Privity of Contract and Third Party Beneficiaries 2007

CIVIL LAW SECTION

PRIVITY OF CONTRACT AND THIRD PARTY BENEFICIARIES

Maria Lavelle, Alberta Law Reform Institute

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TABLE OF CONTENTS

II. Judicial Devices, Statutory Provisions and the "Principled Exception"

(A) Judicial Devices

(B) Statutory Provisions

(C) The "Principled Exception"

(D) The Enforceability of An Agreement by a Third Party Beneficiary

III. Other Corollary Issues.

(A) Identification of Third Parties

(B) Variation and Rescission

(C) Defences

(D) Overlapping Claims

IV. The Need for Reform

(A) Preliminary Consultations

(B) Reforms in Other Jurisdictions

(i) Canada

(ii) Other Common Law Jurisdictions Outside of Canada

U.K

Ireland

New Zealand

Australia

Asia

United States

UNIDROIT

V. Options for Reform

(A) Judicial Development of Third Party Rights

EXECUTIVE SUMMARY

[1] This paper reviews the issue of privity of contract and third party beneficiaries. It concludes that the law is in need of reform and that a uniform proposal for reform from the Uniform Law Conference of Canada (ULCC) would improve the prospects for implementation across Canada.

[2] The doctrine of privity of contract provides that, as a general rule, a contract cannot confer rights or impose obligations arising under it to any person who is not a party. The doctrine has long been criticized as artificial and contrary to the parties' intention to benefit a third party. As a result, the courts have frequently resorted to devices such as agency or trust to allow a third party to enforce a benefit conferred upon it. Legislation has also made incremental inroads into the doctrine by providing for certain specific exceptions. Furthermore, the Supreme Court of Canada created a "principled exception" to the doctrine.[1] Subsequent lower courts decisions, however, have tended to limit the application of this "principled exception" holding that it cannot be used by third parties as a sword, but only as a shield. The result is a complex series of exceptions and judicial devices which, although mitigating the application

of the privity doctrine, have not precluded the possibility of injustice occurring.

[3] The Alberta Law Reform Institute (ALRI) recently completed a preliminary assessment of this issue. It found the current state of the law in Alberta to be problematic, however, initial consultations with the Alberta legal community revealed polarized views as to the perceived need for reform. While some lawyers had encountered this issue in the course of their practice and felt it to be in need of reform, other practitioners were not aware of the issue or simply worked around it. Further, the Alberta government indicated that reforms in this area were not a priority. ALRI concluded that success in implementation would depend on raising awareness of this issue in the legal community in Alberta and would be further assisted by a proposal for uniform law reform from the ULCC.

[4] ALRI's experience is not unique. Law reform bodies in Ontario, Manitoba, Saskatchewan and most recently Nova Scotia have recommended legislative reforms to the doctrine of privity of contract, but to date, none of these recommendations have been implemented. In Canada, Quebec and New Brunswick are the only provinces with legislation addressing this issue.

[5] In failing to reform the doctrine of privity of contract with respect to third-party beneficiaries, Canada is out of step with other common-law jurisdictions. In Australia (Western Australia and Queensland), the United Kingdom, New Zealand, the U.S., and Singapore the privity doctrine has been reformed through legislation. Further law reform commissions in Hong Kong and Ireland recently recommended legislative reforms to address this issue.

[6] A ULCC project on privity of contract and third party beneficiaries would have the advantage of proposing a uniform solution to an area of law in need of reform and would stand a greater chance of implementation than recommendations from individual provincial reform bodies. The ULCC project would benefit from the body of research that has already been completed by other law reform commissions on this

issue.

REPORT

I. The Doctrine of Privity of Contract

(A) The Doctrine and Third Party Beneficiaries

[7] The common law doctrine of privity means that a "contract cannot, generally, confer rights or impose obligations arising under it on any person except the parties to it."[2] The second limb of this doctrine (under which a contract cannot impose liabilities on anyone except a party to it) is generally regarded as sensible and just as it would not be fair to subject people to contractual obligations without their consent. But the first limb (under which a contract cannot confer rights on anyone except a party to it) has been the subject of much criticism.[3] This report will focus only on the first limb of the doctrine of privity.

[8] It wasn't until the mid-19th century, that a hard and fast rule developed that a third party could not enforce a contract to which he was not a party.[4] Prior to this, there were authorities supporting both this view and the contrary view.[5] In *Tweddle v. Atkinson*,[6] the Court acknowledged the existence of contrary authorities, but held that the doctrine of privity of contract meant that third party beneficiary could not enforce against the promisor the promise that the promisor had made to the promisee. The rule was affirmed in *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd* where it was accepted that it was a fundamental principle of law that only a party to a contract who had provided consideration could sue on it.[7] The rule has subsequently been reaffirmed in numerous cases, including *Beswick v. Beswick*.[8] In Beswick, a coal merchant agreed to transfer a business to his nephew in exchange for a salary and the payment of a weekly annuity to his widow on his death. On Beswick's death, however, the nephew refused to pay the annuity. The widow brought an action in her personal capacity as the beneficiary of the contract and in her capacity as administratrix of the estate. The House of Lords held that she was not entitled to enforce the contract in her

personal capacity, but as administratrix of the estate (as her deceased husband's representative) she was able to obtain specific performance.

(B) Examples of the Problems Created by the Doctrine of Privity of Contract

[9] Three scenarios help to illustrate the problems created by the doctrine of privity of contract with respect to third party beneficiaries.[9] The first, parallels the situation in *Beswick v. Beswick, supra.* Where A and B enter into an agreement under which A agrees to pay a sum of money to C. Both parties intend that C should take the benefit of A's promise, however, if A defaults, C cannot sue A because of the doctrine of privity. B has to attempt to enforce the contract for the benefit of C, even though B may not have suffered any loss.

[10] The second takes place in the construction context, where A (property developer

enters into a building contract with B (contractor). A obtains warranties from B for the benefit of C (purchasers) that any defects will be remedied within a stated period of time. If C subsequently discover a defect in their building they have no recourse against B since the purchasers are not privy to the building contract. This, despite the fact that A obtained B's warranties for the benefit of C. (In practice a developer may withhold a portion of its payment to the contractor to ensure that B fulfils its promise to A for the benefit of C).

[11] Finally, in the insurance context where A (the employer) obtains insurance from B (insurer) for the benefit of A and C (the employee), C may have difficulty in obtaining indemnity from B, as C is not a party to the insurance contract even though the parties intend to benefit C.

