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CIVIL LAW SECTION

PRIVITY OF CONTRACT AND THIRD PARTY RIGHTS

REPORT OF THE WORKING GROUP

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INTRODUCTION

[1] This report is the follow-up to a study paper presented to the Uniform Law Conference of Canada [ULCC] in September 2007.[1] As per the resolution of the Civil Section a working group was established to prepare a report examining the options for reform of the doctrine of privity of contract to be considered at the ULCC 2008 meeting.[2]

[2] To this end, the ULCC Working Group on Privity of Contract [Working Group] outlines a series of issues which should be addressed in order to determine further course of action relating to privity. The aim of the Working Group report is to present a picture of the current situation, and put forward options to provide provincial delegates with tools enabling them to assert the issues set out below in the present Canadian context.

[3] The first issue is whether privity of contract creates enough problems in its current form that it needs to be reformed at the present time? Should the privity rule be further relaxed to cover other types of situation where the contracting parties' intention or the contract's object could be frustrated? Or provided that satisfactory remedies are currently available in most cases, does the growing list of exceptions and means of circumventing privity render the law unduly complex and uncertain to the point where it justifies a reform?

[4] The first part of the Working Group report looks at the alleged problem itself. While it is true that the doctrine of privity has resulted in unwanted outcomes in the past, and could still thwart the contracting parties' intention or the contract's object, the report shows that numerous exceptions and means of circumventing privity have attenuated its harsh effects. The report gives particular attention to the principled exception developed by the Supreme Court of Canada because it differentiates Canada from other common law jurisdictions which were, or still are, dealing with a stricter form of the privity rule.

[5] The second issue is what path reform of the doctrine of privity could take if the need arises? Would reform of the doctrine of privity be better achieved through legislative intervention, or judicial development of third party rights? In other words, would it be appropriate for the ULCC to propose a uniform draft bill aiming to expand and/or clarify the current exceptions to privity? Or would it be advisable to stand back and let the common law take its course?

[6] The second part of the report looks at the potential solutions to the privity issue. The report outlines the legislative and judicial options, as well as arguments for and against each option which might be considered in order to determine the best course of action if one concluded that there is a problem to address.

[7] The third issue is what options are available if legislative reform is deemed a better course of action? Which legislative option would be more suitable in the present context? Specific legislative intervention in particular circumstances? A general provision? A detailed legislative scheme? Or abolition of the privity rule?

[8] The second part of the report also outlines different legislative avenues, and briefly discusses secondary issues which follow from the development of third party rights, such as the enforceability of the contract; the identification of third party; the right to vary or cancel the contract; the third party rights subject to the terms of the contract and other defences, set-offs, counterclaims and remedies; the potential for overlapping claims; the possibility to opt-out; the exclusion of certain contracts; and the existing exceptions to privity.

[9] The third part of the report contains the Working Group conclusions and recommendation to the provincial delegates. A review of the law relating to privity ultimately leads the Working Group to conclude that legislative intervention is not needed at the present. Without denying that the privity rule has created unfair results and could still cause difficulties in its current form, the Working Group is of the opinion that privity, as it now stands in Canada, is not an urgent matter which calls for the implementation of stand alone legislation.

[10] Finally, it should be noted that the mandate of the Working Group was to look at the question of privity of contract only. A reform of the doctrine of privity could also fall within the scope of a comprehensive revision of contract law in Canada. The report does not, however, further contemplate this alternative.

A. WHAT IS THE CURRENT SITUATION IN CANADA?

[11] This part of the Working Group report addresses the first issue identified above: Is there a need for reform in Canada at the present time? The question is not whether the general principle that third parties cannot enforce contracts made for their benefit has to be reformed, since there have already been crucial changes of direction initiated by both legislatures and courts, especially, in the latter case, through the principled exception. The question is more whether there is at this time a call for clarifying and/or further expanding the current exceptions through legislation in the Canadian context. To this end, the report reviews the law surrounding privity in order to determine if the rule, as it now stands, poses the type of problem which requires legislative intervention.

