rationale exists for limiting the rights of a defendant where a third party becomes entitled to enforce a claim.

Another problem with set-off concerns claims that are not fully enforceable or complete until after an assignment of a principal demand to a third party has taken place. The report

highlights in particular difficulties that the courts have faced in applying the right of set-off to liabilities that are owed but not payable until after a notice of assignment is received and recommends that they should be treated in the same way as obligations due before an assignment.

The overall conclusion reached in the report is that the law relating to set-off is outdated and badly in need of reform. Recommendations are made to replace it with revised rights of counterclaim. The report includes draft legislation.

### **Further Developments**

The report's recommendations have not been implemented by legislation.