(C) Arguments For and Against the Doctrine of Privity of Contract

[12] The arguments for and against the doctrine of privity of contract are well-rehearsed. They have been discussed in standard texts on contract law and nearly every law reform commission report to address the issue of privity of contract and third party beneficiaries. What follows is a summary of those arguments. For every argument against reforming the

privity doctrine, a counter-argument can be made. Further, there are a number of additional arguments that can be made in favour of reforming the doctrine. As Iacobucci J. found in *London Drugs*, the arguments in favour of reform of the doctrine of privity are persuasive.[10]

(i) *Arguments Against Reform of the Privity Doctrine*

A Third Party should not be able to sue in the absence of consideration[11]

[13] Those who are in favour of the *status quo* point to the fact that a stranger to a contract cannot take advantage of its terms because he or she has not provided consideration.[12]

[14] The counterargument recognizes that the doctrine of privity and that of consideration are conceptually distinct. The former determines the question of who may enforce a contract, while the latter determines which promise may be enforced. There is a valid contract if consideration has been paid, albeit by the promisee rather than the third party. The fact that there has been consideration means that the third party can potentially acquire rights under the contract.[13]

A third party should not be able to obtain contractual rights in the absence of consent

[15] Some assert that a third party should not obtain any contractual rights as they have not consented to an element of the contract either by making an offer or acceptance.[14]

[16] The counterargument is that the element of consent concerns protection of personal autonomy. A third party's personal autonomy is not undermined where the issue concerns the giving of benefits, rather than the imposing of burdens on him or her.[15] Further, when parties have agreed to benefit a third party, permitting a third party to enforce the contract, gives effect to their intention and promotes their autonomy.

Undesirable for a Promisor to be subject to double recovery or a flood of litigation brought about by third party beneficiaries

[17] A consequence of allowing a promisee and a third party to enforce a contract is that the promisor may face double liability for the same loss.

That is, there is a concern that separate suits would be brought against the promisor by the promisee and the third party.[16]

[18] In answer to this argument is that fact one promise can only give rise to a single cause of action. Once extinguished, the promisor will not be further held liable.[17] Further, this concern can be addressed through procedural provisions. For example, Rule 38 of the *Alberta Rules of Court* provides for the joinder of necessary parties and Rule 229 provides for the consolidation of actions.[18] Other jurisdictions have addressed this issue directly through detailed legislative provisions concerning third party beneficiaries.[19]

[19] Similarly, circumscribing the definition of who is a third party beneficiary would limit the range of potential plaintiffs and reduce the possibility of a flood of litigation.[20]

Unjust that a third party beneficiary can sue on the contract but cannot be sued

[20] Another argument in favour of the *status quo* is that it would be unjust for a third party to be able to sue on a contract when they could not be sued.[21]

[21] The counter-argument is that unilateral contracts are enforceable under contract law. In addition, the promisor, although unable to take reciprocal action against the third party, can take action against the promisee. In addition, by intending to benefit a third party, the parties to a contract would be alerted to the fact that identifying a third party beneficiary would mean that the third party cannot be sued, but could sue on the contract.[22]

The Potential for Infringement of the contracting parties ability to rescind or vary the contract

[22] The argument is that if third parties could enforce contracts made for their benefit, the rights of contracting parties to vary or rescind such contracts would be unduly hampered.

[23] This issue has been addressed differently in different jurisdictions. Many have sought to strike a balance between the contracting parties' right to rescind and the interests of the third party in maintaining enforceable rights. The Supreme Court of Canada held in *Fraser River* that variance of a contract was possible up until the point "the contract crystallized into an actual benefit" for the third party.[23]

[24] In the UK, article 2 of the *Contracts (Right of Third Parties) Act 1999* provides that the contracting parties may vary or rescind the contract until the third party has communicated his assent to the promise or the promisor is aware that the third party has relied on it.

(ii) Arguments in Favour of Reform of the Privity Doctrine

The Law Concerning Privity of Contract is Unduly Complex, Uncertain and Artificial

[25] As will be discussed further, a key criticism of the doctrine of privity of contract is that the numerous exceptions that have been created both by both statutes and the courts to mitigate the harshness of the doctrine have resulted in law which is overly complex.[24] It is not always clear whether a third party in a particular case can enforce a right under a contract or not. Further, it is difficult, if not impossible, to reconcile the various exceptions that have developed.[25]

The Doctrine Frustrates the Enforcement of Sensible Commercial and Personal Arrangements Made on a Daily Basis

[26] Many criticize the doctrine of privity of contract for its failure to give effect to the expressed intention of the parties to benefit a third party. In such circumstances, it is asserted that the failure of the law to afford a remedy to third parties frustrates the parties' intentions.[26]

The Person who has Suffered the Loss Cannot Sue, while the person who has suffered no loss can sue

[27] As a result of the doctrine of privity, the person who suffered the loss (i.e. the third party) cannot sue, whereas the person who has suffered no loss (i.e. the promisee) can sue, but may only be able to obtain nominal

damages.[27]For example, where the breach of a contract consists of a failure to perform in favour of a third party, unless the promisee also suffers some loss as a result of the breach, the damages awarded would generally only be nominal. Where a contract is made for the benefit of a third party, the promisee has normally no claim to the money or other performance properly due to the third party. In some cases, the courts have awarded the promisee with specific performance,[28] but such a remedy will not be available in every case. Further, even in those cases where substantial damages or specific performance may be available, the promisee, may not be able to, or wish to, sue the promisor.[29]

An Injustice to a Third Party Who has Relied on the Promise

[28] A third party may act in reliance on a promise made in a contract, particularly where it is clearly contemplated in the contract that the third party will acquire enforceable rights. Under the doctrine of privity, the third party would have no recourse, where the promise is not fulfilled.[30]

Widespread Criticism and the Reform of the Doctrine in Other Jurisdictions

[29] As will be discussed, the doctrine of privity of contract has been the subject of widespread academic and judicial criticism in both Canada and other common law jurisdictions.

[30] The Supreme Court of Canada, in *London Drugs,* acknowledged the academic and judicial criticisms of the restrictions imposed by the doctrine of privity. The Court, however, held that "major reforms to the rule denying third parties the right to enforce contractual provisions made for their benefit must come from the legislature."[31] It introduced a "principled exception" to the doctrine, but stopped short of abolishing it.

[31] As well, several law reform commissions in Canada have criticized the doctrine and called for legislative reforms.[32] Their calls, however, have been largely unheeded by their respective provincial legislatures. New Brunswick is the only common law jurisdiction in Canada to have introduced a general legislative provision for the benefit of third party beneficiaries.

[32] In contrast, many other common law jurisdictions, including the U.S., the U.K., Australia (Western Australia and Queensland), New Zealand and Singapore have introduced legislation to abrogate or reform the doctrine. Further, law reform commissions in Hong Kong and Ireland have also recently recommended reforms in this area.

II. Judicial Devices, Statutory Provisions and the "Principled Exception"

[33] In order to mitigate the harshness of the doctrine with respect to third party beneficiaries the common law has developed a number of means of avoiding its strict application. Similarly, in specific situations, statutory provisions have been implemented. Most recently, the Supreme Court of Canada created a "principled exception", as a further incremental change to the application of the doctrine of privity where parties intend to benefit third parties.