1. The Privity of Contract Doctrine

[12] Two principles underpin the doctrine of privity of contract. First, only a person who is party to a contract can sue on it. Second, it is generally accepted that consideration must have been given by the promisee to the promisor.[3] In other words, a person who wants to enforce a contract must provide something of value in exchange for a promise.[4]

[13] A strict application of the privity rule would prevent a third party C from suing on a contract between A and B. C could not sue despite the fact that the contract confers a benefit upon C;[5] or extends the protection of an exemption clause to C;[6] or gives C an express right to enforce the contract.[7] Even though one of the contracting parties has already paid (or agreed to pay) to the other a price for the benefit conferred upon the third party in the contract, the third party is precluded from enforcing the promise – all because C is not a party to the contract. This could conceivably lead to the result that "a promise given for good consideration will be essentially unenforceable for all practical purposes".[8]

[14] On the other hand, the privity of contract doctrine still has its merits. It might prevent a third party who is not an intended beneficiary of a particular contract, but only an incidental one, from suing.[9] It might also protect a third party from being held liable where an agreement purports to impose an obligation upon the third party.

[15] The privity of contract rule is still regarded as a well-established feature of law in a number of common law jurisdictions, including most of the Canadian provinces and territories. However, "its force has been significantly undermined by a growing list of

exceptions to the rule”.[10] Legislators and courts have, over time, recognized various exceptions and other means to circumvent the rule.

2. Statutory and Common Law Exceptions

[16] A quick review of the various exceptions and the other means by which the rule can be avoided is appropriate at this point. The report reviews examples of when the privity rule has gotten in the way of the contracting parties’ intentions, as well as how contracting parties have been relieved from the strict application of the rule in certain circumstances.[11] Presenting a big picture of the current situation will hopefully help to answer the question of whether there is a need for reform in the Canadian context, and, if so, to what extent should the rule be reformed.

[17] Within this report, the types of cases where the privity rule has caused, or still causes practical difficulties have been loosely divided into categories: (a) Express intention to benefit a third party; (b) Third party as instrument or representative of a contracting party; (c) Chain of contracts; and (d) Rights and obligations follow the “subject matter” of the contract. Admittedly, these categories are in no way watertight. It is additionally possible to subdivide each of the categories, or even add further categories. However, using categories helps to identify the types of situations where it is often necessary to relax the privity rule. Other legal devices commonly used to circumvent the privity rule, which are not true exceptions, are also examined in order to give an overview of all currently available tools.

a. Express Intention to Benefit a Third Party

[18] The first category deals with the “true” third party beneficiary, that is, a third party expressly identified by name or description as the intended beneficiary of the contract.[12] The benefit expressly provided for in the contract can be financial, commercial, a privilege or other advantage, as well as an indemnity, exemption or limitation of liability, or a mere right to enforce a contract.

[19] Exceptions falling in this category seem to be justified by the fact that a true or express beneficiary should have rights under the contract, and reflects the importance of giving effect to the contractual arrangements entered into by the contracting parties.[13] Examples of when the privity rule has gotten, or might still get, in the way of the parties’ intentions are numerous.[14]

[20] Common law exceptions have developed to enable courts, in appropriate circumstances, to arrive at results which conform to the express intentions of the contracting parties to confer a benefit upon a third party, such as insurance law and pension and benefit law.[15] Numerous statutory provisions also permit certain classes of express third party beneficiary to escape the consequences of the privity rule where the harsh effects of the doctrine would have thwarted the contracting parties' true intentions. Exceptions falling within the first category are common in particular contexts, such as insurance law, as well as pension and benefit law.[16]

[21] The Supreme Court of Canada has developed the unique "principled exception" which potentially encompasses a good number of cases where true third party beneficiary rights are at stake. In *Fraser River Pile & Dredge v. Can-Dive Services Ltd.,*[17] the Court allowed Can-Dive, third party named as beneficiary in an insurance contract, to rely on the waiver of subrogation clause contained in Fraser River's insurance policy in its defence against a negligence action brought by the insurer and Fraser River.

