

# **PRIVITY OF CONTRACT AND THIRD PARTY RIGHTS**

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**REPORT OF THE WORKING GROUP  
PRESENTED BY**

**GENEVIEVE TREMBLAY-McCAIG, Working Group Chair**

# ISSUE #1

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Does the privity rule in its current form need to be reformed at present?

“Is there a problem to be fixed?”

# ISSUE #2

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If privity needs to be reformed, is legislative intervention an appropriate course of action?

“Which solution is more suitable?”

# ISSUE #3

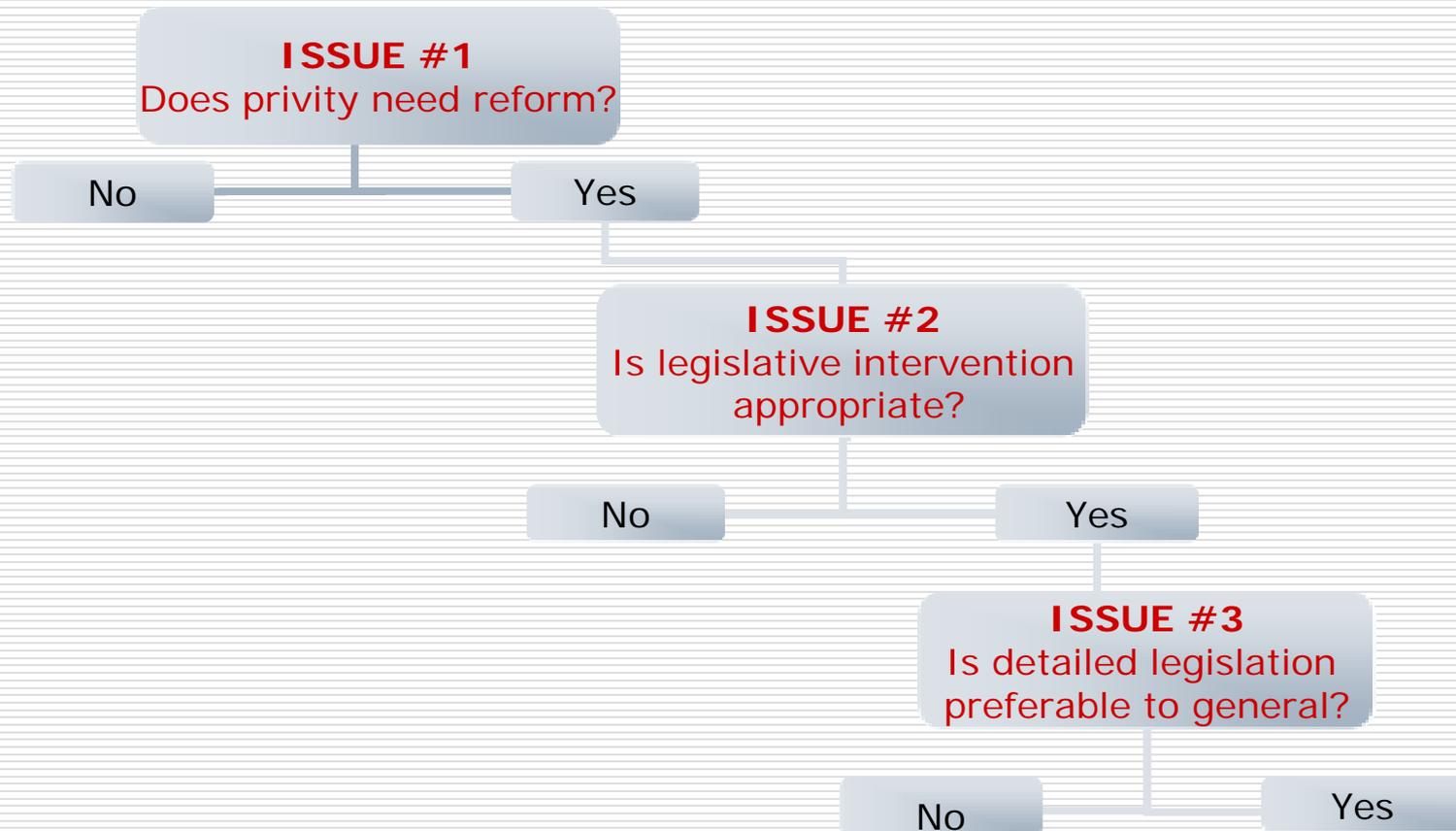
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If legislative intervention is appropriate, is detailed legislation preferable to a general provision?

“Which legislative option is better suited?”

# METHODOLOGY

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# ISSUE #1 — Reform?

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What does privity of contract mean? What underpins the privity rule?

- Only a Party to a Contract Can Sue on It
- Promisee Must Provide Consideration

# ISSUE #1 — Reform?

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What types of problems has the privity rule posed, and could still potentially pose?

- Express Intention to Benefit Third Party
- Instrument or Representative
- Chain of Contract
- Incidental Rights or Obligations

# ISSUE #1 — Reform?

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What tools are available to circumvent the privity rule?

- Statutory Exceptions
- Common Law Exceptions – Especially the Principled Exception\*
- Means of Working Around Privity
- Other Causes of Action

What now remains of the rule?

# ISSUE #2 — Legislation?

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What are the arguments in favour of legislative intervention?

- Expediency
- Certainty
- Consistency
- Uniformity

# ISSUE #2 — Legislation?

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What are the arguments against legislative intervention?

- Irrelevancy
- Difficulty of Defining Extent of Third Party Rights
- Rigidity
- Risk of Becoming Obsolete

# ISSUE #3 — Detailed Scheme?

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What subsidiary issues could be addressed in a detailed legislative scheme?

- Enforceability Test
- Third Party Identification
- Variation/Cancellation
- Defences/set-offs/remedies
- Overlapping Claims
- Opt-out
- Exclusions
- Current Exceptions

# ISSUE #3 — Detailed Scheme?

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What shape could a general provision take?

- Intention to Benefit Third Party
- Right to Enforce
- Limitation of Liability
- Negative Rule
- Abolition

# ISSUE #1 — Conclusion

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- Privity of contract has created unfair results and could still potentially cause difficulties in certain context.
- However, privity as it now stands in Canada does not pose de type of problem which call for the implementation of stand alone legislation.
- Privity does not represent an urgent matter or, at any rate, a legislative priority at present.

# ISSUES #2 & #3 — Conclusion

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- No need to provide definitive answers to issues #2 & #3, since the conclusion on issue #1 is that privity in its current form does not pose enough problems that it needs to be reformed at present.
- Nevertheless, issues #2 & #3 are outlined and briefly discussed in case provincial delegates disagree with the conclusion on issue #1 and want to reflect on those two issues and available options, as well as subsidiary issues ensuing from the development of third party rights.

# RECOMMENDATION

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The Working Group recommends no further action at this time. The common law should take its course given the potential for further clarification and expansion of third party rights.

# Working Group

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THANK YOU