(A) Judicial Devices

[34] In some cases, the courts have held that a contract which purported to benefit a third person created a trust for that person's benefit. The device of trust, although accepted in principle by the Supreme Court has been severely reduced in effect by the insistence on a "real" intention to create a trust. Further, where the word "trust" or "trustee" is not used, there may be difficulties in determining whether or not there is the requisite intention.[33]

[35] The courts have also used the device of agency as a means of extending benefits of a contract to a third party. Where the promisee contracts as an agent of the third party (principal) the third party will be able to sue the promisor directly as a party. The difficulty with this exception is that again the courts will look to the contract for evidence of the intention to create an agency relationship.[34]

[36] Similarly, assignment may be used as a device to circumvent the privity doctrine as the person bearing the burden of the contract becomes

liable to a person with whom he had no contractual relationship and whom he may not have intended to benefit.[35]

[37] In addition, the tort of negligence can be viewed as an exception to the doctrine of privity where the negligence in question constitutes the breach of contract to which the plaintiff is not a party.[36] For example, in the classic case of *Donaghue v. Stevenson*, where A supplies goods to B under a contract with B with no indication that they intended to benefit C, the Court found that A may owe a duty to C in respect of personal injury or damage to property caused by defects in those goods.[37]

[38] Covenants in a lease can benefit a third party who later acquires an interest in the property.[38] A person, who was not party to the covenant, may be able to enforce a covenant affecting land made by his predecessor in title and a covenant may be enforced against someone acquiring land with notice that it is burdened with a covenant.[39]

[39] Further, a contract between two parties may be found to be accompanied by a collateral contract between one of them and a third party. A collateral contract may effectively permit a third party to enforce the main contract. An example of a collateral contract is found in *Shanklin Pier Ltd. v Detel Products Ltd.*[40] The defendant paint supplier represented to the plaintiff pier owner that its paint was durable. On the basis of these representations, the plaintiff ordered its contractor to use the defendant's paint in repainting the pier. The contract to supply the paint was between the defendant and the contractor. The paint proved defective. The plaintiff, although third party to the supply contract, was held entitled to sue for breach of the promise as to durability. The Court found that the transaction gave rise to a collateral contract between the plaintiff and the defendant. The defendant's representations as to the quality of their paint amounted to a warranty and the consideration was the plaintiff instructing its contractor to use the defendant's paint.

(B) Statutory Provisions

[40] Statutory provisions to circumvent the privity doctrine are frequently found in particular provincial legislation, such as, for example, those concerning insurance, consumer protection and the carriage of goods. For

example, in Alberta, section 520 of the *Insurance Act*,[41] permits an injured party to enforce a judgment against an insurer, where the insured has not satisfied a judgment. S. 574 of the Act provides for the designation of a beneficiary for the purposes of life insurance. The beneficiary, although not a party to the contracted insurance, is able under s. 579 to enforce the payment of money due to him or her under the contract.[42]

[41] Further, under s. 635 of the Alberta Act, any person who has a claim against an insured under a motor vehicle liability policy, even though not a party to the contract, may on recovering judgment have the insurance money payable under the contract applied in or toward satisfaction of the judgment.[43] Similar legislation in other provinces has comparable provisions.

[42] Even with the exceptions found in the *Insurance Act* there are still some insurance situations where the doctrine of privity continues to apply. For example, in *Azevedo v. Markel Insurance Co of Canada*,[44] Deleurme had agreed to move a mobile home for Azevedo and it was damaged during the move. Azevedo obtained a judgment against Deleurme in negligence, but the judgment went unsatisfied. The carrier's cargo liability insurance covered any loss from the move. Azevedo brought an action against Deleurme's insurer, Markel, for payment of the judgment under its insurance policy. The Court of Queen's Bench dismissed Azevedo's claim against Markel and stated:

Although it is inequitable and unjust to the Azevedos in being prevented from receiving the benefit of the cargo liability insurance contract the carrier had with Markel, this inequity can only be resolved by the Legislature amending the Insurance Act, extending the rights of a Third Party with respect to a cargo liability policy similar to that which the Legislature did with respect to motor vehicle liability policies in s. 320(4) [now s. 635] of the Insurance Act.[45]

(C) The "Principled Exception"

[43] In the 1992 case, *London Drugs Ltd.,* the Supreme Court of Canada carved out a "principled exception"[46] to the traditional privity of contract doctrine and allowed a negligent third party beneficiary to rely on a

provision in their employer's contract limiting liability for damaged goods to $40. In reaching that decision the Court stated the departure from the traditional doctrine represented only an "incremental change" to the common law.[47]

[44] In *Fraser River* a third party beneficiary sought to rely on a contractual provision in defence against an action brought by one of the contractual parties (the insurer). The Court held that the third party beneficiary was entitled to rely on the waiver of a subrogation clause whereby the insurer expressly waived any right of subrogation against the third party beneficiary. In reaching its decision, the Court declared the *London Drugs* decision was not limited to employer/employee situations and that a non-contracting third party could enforce the waiver/limitation if,

1. the parties to the contract intended to benefit the third party; and
2. the third party was performing the very activities contemplated by the contractual provision.[48]

[45] In both *London Drugs* and *Fraser River*, the Court stopped short of abolishing the doctrine of privity of contract. It referred to the difficulty faced by the judiciary in anticipating the complex repercussions of the wholesale abolition of the doctrine and emphasized that such sweeping legal reforms were the responsibility of the legislature. The Court believed, however, that it was appropriate to undertake an incremental change in keeping with commercial reality and justice.[49]

[46] The scope of the *London Drugs* and *Fraser River* "principled exception" is unclear. Some commentators assert that the exception is so broadly framed that it could amount to an abolition of the privity doctrine entirely.[50] Others assert that there has been an abolition of the doctrine only with respect to exclusion clauses and not with respect to a third parties' ability to enforce their rights under a contract.[51] In reviewing the judgments of the Supreme Court it is not clear whether they intended to limit the application of the "principled exception" to a situation where a third party seeks to resist an action in the face of a limitation, waiver or exclusion clause contained in a contract to which they are not party.

In *London Drugs* the Court indicated that it was proposing a "very specific and limited exception to privity in the case at bar; *viz* permitting employees who qualify as third party beneficiaries to use their employer's limitation of liability clauses as Ashields in actions brought against them."[52] Similarly, the Court in *Fraser River*, while emphasizing that the "principled exception" was not limited to employment contracts, did point out that the third party beneficiary was "...seeking to rely on a contractual provision in order to defend against an action initiated by one of the contracting parties."[53]

[47] Relying on these statements from the Supreme Court, some subsequent lower court decisions have interpreted the "principled exception" narrowly such that it could not be used by a third party as a sword, but only as a shield. That is, the exception would not allow a third party to sue on a contract, rather it would only apply where a third party seeks to rely on a provision in a contract to which it is not party in its defence. Others have interpreted the exception more broadly.

[48] There are few cases in Alberta that have considered this issue. In *Parwinn Developments Ltd v. 375069 Alberta Ltd.*, the Court of Queen's Bench found the plaintiffs were not the type of third-party beneficiaries contemplated by the Supreme Court of Canada in *Fraser River*.[54] There was no evidence that the parties to the purchase contract intended to extend the benefit of the commission provided for in the purchase agreement to the plaintiffs. Further, the exception in *Fraser River* was to be used only as a shield by third parties, rather than as a sword.[55]

[49] In contrast, in the more recent case of *Fenrich v. Wawanesa Mutual Insurance Co.*, the Alberta Court of Queen's Bench, affirmed by the Alberta Court of Appeal, would have found both the conditions in *Fraser River* met and allowed a third party beneficiary to sue on a contract of insurance, except that the contract itself made clear that only the parties to the contract could sue on it.[56]

[50] Courts in other Canadian provinces have also made the shield/sword distinction. For example, the Ontario Court of Appeal in *Tony & Jim's Holdings Ltd. v. Silva*,[57] distinguished between cases where a third party is

relying on a contractual provision as a defence and those where it is asserting a right to sue. The former types of cases did not raise concerns with respect to double recovery, floodgates of litigation, reciprocity or the right of contracting parties to rescind or vary their contracts, whereas the latter did.[58]