[22] The Court rejected a narrow interpretation of the principled exception first articulated in *London Drugs v. Kuehne & Nagel Investments* which would have limited the principled exception to cases where parties to contract understood that the services could only be supplied by employees or agents of the supplying party.[18] Instead, the Court held that the principled exception applies to situations that meet the twofold test it had previously put forward:

> In terms of extending the principled approach to establishing a new exception to the doctrine of privity of contract relevant to the circumstances of the appeal, regard must be had to the emphasis in *London Drugs* that a new exception first and foremost must be dependent upon the intention of the contracting parties. Accordingly, extrapolating from the specific requirements as set out in *London Drugs*, the determination in general terms is made on the basis of two critical and cumulative factors: (a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and (b) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?[19]

The Court then affirmed that the principled exception has an open-texture, that is, it is not restricted to a particular class of agreement.[20]

[23] Although *Fraser River* confirms that the principled exception is not restricted to a particular kind of contract, the twofold test may be more hazardous when the contracting parties expressly confer a direct benefit upon a third party beneficiary who does not have to perform any particular activity coming within the scope of the initial contract or provision.[21] For instance, one could wonder how the twofold test would be met in a case where an individual A agrees to pay a landscaper B to take care of A's parents' property. Would the principled exception apply to cases where third parties are not engaged in the "very activity" envisaged by the agreement? However, it is possible that distinguishing between cases where the third party is engaged in the very activity contemplated and cases where the third party does not have to perform any particular activity envisaged by the agreement may not, in itself, be a satisfactory argument to deny the application of the principled exception.

[24] In addition, it is still not clear whether the reach of the principled exception can extend to situations where an express third party beneficiary brings a claim to enforce a contract; or whether its application is restricted to situations where a third party beneficiary relies on a provision of a contract intended for its benefit as a defence against a claim brought by one of the contracting parties. In other words, can the principled only be used as a shield or can it also be used as a sword?

[25] There are, on the other hand, arguments that weigh in favour of using the principled exception both as a shield and a sword. The Supreme Court has opened the door to using the principled exception as a sword by overruling *Preferred Accident Insurance Co. of New York v. Vandepitte*.[22] *Vandepitte* had refused a claim by a third party, a named insured, because the latter was not privy to the insurance contract. While one might argue that such an exception had already been recognized in the insurance context prior to *Fraser River*, it still remains that overruling of *Vandepitte* could support a claim brought by a plaintiff seeking to enforce a contract or a term of a contract.[23] Furthermore, as McCamus pointed out:

> [I]f, as the Court states in *Fraser River*, the purpose of the exception is to withhold application of the privity doctrine in cases where consideration of 'common sense and commercial reality' suggest that the doctrine should be ignored, there appears to be no convincing basis for assuming that such considerations could apply only in the context of third-party reliance on limitations of liability or waiver of subrogation provisions.[24]

[26] Nonetheless, lines of authority are in direct conflict on whether the principled exception can be used as a sword.[25] There is no acknowledged common ground at

present.[26] Nor is it clear whether the principled exception has established a "principle" that third parties can enforce contracts made for their benefit or only an "exception" to the common law principle that they cannot. If the expansive view prevailed, the principled exception would be closely equivalent to the civil law principle of "stipulation for another" that allows contracting parties to confer a benefit on a third party which will be directly enforceable by the beneficiary.[27] The option of stipulating for another or conferring to a third party a right to enforce contractual arrangements bargained for its benefit creates a major inroad into the civil law principle of privity of contract which has at times mistakenly lead to the belief that privity is specific to common law jurisdictions.[28]

b. Third Party as Contracting Party's Instrument or Representative

[27] Sometimes a contract will not expressly identify an intended third party beneficiary. However, there are cases where a contract implicitly benefits a third party.[29] The intentions to benefit a third party can be, among other things, implied from the specific relationships linking the contracting party and the third party. Consequently, the second category embraces situations where a third party is an instrument (vicarious performance/liability) or a representative of a contracting party (implicit agency).