[51] Similarly, the British Columbia Court of Appeal in *R.D.A. Film Distribution Inc. v. British Columbia Trade Development Corp.*, agreed with the Trial Court that the incremental nature of the "principled exception" was such that it was intended to be used by third parties as a shield rather than a sword.[59]

(D) The Enforceability of An Agreement by a Third Party Beneficiary

[52] In consultations, some Alberta lawyers identified this uncertainty in the law as a real problem for their clients. For example, one firm, who acts for the owners of a large oil sands project has encountered this issue when they obtain insurance (property risk, wrap-up liability and workers compensation) intended to cover an entire project. Their hope was that by obtaining such comprehensive insurance, the insurance premiums and costs would be lower than if all the contractors and sub-contractors on a project were to get coverage individually. The difficulty, however, was that the owner has a contractual relationship only with the contractor. Accordingly, the current uncertainty in the law as to whether a third party can enforce a contract intended for their benefit means that it was not certain that sub-contractors, and other third parties would be able to seek indemnification from the owners, even though the owner's insurance was intended to cover them. The sword/shield distinction made by the courts does not reflect the parties' intentions or commercial realities.

[53] On the other hand, counsel with two large oil companies did not encounter this issue in their work. Their client's projects are structured such that the contractors and sub-contractors are responsible for obtaining their own insurance.

[54] In light of the current uncertainty in the law, reform of the doctrine of privity could clarify that third party rights are enforceable. That is, that a third party cannot only rely in defence on an exclusion clause, limitation

or waiver in a contract to which they are not party, but also to sue on that contract to enforce their rights.

[55] It is difficult to justify the limitation that a third party can use the "principled exception" as a shield, but not as a sword. First, the considerations against the doctrine of privity, relied on by the Supreme Court in creating the "principled exception", would equally apply to the situation where a third party is attempting to sue on a contract. In particular, this distinction does not reflect the intent of the parties or the commercial realities. Second, in other jurisdictions, the principle reason for legislative reform of this issue is to ensure the enforceability of an agreement by a third party beneficiary. Finally, as Prof. David Percy observes, the "repercussions that arise from recognizing that people may have enforceable rights under contracts for which they have provided no consideration are not significantly greater than those which have already occurred as a result of Supreme Court of Canada decisions."[60]

III. Other Corollary Issues

[56] The enforceability of third party beneficiary agreements is the primary consideration behind any law reform project in this area. It is not, however, the only issue raised by the prospect of reform. If the ULCC were to proceed with such a project, a number of other corollary issues would also have to be considered, including:

(A) identification of third parties;

(B) variation and rescission;

(C) defences;

(D) overlapping claims.

[57] These issues have not been very developed in Canadian law. A comparison of existing Canadian law with the UK's *Contracts (Rights of Third Parties) Act 1999* will help to illustrate these issues.[61]

(A) Identification of Third Parties

[58] With any reform, the question arises with what degree of certainty must the third party be identified. That is, must they be identified in the contract, and if so with what degree of specificity. Further, must they be in existence at the time the contract is entered into? The Supreme Court of Canada's "principled exception" does not require that third parties be expressly identified in the contract. (Although there is some uncertainty as to when they will imply that a contract was intended to benefit a third party). In contrast, the *U.K. Act* requires the third party be either expressly identified or satisfy a statutory test for identification, e.g. name, or as a member of a class or as answering a particular description. It does not require that the third party be in existence when the contract is entered into. [62]

(B) Variation and Rescission

[59] A question central to any reform would be under what circumstances, would parties who have agreed to confer a right on a third party be permitted to vary or rescind that right and when would crystallization of the third party right occur. The Supreme Court of Canada and the U.K. legislation deal with this issue in two very different ways. In *Fraser River*, the Court held that parties to the contract could unilaterally revoke those rights at any time prior to "crystallization" and without regard to the third party. Crystallization was said to occur when the "contract crystallized into an actual benefit in the form of a defence against an action in negligence."[63] Its approach is consistent with freedom on contract. The Court was silent about consent to or reliance by the third party.

[60] In contrast, the *U.K. Act* offers a greater balancing of third party interests with those of the contracting parties. It provides that where a third party right arises under the terms of the contract, the parties to the contract may not vary or rescind it without the consent of the third party once: (i) the third party has communicated his assent to the term to the promisor; or (ii) the promisor is aware that the third party has relied on the term; or (iii) the promisor could reasonably foresee that the third party would rely on the term and the third party has relied on the term.[64]

[61] Resolution of this issue is likely to be controversial as even some preliminary consultees who favoured reform of the doctrine of privity indicated they would be uncomfortable with any limitations placed on the ability of parties to vary or rescind an agreement.

(C) Defences

[62] In a typical bilateral contract, each party is able to rely on certain defences in the event of non-performance. The question is whether the promisor's defences, set-offs and counterclaims should be available to the promisor in an action by a third party. On the one hand, the third party should not be put in a better position than the contracting parties. On the other hand, not all the defences, set-offs and counter-claims may be appropriate in the context of a third-party claim. The Supreme Court did not address this issue in either *London Drugs* or *Fraser River* as these cases involved a third party relying on a provision in a contract in defence. The UK legislation expressly provides that third party claims should be subject to all defences and set-offs that would have been available to the promisor in an action by the promisee and which arise out of or in connection with the contact.[65]

(D) Overlapping Claims

[63] Allowing third parties to enforce contracts against promisors raises the possibility of overlapping claims. Should promisors be liable to both promisees and third parties? Should promisors be shielded from double liability, and if so, how? Neither *London Drugs,* nor *Fraser River* addresses this issue. Article 4 of the *U.K. Act* provides that the fact that a third party has been given rights does not affect the promisees right to enforce any term of the contract. Article 5 of the *U.K. Act* seeks to protect the promisor from double liability. It provides that where a promisee has recovered from the promisor a sum in respect of the third party's loss then the court shall reduce any award to a third party to the extent it thinks appropriate to take account the sum recovered by the promisee.

[64] Other possible issues include: whether arbitration and exclusive jurisdiction clauses should be binding on third parties; the interrelationship between existing common law and statutory rules

affecting third parties and any reform proposal; and, whether certain contracts should be excepted from any legislative reform of the privity rule.

IV. The Need for Reform

(A) Preliminary Consultations

[65] ALRI undertook preliminary consultations with lawyers in Edmonton and Calgary practicing in the oil, construction and insurance law areas, as well as, law professors from both the University of Alberta and Calgary and with Alberta Justice.

[66] While the law professors consulted were unanimous in their support for reform in this area, the same could not be said for lawyers in practice. The law professors generally identified the lack of clarity, particularly with respect to the enforceability of contracts by third parties intended for their benefit as area in need of reform. Further, issues such as variation and rescission and the potential for double liability were also identified.

[67] The majority of lawyers consulted were not aware of the issue of privity of contract and third party beneficiaries. Of those who were aware of the issue, the responses received fell into three categories:

- i. Those who favour the *status quo*;
- ii. Those who favour greater clarity with respect to the existing exceptions, in particular clarification as to when a court will imply that the parties intended to benefit a third party;[66] and,
- iii. Those who favour reform to the doctrine of privity to ensure that third parties can enforce contracts intended for their benefit.