[28] In certain cases, circumstances may allow the inference that the contracting parties recognize that the contractual obligations could only be performed by servants, employees or agents of the supplying party. Here, the third party is a mere vehicle through which one of the contracting parties carries on business or performs its contractual undertakings.[30] In other words, there is a sufficient identity of interests between the corporation and its officers or between the employer and its employees as far as the performance of the employer's contractual obligations is concerned.

[29] Contracting parties may also have contracted on behalf of third parties, whether the contracting party and the other parties have an identity of interests or not.[31] In this latter type of case, the contracting parties are the representatives of the third parties, by contrast to the former type of case where the third parties are an instrument of the contracting party.

[30] Common law or statutory exceptions developed in this second category are mainly motivated by considerations of fairness or equity and often require the court's

intervention to prevent contracting parties from evading the agreed contractual obligations. However, this result is often also underpinned by practical and commercial realities, as well as special considerations which arise from certain types of contractual relationships.

[31] The principled exception in *London Drugs v. Kuehne & Nagel Investments* now provides a remedy for many of these types of cases. Nonetheless, this inroad on the doctrine of privity conveys some analytical difficulties. As mentioned above, the twofold test requires looking at the questions of (1) whether the contracting parties intended to extend the benefit to the third party seeking to rely on the contractual provision, and (2) whether the activity performed by the third party is the very activity contemplated in the contract.[32] Here again, the second branch of the test can be slightly problematic. Problems might indeed occur when liability does not arise from the direct performance of a specific contract which contains the clause that would protect a third party, but instead from the negligence of an employee, agent or servant acting in the course and scope of their general duties.[33]

[32] The problems regarding the second branch of the test might be more apparent than real, however. The second branch requirement that the third party be "engaged in the very activity envisaged by the agreement" essentially allows the inference that the contracting party impliedly intended to extend the benefit to its employees, agents or servants, even though the contract does not expressly say so. Indeed, "a better view of the content of the second branch of the test is that it applies only in cases where the third-party beneficiary is not explicitly referred to in the agreement and it applies in support of an inference that the agreement implicitly so provides".[34]

[33] Further, as previously noted, there is no consistent case law holding that the principled exceptions can be used as a sword. The shield/sword dichotomy is even more challenging when the third party is an implied beneficiary. Additional concerns arise when the issue is not to prevent a party from evading its contractual obligations, but rather to grant a claim to a third party who is a mere implied beneficiary, because of the risks related to potential double recovery.[35] Moreover, while it might seem fair to allow third parties to rely on a limitation clause impliedly intended for their benefit, it might on the other hand appear unfair to permit implied third parties to recover damages when there is no reciprocity, that is, allowing third parties to sue for breach of contract when they cannot themselves be sued for breach.[36] However, despite some courts' reservations, nothing in *London Drugs* or *Fraser River* plainly limits further judicial developments of

the principled exception for use by third party beneficiaries to enforce contractual arrangements both by suit (sword) or defence to a suit (shield).

[34] Moreover, it is not clear whether the principled exception can be used by other implied beneficiaries to make up for a technical lack of privity when it appears to be a sensible conclusion.[37] Is the application of the principled exception justified in cases where there is a community of interests between the third party and one of the contracting parties, or practical necessity?[38] If so, one could argue that we might be on the way towards abolition of the existing doctrine of privity, rather than incremental changes to the common law.[39]

[35] In addition to the principled exception, a number exceptions have also been created to relieve against the consequences of the privity rule in cases where third parties are instruments or representatives of contracting parties, such as insolvency law, will and estate law, mercantile agent law, partnership and corporation law and union law. Moreover, contracting parties can also work around the privity rule by explicitly providing for the use of a separate legal device, such as a trust or agency, and hence escape the undesirable effects of the rule.[40]

c. Chain of Contracts

[36] Another class of third party beneficiary can be added when third parties are not express beneficiaries or even implied beneficiaries of a contract or term of a contract, but simply relational third party beneficiaries. The third category covers cases where a contracting party subcontracts with a "third party" who might also engage in further contractual relationships with another "third party" and so on. Chains of contracts are common in commercial contexts where a contracting party will often chose to subcontract in order to fulfill its contractual obligations.