[68] The responses could not be grouped around the area of law or the type of projects undertaken. For example, two firms involved in large oil projects recognized the lack of certainty as to whether the “principled exception” would enable a third party to enforce a contract intended for their benefit as a significant issue. In contrast, counsel for two other large

oil companies engaged in similar sorts of projects did not believe this to be a pressing issue. Their contracts are structured such that this issue does not arise.

[69] Finally, a contact with the Alberta Justice discussed this issue with lawyers in both the Legislative Reform and Civil Law sections. The consensus was that this was not an area in need of reform.

(B) Reforms in Other Jurisdictions

[70] Law reform bodies in Canada and in other Commonwealth jurisdictions have recommended legislative reform to address the problem of privity of contract and third party beneficiaries. In Canada, few of these recommendations have been implemented. In contrast, many other Commonwealth jurisdictions have implemented comprehensive legislative reforms.

- (i) Canada

[71] New Brunswick is the only common law jurisdiction in Canada to have legislatively reformed the privity rule.[67]The effect of the legislation is that a third party can enforce a claim under a contract made for their benefit.[68] The New Brunswick legislation also provides that any defence may be raised that could have been raised by the parties.[69]Further, the contracting parties can amend or terminate the contract at any time, but if by doing so they cause loss to a third party beneficiary, they may be liable for the loss.[70] The legislation has been described as steering a middle course between the detailed legislative framework of the New Zealand reform and the general enabling provision favoured by the Ontario Law Reform Commission (see discussion below).[71] Recently, however, the New Brunswick Court of Appeal did not apply the legislation in a case where a third party sought to enforce a contract for carriage of goods.[72] Instead it relied on the law of negligence and the judicial device of agency. It found no lack of privity between the carrier and the consignee because the consignee was acting as the consignor's agent.

[72] Quebec, like other civil law jurisdictions, has recognized the enforceability of contracts for the benefit of third parties for some time.

The relevant provisions are found in articles 1444 to 1450 of the Quebec *Civil Code*.[73] Initially the *Civil Code* contained only a general provision dealing with contracts in favour of third parties. In its current version it includes more detailed provisions including revocation and defences.

[73] In other jurisdictions in Canada, calls for legislative reform have not been acted upon largely because this issue is not a legislative priority. The Nova Scotia Law Reform Commission is the most recent body to recommend that the doctrine of privity of contract be relaxed by statute, to allow third party beneficiaries to enforce their rights under contract.[74] To date, however, its recommendations remain unimplemented.

[74] In 1993, the Manitoba Law Reform Commission recommended the adoption of detailed legislation to govern third party beneficiary agreements.[75] Its approach was similar to that implemented in Western Australia, Queensland, and Quebec, New Zealand and recommended by the English Law Commission. Its recommendations have also not yet been implemented.

[75] Earlier, the Ontario Law Reform Commission (OLRC) dealt with the doctrine of privity as part of a set of larger report on amendment of the law of contract.[76] The OLRC was firmly of the view that the doctrine of privity should be abolished.[77] It rejected the idea of detailed legislative amendments to address this issue, as in its view defining the class of beneficiaries entitled to sue and the problem of modification or rescission by the original parties would be an exceptionally complex and difficult task.[78] The OLRC opted instead for a general enabling provision to the effect that Acontracts for the benefit of third parties should not be unenforceable for lack of consideration or want of privity.[79]

- (ii) Other Common Law Jurisdictions Outside of Canada

[76] There has been widespread criticism of the doctrine of privity in other common law jurisdictions i.e., the United Kingdom, Hong Kong, Singapore, parts of Australia and New Zealand and detailed legislation has been

introduced by way of reform. It is notable that none of these jurisdictions distinguish between a third party seeking to enforce a right under a contract and using it as a defence.

[77] Although there are variations in the approaches taken, where detailed legislation is in place, the provisions generally include those that identify the third party, set out the test for enforceability, address variation and rescission, provide for defences, set-offs and counterclaims, and deal with overlapping claims against the promisors.

U.K.

[78] The U.K. recently adopted detailed legislation, the *Contracts (Rights of Third Parties) Act 1999*, abrogating the rule of privity of contract for third party beneficiaries. The U.K.'s 1999 Act was modelled in part on the New Zealand *Contracts (Privity) Act 1982.* Calls for reform in the area, however, date back to at least 1937 with the recommendations of the English Law Revision Committee. This earlier call for reform was not implemented. In 1991, the Law Commission (for England and Wales) put forward for discussion in a consultation paper proposals for reforming the privity rule and subsequently recommended a detailed legislative scheme in its final report in 1996.[80] An important consideration behind its recommendation for detailed legislative reform was the fact that although the House of Lords had been highly critical of the third party rule in English law it had declined on a number of occasions to reconsider it.[81] The U.K.'s 1999 Act essentially replicates the recommendations in the Law Commission's 1996 report.[82] The 1999 Act has been generally well-received; however, interestingly, the construction industry in Britain has reportedly excluded the operation of the 1999 Act from its standard form contracts.[83]

Ireland

[79] In 2006, the Law Reform Commission of Ireland released a consultation paper entitled, *Privity of Contract: Third Party Rights*.[84] The paper examines the historical origins and development of privity of contract and highlights the practical problems that have resulted in the areas of construction, shipping, insurance, consumer law and in

exemption clauses. After reviewing the options for reform, the Commission recommended detailed legislative reforms.

New Zealand

[80] In 1981, the New Zealand Contracts and Commercial Law Reform Committee recommended detailed legislative reforms to govern third party agreements. The Contracts (Privity) Act 1982 implemented the Committee's proposals. In 1993, the New Zealand Law Commission reviewed the operation of the Act and concluded that:

"No serious problems posed by the terms of the Act have yet come to light. Although the law is not entirely clear in certain respects, notably regarding a third party beneficiary's entitlement to sue under s 4, the degree of uncertainty is not such as to warrant amendment of the Act."[85]

Australia

[81] Two Australian states, Western Australia and Queensland,[86] have given statutory recognition to third party beneficiary rights. The *Western Australian Property Law Act of 1969*, built on the English Law Revision Committee's 1937 recommendations, but is less detailed than the U.K.'s 1999 Act. The State of Queensland followed in 1974, with the *Queensland Property Law Act of 1974*. Its proposal was also based on the English Law Revision Committee's 1937 recommendations, but was less restrictive than the approach of Western Australia.[87]

[82] The High Court of Australia in *Trident General Insurance Co. Ltd.* v. *McNiece Bros Proprietary*[88] has also relaxed the doctrine of privity in relation to insurance contracts.

Asia

[83] Following a report of the Law and Revision Division of the Attorney-General's Chambers,[89] Singapore introduced legislation that is virtually identical to that of the U.K..

[84] On 25 October 2005, the Law Reform Commission of Hong Kong released a report on proposals to reform the doctrine of privity of contract. The report recommends that the doctrine should be reformed

(but not completely abolished), by means of a detailed legislative scheme which would provide a comprehensive, systematic and coherent solution. It also recommends that all the major issues arising from their proposed statutory exception should be dealt with in the new legislation. In a nutshell, the proposed reform should be regarded as a general and wide-ranging statutory exception to the privity doctrine.[90]

United States

[85] Since the New York Court of Appeals decision in *Lawrence v. Fox,*[91] it has been generally accepted in the U.S. that a third party is able to enforce a contractual obligation made for his benefit.[92] The *First Restatement of the Law of Contract* in 1932 restricted third party rights to those who fell in one of two categories: donee beneficiaries and creditor beneficiaries. The courts, however, found these two categories overly restrictive and eventually adopted the "intention to benefit test".[93] The *Second Restatement of the Law of Contract* in 1981 adopted the intention to benefit test. The *Second Restatement* addresses other issues, including variation and termination and defences. In contrast, some states, such as California, have enacted only a general enabling provision and little more.[94]

UNIDROIT

[86] The Working Group for the Preparation of Principles of International Commercial Contracts of UNIDROIT, the International Institute for the Unification of Private Laws, also developed draft articles to recognize third party beneficiaries.[95] The draft articles included provisions addressing the identification of third parties, exclusion and limitation clauses, defences, revocation and renunciation. The draft was incorporated into UNIDROIT's *Principles of International Commercial Contracts*, published in 2004.

V. Options for Reform

[87] If reform of the doctrine of privity of contract is to be undertaken then four options are possible:

(A) Judicial Development of Third Party Rights

[88] The first option is not to do anything and rely on the courts to create any further exceptions to the doctrine of privity in relation to third party beneficiaries.[96]

Advantages

- Flexibility - exceptions can be tailored to meet the specific situation of a particular case.

Disadvantages

- As the Supreme Court of Canada observed in *London Drugs*, the development of the common law by the courts should be exercised generally in an incremental fashion.[97]
- The court process is lengthy and dependant on the particular case before the courts.
- There is also some uncertainty as judicial opinion can change over time.

(B) Legislative Exceptions in Particular Situations

[89] As discussed above, some statutory exceptions already exist and others could be developed to address third party beneficiaries in particular situations.

Advantages

- Can address in detail particular needs in particular situations
- Clear intent to confer an enforceable right
- High degree of specificity and certainty in limited areas.

Disadvantages

- Does not address the underlying problems with the doctrine.

- Adds an additional exception to the patchwork of existing exceptions.
- May impede further judicial reform.

(C) Abolish the Rule Preventing Non-Recovery by the Promisee of a Third Party's Loss

[90] A general legislative provision could be developed that would permit a promisee to recover for a third party's loss. The current difficulty, as discussed in Part II, is that where a promisee attempts to bring an action against the promisor for the benefit of a third party, the promisee is faced with the argument that he has not suffered any damages. The damages resulting from the promisor's breach were to the third party, rather than to the promisee.

[91] In the U.K. a number of cases have dealt with the enforcement by the promisee of damages in favour of the third party.[98] There does not appear, however, to be any recent Canadian cases that dealt with the recovery by a promisee of damages for a third party. Some commentators assert that judicial developments in the U.K. in this area largely negate the need for the detailed *Contracts (Rights of Third Parties) Act 1999*.[99]

Advantages

- Closest approximation to the Promisee's intention.
- Solves a number of the problems with privity without dislocating basic contractual principles
- Avoids the complexity and necessity of resolving the numerous issues that arise in drafting a detailed legislative scheme, such as the test for enforceability of third party rights.

Disadvantages

- An incomplete solution where the promisee is unable or unwilling to enforce a contract made for a third party.

(D) Adopt a General Provision that No Third Party should be Denied Enforcement of a Contract Made for his Benefit on the Grounds of Lack of Privity

[92] For a number of reasons, the Ontario Law Reform Commission favoured the enactment of a general legislative provision "to the effect that contracts for the benefit of third parties should not be unenforceable for lack of consideration or want of privity."[100] First, it thought the courts should be given some flexibility in dealing with the variety of issues which would arise under any reform. Second, as third party beneficiary cases arise in a number of different contexts, it was thought that detailed legislation could not satisfactorily deal with all such problems. Anomalies were likely to occur if the same legislation were to apply to widely differing circumstances. Third, the problem of defining the class of beneficiaries entitled to sue and the question of variation and rescission were regarded as intractable.

[93] The approach recommended by the Ontario Law Reform Commission has not been implemented in Ontario and has expressly been rejected by law reform commissions in Manitoba, U.K., Hong Kong and Singapore.

Advantages:

- Degree of flexibility in addressing the broad context of cases that arise.

Simple to implement, do not have to find normative solutions for a broad range of cases.

Disadvantages:

- Leaves it to the courts to resolve difficult questions, such as who is a third party beneficiary, without providing any legislative guidance.
- Incremental change - Like option 1, it is case dependent and the creation of exceptions can take considerable time to occur.

(E) A Detailed Legislative Scheme

[94] This option calls for the implementation of detailed legislation, like that adopted in Quebec, the U.K., Hong Kong, New Zealand, Western Australia, and Queensland. This approach is favoured by a number of law reform bodies including, Nova Scotia, Manitoba and Singapore. The legislative scheme would extend to all third party beneficiaries whether seeking to enforce their rights or use a contractual clause as a defence. This approach would also address other relevant issues such as: identification of a third party beneficiary; variation or termination; defences; and joinder.

Advantages:

Certainty and clarity would be achieved through the establishment of a coherent body of rules.

Legislature would fulfil its responsibility to provide normative solutions that would satisfy the majority of cases.

Disadvantages:

Lack of flexibility. There may be particular situations where the legislation does not lead to a just result.

Delay and complication associated with legislative amendment, where necessary.

[95] In considering the advantages and disadvantages of the various options for reform, the preliminary recommendation is to pursue option (E) a detailed legislative scheme to address this issue. This approach has been employed successfully in other jurisdictions and has the advantage of providing greater certainty and clarity than the other options discussed. While options (A) and (B) would provide greater flexibility, their approach is piecemeal and incremental. Option (C) provides an incomplete solution and option (D) effectively shifts the burden of resolving fundamental questions, such as who is a third party beneficiary, from the legislature to the courts.

VI. Should the ULCC Undertake this Project?

(A) Arguments For

[96] As the preceding sections elaborated, the current state of the law is marked by a complex series of exceptions, which although mitigating the application of the privity doctrine have not eliminated the possibility of injustices occurring. Further, the distinction drawn in some of the case law between a third party relying on a contract in their defence and enforcing a contract intended for their benefit is difficult to justify.

[97] Uniform legislation providing for a detailed legislative scheme could address the problem. This is the approach adopted in Quebec, the UK, Hong Kong, New Zealand, and Australia (Western Australia and Queensland). It would be possible to draw upon these resources in drafting a uniform act for Canada. It is also the approach favoured by most of the Canadian law reform commissions that have considered this issue. (Only Ontario rejected this approach as defining the class of beneficiaries entitled to sue and the problem of modification or rescission by the original parties was thought to be too complex to resolve through legislation).

(B) Arguments Against

[98] Preliminary consultations in Alberta revealed polarized views from the legal profession as to the need for reform and an indication from the government that this was not a priority area for reform. The majority of legal practitioners were not aware of this issue. The failure to implement recommendations for reform in other Canadian jurisdictions confirms that Alberta is not unique in this regard. Extensive communication and consultation would be needed if this project is to be undertaken by the ULCC first, to ensure that there is a common understanding of the problem and second, to gather ideas and insight towards building a consensus.