[37] One of the main arguments for relaxing the privity rule for chains of contracts is that there is no good reason to preclude parties that are integrated in a chain of contracts, thus not complete strangers to the head contract, from recovering or protecting themselves against subrogated lawsuits when it is not at odds with the general intentions of the parties or the object of the contract. Commentators have also suggested that such an exception would help to reduce wasteful transaction costs, as well as some of the practical difficulties which may occur when all parties cannot be identified by name or class at the time the head contract is entered into.[41]

[38] It is true that the principled exception in *London Drugs* and *Fraser River* could apply to chain of contracts if the twofold test is met. However, unless the contracting parties intended to benefit a third party and the third party was performing the activities envisaged in the contract, it would be impossible to alleviate the consequences of the privity rule through the principled exception.[42]

[39] Again, however, a small number of exceptions have developed to relieve against the strict application of the doctrine of privity of contract in certain contexts, such as intellectual property law, shipment and carriage law and construction law.[43]

[40] Some commentators have suggested that expanding the current exceptions in other commercial contexts would be cost and time efficient, but also "consistent with modern notions of commercial realty and justice".[44] Anyway, it is likely that chains of contracts are better dealt with on a piecemeal basis through both judicial and legislative intervention in accordance with the circumstances of each case.

d. Rights and Obligations Follow the "Subject Matter"

[41] The fourth category embodies cases where a contractual right or obligation follows the specific "subject matter" of the contract whether it is the intention of the parties or not. In certain circumstances, particular rights or obligations "attach" to the goods, real property, chattel or document of title which is the subject of the contract. The "ownership" of the contractual right or obligation is contained in the "subject matter" of the contract itself.

[42] Certain rights and obligations may indeed pass to successors if these rights or obligations are incidental to or directly related to the property.[45] Courts and legislators alike have long accepted that practical realities could compensate for the lack of privity in appropriate circumstances.

[43] Hence, commercial convenience and efficiency have prompted the development of common law and statutory exceptions in particular contexts, such as real estate law, landlord and tenant law, merchant law, surety law, merger, acquisition and other changes of corporate control law and consumer law.

3. Legal Devices Ousting the Privity of Contract Rule

[44] In addition to the categories of exception discussed above, there are other means of working around the privity rule. These legal devices are not, *per se*, exceptions to privity. However, they are established devices designed to help parties structure their contracts to avoid the detrimental effects of the rule, or they offer another course of action to third parties who have no contractual rights owning to the lack of privity.

a. Other Means of Circumventing the Privity Rule

[45] A number of separate means of circumventing the privity rule have been extensively used to facilitate legal transactions, such as agency, trust, assignment, novation, as well as collateral contract and collateral warranty.[46] In most cases, such relief will, however, require the evidence of a real intention to create a trust or an agency or the use of a specific wording, or the compliance with certain formalities and restrictions to assign contractual rights, or the construction of a collateral contract or warranty.

[46] Nonetheless, one should not forget that all these recognized legal devices carry their own specific requirements, and should not be used lightly, or made up for the mere purpose of escaping the consequences of privity after the fact.

b. Other Causes of Action

[47] Third parties who are not permitted to bring an action in contract may base their claims on other available courses of action. For example, a contracting party may also be independently liable in tort to a third party for physical injury, property damage, and even economic loss in certain circumstances.[47] There are also a number of *sui generis* causes of action available, such as breach of confidence and fiduciary relationship, as well as additional remedies in restitution, such as unjust enrichment, promissory estoppel and damages for third party beneficiary loss (contracting party enforcing third party beneficiary rights in particular contexts).