[99] Reform of this area of law raises complex issues such as the definition of the class of beneficiaries entitled to sue and the question of when the parties to a contract may vary or rescind a contract. While some have

argued that these issues are too complex to be addressed in uniform legislation, other jurisdictions have dealt with these issues through detailed legislative provisions.

[100] As discussed earlier, New Brunswick is the only common law jurisdiction in Canada to have legislatively reformed the doctrine of privity. Quebec, like other civil law jurisdictions, has long recognized the enforceability of contracts for the benefit of third parties. A proposal for uniform legislation would have to take into account these provincial variations.

(C) Recommendation

[101] The ULCC should complete a study on this issue, including recommendations for uniform legislative reform. The doctrine of privity of contract with respect to third party beneficiaries is in need of reform. The existing exceptions and judicial devices mitigating the effect of this doctrine on third party beneficiaries are complex. In addition, the common law is unclear as to whether a third party can enforce a contract intended for his or her benefit. The result may be inconsistent with the parties' intentions and commercial realities. Further, there is a clear trend in other common law jurisdictions outside of Canada to permit third parties to enforce contracts made for their benefit.

[102] Uniform legislative change is preferable to waiting for the courts to address this issue as the latter is incremental and depends on the facts of a particular case.

[103] Implementation will likely pose a challenge. As the study proceeds it will be important that governments, as well as the legal profession are consulted and provided with background materials to assist them in understanding the nature of the problem and the proposals for reform. A uniform reform proposal would have the advantage of carrying greater weight than recommendations from individual provincial law reform bodies.

FOOTNOTES

* Special thanks to Prof. Nicholas Rafferty, University of Calgary, Faculty of Law, who provided comments on an earlier draft of this paper.

[1]. *London Drugs v. Kuehne & Nagel Investments* [1992] 3 S.C.R. 299 [*London Drugs*]; *Fraser River Pile & Dredge v. Can-Dive Services* Ltd. [1999] 3 S.C.R. 108 [*Fraser River*].

2 Joseph Chitty, *Chitty on Contracts,* 29th ed. (London: Sweet & Maxwell, 2004) at 1075, para. 18-003.

[3]. *Ibid.* at 1073, para. 18-001.

[4]. David Percy, "Privity of Contract: The Final Siege of the Citadel" (Paper presented April 2000) at 3 [unpublished].

[5]. S.M. Waddams, *The Law of Contracts*, 5th ed. (Aurora: Canada Law Book, 2005) at 193.

[6]. (1861) 121 E.R. 762 (Q.B.)

[7]. [1915] A.C. 847 (H.L.).

[8]. [1968] A.C. 58 (H.L).

[9]. Examples derived from the Law Reform Commission of Hong Kong Privity of Contract Sub-Committee, Consultation Paper, *Privity of Contract* (Wanchai: The Commission, 2004), online: The Law Reform Commission of Hong Kong <http://www.hkreform.gov.hk> at 5-6 [Hong Kong Report].

[10]. *London Drugs*, *supra* note 1at para. 208.

[11]. Organization and headings for this section based on Hong Kong Report, *supra* note 9 at 14-20.

[12]. Robert Stevens, "The Contracts (Rights of Third Parties) Act 1999" (2004) 120 L.Q.R. 292 at 320-322 [Stevens]; Hong Kong Report, *supra* note 9 at 14; Law Commission of England and Wales, *"Privity of Contract: Contracts for the Benefits of Third Parties*", Consultation Paper No. 121 (1991) at 69, para. 4.4 (iii) [UK Consultation Paper].

[13]. Hong Kong Report, *supra* note 9 at 14; UK Consultation Paper, *supra* note 12 at 66.

[14]. Hong Kong Report, *ibid.* at 15; UK Consultation Paper, *ibid..* at 67.

[15]. Hong Kong Report, *ibid*.; UK Consultation Paper, *ibid.* at 68.

[16]. Hong Kong Report, *ibid*.; UK Consultation Paper, *ibid.* at 66.

[17]. Hong Kong Report, *ibid*.; UK Consultation Paper, *ibid.* at 69.

[18]. Alta. Reg. 390/1968.

[19]. See for example, article 5 of the U.K. *Contracts (Right of Third Parties) Act 1999.*

[20]. Hong Kong Report*, supra* note 9 at 16; UK Consultation Paper, *supra* note 12 at 70.

[21]. Hong Kong Report, *ibid.*; UK Consultation Paper, *ibid.* at 66.

[22]. Hong Kong Report, *ibid.*; and Law Commission of England and Wales, A*Privity of Contract: Contracts for the Benefit of Third Parties*@, Report No. 242 (1996) at 39-40 [UK Report].

[23]. *Fraser River*, *supra* note 1 at para. 36.

[24]. UK Report*, supra* note 22 at 41; Hong Kong Report, *supra* note 9 at 17.

[25]. *Ibid.*

[26]. *Supra* note 12. Stevens asserts that the intention of parties to the contract is better protected by giving adequate remedies to the promisee. That is, it is the expectations of the promisee that are frustrated by the doctrine of privity rather than those of the third party.

[27]. UK Report*, supra* note 22 at 40; Hong Kong Report*, supra* note 9 at 19.

[28]. See for example, *Beswick v. Beswick*, [1968] A.C. 58 (H.L.).

[29]. UK Report, *supra* note 22.

[30]. UK Report*, ibid*. at 39; Hong Kong Report, *supra* note 9 at 19.

[31]. *London Drugs*, *supra* note 1 at 436-437.

[32]. Ontario 1987, Manitoba 1993 and Nova Scotia 2004.

[33]. Supra note 5, at 196, para. 285.

[34]. *Ibid.*, at 197, para. 287.

[35]. Hong Kong Report*, supra* note 9 at 15.

[36]. *Ibid.* at 12-13.

[37]. [1932] AC 562 (H.L.).

[38]. Hong Kong Report, *supra* note 9 at 7.

[39]. *Tulk v. Moxhay* (1848) 2 Ph 774 (C.h.).

[40]. 1 [1951] 2 KB 854.

[41]. R.S.A. 2000, c. I-3.

[42]. See also, for example, comparable provisions: s. 195 *Insurance Act* (On.), R.S.O. 1990, c.I.8 and s. 53 of*Insurance Act* (B.C.) [R.S.B.C. 1996] c. 226.

[43]. See also, for example, comparable provisions: s. 258 *Insurance Act* (On) and s. 159 *Insurance Act* (B.C.).

[44]. 1998 ABQB 842.

[45]. *Ibid.* at para. 20.

[46]. *London Drugs*, *supra* note 1.

[47]. *London Drugs*, *supra* note 1 at 449.

[48]. *Fraser River*, *supra* note 1at 125-126.

[49]. *London Drugs*, *supra* note 1at 446.

[50]. UK Report*, supra* note 22 at 163-176.

[51]. *Supra* note 4 at 15.

[52]. *London Drugs*, *supra* note 1at 450.

[53]. *Fraser River*, *supra* note 1at 132.

[54]. 2000 ABQB 31 at paras. 32-33.