B. What Are the Possible Courses of Action?

[48] If one concludes that the privity rule, in its current form, poses the type of problem which calls for reform, the question is then whether legislative intervention is a suitable solution. In that case, what options are available, and which one possibly offers

greater benefits? The Working Group's analysis of the legislation and case law leads it to conclude that privity is not an urgent matter which requires legislative intervention or, at any rate, a legislative priority at the present time. Nonetheless, the Working Group recognizes that provincial delegates might disagree with the conclusion on the first issue and want to reflect on the next issues, as well as the potential options. For that reason, the report outlines and briefly discusses the legislative and judicial alternatives and arguments for and against each one, as well as the possible avenues if legislation was deemed a better path, and secondary issues which might follow from the development of third party rights.

1. Let the Common Law Take its Course

[49] Provided that there is a problem which needs to be addressed, the next issue to consider is whether legislative intervention is preferable to judicial treatment in the Canadian context. In other words, are legislatures the better bodies to provide a satisfactory solution to the privity problem? Or is it more appropriate at this time to simply leave courts to develop third party rights?

[50] The answer could be that courts are perfectly able to consolidate and further develop third party rights. Until now, courts have made do with taking away barriers and preventing unfairness by creating ways to get around the privity rule. Courts could, without a doubt, play a more active role in defining parameters which would clearly indicate in what circumstances third parties are allowed to enforce a contract.

[51] Once the question of third party rights is clarified, courts would be able to develop the law relating to secondary issues, such as variation or cancellation of the contract, counterclaims, defences and set-offs available to the promisor, as well as the remedies available to the third party, double liability, double recovery and overlapping claims, arbitration agreements and jurisdiction agreements, existing exceptions to the privity rule, and exclusion of certain types of contract.

[52] However, clear indications of a will to reshape the privity rule need to be provided. On that point, Newbury J.A. in *RDA Film Distribution Inc. v. British Columbia Trade Development*, quoting Steyn L.J. of the Court of Appeal of England, pointed out:

> There is a respectable argument that it is the type of reform which is best achieved by the courts working out sensible solutions on a case by case basis, e.g., in regards to the exact

> point of time when the third party is vested with an enforceable contractual rights: … But that requires the door to be opened by the House of Lords reviewing the major cases which are thought to have entrenched the rule of privity of contract.[48]

[53] In the same way, the Supreme Court of Canada might have to open the door by clearly recognizing "the principle that the absence of privity, *per se*, will not preclude an action by a third-party beneficiary to enforce a promise" whether the third party is a plaintiff or a defendant.[49] In other words, it could be appropriate to recognize that third parties are able to enforce positively contracts made for their benefit. The shield/sword dichotomy would thus lose any remaining relevancy.

[54] Judicial treatment offers a number of benefits, such as showing greater flexibility and adaptability, allowing developments on a case-by-case basis, increasing accuracy by eliminating the "guess work", and insuring certain maintenance. Judicial treatment has the advantage of tailoring to actual needs and of keeping the law up to date on a periodic basis.[50]

[55] Nevertheless, judicial treatment also has downsides, such as raising concerns over the growing number of exceptions, rendering the application of the privity rule unpredictable, avoiding comprehensive reform, overlooking certain secondary issues arising from the development of third party rights, and introducing inconsistencies among courts and across jurisdictions. Judicial treatment has the disadvantage of lacking certainty and effectiveness.[51]

2. Legislative Intervention

[56] The answer could be, on the contrary, that legislative intervention is necessary to plainly set down third party rights. In *London Drug*, Iacobucci J. expressed the majority's view that "any substantial amendment to the doctrine of privity is a matter properly left with the legislature".[52] As early as 1987, the Ontario Law Reform Commission in its *Report on Amendment of the Law of Contract* made the following comments:

> Abolishing the present third party beneficiary rule would, we believe, render the law more consistent internally, and more understandable by lay persons. As was pointed out previously, the courts have been able to circumvent the doctrine of privity by one legal device or another when the desired result was the enforcement of the promise by the third party beneficiary. The present state of the law, with its anomalies and unjustified distinctions, cannot and should not continue.[53]