[55]. *Ibid*. See also, for example, *804977 Alberta Ltd v. Lowrie*, 2003 ABQB 234 at paras. 28-29 where the Court discusses that major reforms to the rule denying third parties the right to enforce contractual provisions for their benefit, must come from the legislature. AIf shareholders of a corporation are to be beneficiaries under corporate contracts it will have to be made so by legislation, which would certainly be a radical departure from present corporations law.@

[56]. (2004), 26 Alta. L.R. (4th) 337, aff'd (2005), 256 D.L.R. (4th) 395 (A.B.C.A.).

[57]. (1999), 43 O.R. (3d) 633 (C.A.)

[58]. *Ibid*. at para. 28.

[59]. [2000] B.C.J. No. 2550 at paras. 67- 76 (S.C.) (Q.L.).

[60]. *Supra* note 4 at 17.

[61]. Comparison based on article by M.H. Ogilvie "Privity of Contract in the Supreme Court of Canada: Fare Thee Well or Welcome Back" [2002] J.B.L. 163.

[62]. *Contracts (Rights of Third Parties) Act 1999* (U.K.) 1999, c. 31, s. 1(3) [*U.K. Act*].

[63]. *Fraser River*, *supra* note 1at para. 36.

[64]. *U.K. Act*, s. 2.

[65]. *U.K. Act*, s. 3.

[66]. At the same time, they did not favour any expansion of the exceptions to allow third parties to enforce a contract. In particular, there were concerns that there could be a flood of litigation if third parties were able to sue to enforce contracts intended for their benefit, concerns about how "third parties" would be defined and concerns that any legislative reform might further complicate the current situation.

[67]. *Law Reform Act*, S.N.B. 1993, c. L-1.2.

[68]. S.4(1) of *Law Reform Act* provides that:

a person who is not a party to a contract but who is identified by or under the contract as being intended to receive some performance or forbearance under it may, unless the contract provides otherwise, enforce that performance or forbearance by a claim for damages or otherwise.

[69]. *Supra*, note 67, s. 4(2).

[70]. *Ibid.*, s. 4(3).

[71]. Manitoba Law Reform Commission, *Privity of Contract* (Winnipeg: The Commission, 1993) at 53-54.

[72]. *Day & Ross Inc. V. Beaulieu*, 2005 NBCA 25, 250 D.L.R. (4th) 533.

[73]. S.Q. 1991, c.64.

[74]. Law Reform Commission of Nova Scotia, *Privity of Contract (Third Party Rights)* (Halifax: The Commission, 2004).

[75]. *Supra* note 68.

[76]. Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Toronto: The Commission, 1987).

[77]. *Ibid*. at 68.

[78]. *Ibid*. at 69.

[79]. *Ibid.* at 71.

[80]. UK Report*, supra* note 22 at 39-40.

[81]. *Ibid*. at 65, para. 5.8.

[82]. The Law Commission (for England and Wales) and the Scottish Law Commission have recommended further reforms in relation to the Third Parties (Rights against Insurers) Act 1930. See Report No. 272, *Third Parties- Rights Against Insurers*, July 2001. While the UK Government announced that it had accepted these proposals, it does not appear that legislative reforms have been implemented.

[83]. Stevens, *supra* note 12 at 317.

[84]. Law Reform Advisory Committee for Northern Ireland, *Privity of Contract: Contracts for the Benefit of Third Parties*, Report Nos. 4-6 (Dublin: LRAC, 2006).

[85]. New Zealand Law Commission, *Contract Statutes Review*, Report No. 25 (Wellington: The Commission, 1993) at 228.

[86]. Western Australia was the first common law jurisdiction to legislatively reform the law of privity (*The Property Law Act 1969*, no. 32 of 1969). In 1974 Queensland followed with passage of the *Property Law Act* (no. 76 of 1974).

[87]. *Supra* note 74 at 10.

[88]. (1988), 165 C.L.R. 107 (H.C.A).

[89]. Law and Revision Division, Attorney-General=s Chambers, Singapore, *Report on the Proposed Contracts (Rights of Third Parties) Bill 2001* (The Adelphi: LRRD No. 2, 2001).

[90]. Hong Kong Law Reform Commission, Press Release (15 October 2005).

[91]. 20 N.Y. 268 (N.Y 1859).

[92]. UK Report*, supra* note 22 at 60.

[93]. *Ibid.* at 61.

[94]. The Civil Code of the State of California (1985),' 1559, as cited in *supra* note 74 at 11.

[95]. UNIDROIT, Working Group for the Preparation of Principles of International Commercial Contracts, *Third Party Rights* (Rome: UNIDROIT, 2003) Study L- Doc. 83.

[96]. In considering the possibility of judicial reform versus legislative reform, one commentator put it, A[a] provincial patchwork of legislation is not likely preferable to a nationally-binding decision of the SCC, although the piece-meal nature of judicial law-making will result in a protracted reform of privity law as *Fraser River* is applied in the future.@ *Supra* note 61 at 171.

[97]. *London Drugs, supra* note 1 at 449.

[98]. See *Linden Gardens Trust v. Lenesta Sludge Disposals* [1993] 3 W.L.R. 408 (H.L.); *Darlington Borough Council v. Wiltshier Northern Ltd.* [1995] 1 W.L.R. 68 (C.A.); *McAlpine Construction Ltd v. Panatown Ltd.* [2000] 3 W.L.R. 946 (H.L.).

[99]. Stevens*, supra* note 12.

[100]. *Supra* note 76 at 71. It should be noted that the wording proposed by the Ontario Law Reform Commission does not make it clear by whom the contracts would be enforceable.

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2. The Law Commission (for England and Wales), *Privity of Contract: Contracts for the Benefit of Third Parties*, Law Com No. 242, 1996.

3. Law Reform Advisory Committee for Northern Ireland, *Privity of Contract: Contracts for the Benefit of Third Parties*, Report Nos. 4-6 (Dublin: LRAC, 2006).

4. Law Reform Commission of Nova Scotia, *Privity of Contract (Third Party Rights)* (Halifax: The Commission, 2004).

5. Law Reform Commission of Hong Kong Privity of Contract Sub-Committee, Consultation Paper, *Privity of Contract*(Wanchai: The Commission, 2004).

6. Law and Revision Division, Attorney-General=s Chambers, Singapore, *Report on the Proposed Contracts (Rights of Third Parties) Bill 2001* (The Adelphi: LRRD No.2, 2001).

7. Manitoba Law Reform Commission, *Privity of Contract* (Winnipeg: The Commission, 1993).

8. New Zealand Law Commission, *Contract Statutes Review*, Report No. 25 (Wellington: The Commission, 1993).

9. M.H. Ogilvie APrivity of Contract in the Supreme Court of Canada: Fare Thee Well or Welcome Back@ [2002] J.B.L. 163.

10. Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Toronto: The Commission, 1987).

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12. Robert Stevens, AThe Contracts (Rights of Third Parties) Act 1999" (2004) 120 L.Q.R. 292.

13. Doug Stollery, Memorandum to Peter Lown, Re: Third Party Beneficiaries, December 10, 2002.

14. UNIDROIT, Working Group for the Preparation of Principles of International Commercial Contracts, *Third Party Rights* (Rome: UNIDROIT, 2003) Study L- Doc. 83.

15. S.M. Waddams, *The Law of Contracts*, 5th ed. (Aurora: Canada Law Book, 2005).