[57] After reviewing the approaches for getting around privity, another question is whether there still are privity issues that could be satisfactorily settled through legislative intervention? In other words, what situations, if any, are not already covered by exceptions, either statutory or common law, or separately recognized areas of law, or legal devices for working around the privity rule? And are legislatures justified to intervene for those cases? Does the availability of the exceptions and other devices always correspond with their need?[54]

[58] Despite the many exceptions and devices described above, there could be situations where third parties would not be able to circumvent the privity rule beforehand, nor be able to apply any of the exceptions afterwards. Furthermore, other courses of action might simply not be available, or as convenient or as efficient in certain circumstances. In particular it appears that privity remains a problem in cases where a third party brings an action to claim a benefit expressly or impliedly conferred upon her or him by the contracting parties, or a right to enforce a contract or a term of a contract.[55] Thus, it could be said that "the underlying concerns of commercial reality and justice" militate for the reconsideration of the doctrine of privity of contract.[56]

[59] An additional consideration is whether legislative intervention is needed to address the complexity brought about by the great number of exceptions and devices, and the uncertainty and unpredictability they cause. On that point, McCamus writes:

> A number of considerations suggest that the doctrine of privity is vulnerable to further reform. The rule lacks a convincing policy foundation. It is capable of producing unjust and surprising results in commonplace fact situations. Its unsatisfactory nature has produced a long and growing list of exceptions, thus rendering application of the doctrine unpredictable.[57]

[60] Finally, one more question to consider is whether lay people are aware of the privity rule and its potential effects. Can they turn to the tools that are available in order to work around the privity rule? The various means and exceptions are only valuable if the contracting parties are fully informed of these tools, and know how to bring them into play.[58]

[61] Legislative treatment presents certain merits, such as clarifying the privity rule, solidifying third party rights, reducing transaction and/or litigation costs, echoing sound commercial practices and modern realities, directly addressing most secondary issues arising from the development of third party rights, as well as reducing complexity,

promoting judicial consistency and uniformity. Legislative treatment has the advantage of not being limited to incremental changes and of enunciating a single legislative scheme.[59]

[62] On the other hand, legislative treatment also has drawbacks, such as defining third party rights too broadly, introducing irrelevance to the debate through unnecessary intervention, increasing the number of actions by third parties, blurring the boundary between tort liability and contract liability, narrowing current statutory and common law exceptions, deterring socially beneficial contractual relationships, and becoming obsolete. Legislative treatment has the disadvantage of lacking adjustability and adaptability.[60]

[63] In any event, legislatures have several options if they should decide to reform the doctrine of privity of contract.

a. Exceptions for Particular Situations

[64] The first legislative option would be to identify where the privity rule is still producing unwanted or counterproductive results in common situations, and to rectify the problems in a targeted way. In some cases, legislatures might be able to anticipate the potential effects of the privity rule and reverse them on a piecemeal basis. In other cases, legislators will have to incorporate exceptions already created by the courts.

b. General Provision

[65] The second legislative option would be to introduce a general reform provision. A general provision, in turn, raises further options.

[66] For instance, a general provision could create a positive rule that would allow a third party to enforce a contract made for benefit of the third party. When a term of a contract indicates that the contracting parties purposed to benefit a third party, it should be presumed that they also intended for the third party to have the right to enforce the contract.[61] This presumption could be rebutted by the contracting parties if they only intended to extend a contractual benefit to a third party without conferring a separate right to directly enforce the contract, that is, a right to sue on it.[62]

[67] A general provision could also allow a third party to sue on a contract that contains a provision which expressly gives the third party a right to enforce it, whether or not the contractual arrangements are for the benefit of the third party. The possibility of

conferring a mere right of enforcement could be particularly useful where there is a chain of contracts. For instance, an owner could be entitled to sue a subcontractor, notwithstanding the lack of privity, provided that the head contractor and the subcontractor have conferred this right on the owner.

[68] A general provision could also allow a third party to rely on a term of a contract which limits liability for breach of contract or liability in tort, provided that was the contracting parties' intentions. As previously mentioned, these types of case are mostly embraced by the principled exception.[63]

[69] Another option would be to enact a "negative rule", that is, a provision to the effect that the lack of privity is not in itself a defence against third party beneficiaries' claims under a contract.[64] In contrast to a positive rule, a negative rule would not require carving out exceptions to the privity rule. Moreover, a negative rule would still prevent floodgates of litigation by third parties as the rule would only apply when contracting parties intend to benefit a third party. It would then be a question of contract interpretation.

[70] It is clear, however, that the mere fact of enacting one or a combination of the general provisions would not resolve all problems created by the privity rule in common fact situations. For instance, most of the cases encompassed in both the chain of contracts category and the rights and obligations follow the subject matter category would not be dealt with by any of the previous models of general provision. In order to properly take care of the latter two categories, a general provision should make it clear that the right of a third party to enforce a contract can be inferred from an appropriate analysis of either the contracting parties' intentions or the fact situation (i.e. particular circumstances, class of agreement, relationship between the third party and the contracting party, common sense and commercial reality).[65]

[71] A more drastic option could be the abolition of the doctrine of privity. This option seems at first glance dangerous. Indeed, there should be limits to when and how a third party can enforce a contract. It might be hazardous to merely abolish the privity rule. All types of third party beneficiary (especially relational, situational or incidental beneficiaries) should not be granted the right to enforce agreements to which they are not privy without a thorough appreciation of the particular circumstances of each case. Moreover, complete strangers to a contract should not suddenly be able to enforce

contractual arrangements because of the absence of a rule precluding people who are not party to a contract to sue on it.

c. Detailed Legislative Scheme

[72] The third legislative option also picks up the idea of a general provision, but goes further by providing details in order to insure that appropriate safeguards are in place. In recent years, a number of reform agencies have identified subsidiary issues which, in their view, needed to be addressed in a detailed legislative scheme.[66] These issues relate to (i) the enforceability of the contract; (ii) the identification of third party; (iii) the contracting parties' right to vary or cancel the contract (crystallization test); (iv) the third party rights subject to the terms of the contract (including the arbitration and jurisdiction agreements) and the defences, set-offs and counterclaims available to promisor, as well as the remedies available to the third party; (v) the potential for overlapping claims; (vi) the possibility to opt-out; (vii) the exclusion of certain types of contract; and (viii) the existing exceptions to the privity rule.

[73] There are a number of "second generation issues", that is, secondary issues ensuing from the development of third party rights, which may be more difficult to handle by a general provision reforming the privity rule or judicial development of third party rights on a piecemeal basis. On the other hand, these questions could be addressed in a detailed legislative scheme, that is, a comprehensive set of rules to favour expediency, predictability and consistency in the treatment of these second generation issues. In any event, it might be easier to create rules that accommodate specific results once it is established what should happen in the cases encompassed by each of the second generation issues reviewed below. However, the mere fact of looking at the second generation issues does not determine the path reform should take. An informed discussion on these second generation issues could nevertheless assist legislators and courts.

i) Enforceability of the Contract

[74] As previously noted, one of the underpinnings of the doctrine of privity is that a third party cannot enforce a promise because no consideration has flowed from the third party exchange for the promise. Consequently, a detailed legislative scheme could clarify that a third party who has not provided consideration should be able to enforce a contract as long as all other specified requirements are met. This would not call into question the

doctrine of consideration in general. The consideration rule should still apply between the contracting parties, that is, the promisor and the promisee.[67]

ii) Identification of the third party

[75] The question of whether a contract should benefit a third party is not always clear-cut. Therefore, a detailed legislative scheme could include requirements to identify the third parties. It could be stipulated that the third party rights should be limited to beneficiaries expressly identified by name or description.[68] Alternatively, it could be specified that third party rights should be extended to implied beneficiaries on a proper construction of the contract, and even relational and situational beneficiaries in appropriate circumstances.[69]

iii) Right of the Contracting Parties to Vary or Cancel

[76] Contracting parties remain free to amend or rescind a contract or a term of a contract when they mutually agree. However, third party rights become valueless if contracting parties could modify or terminate a contract made for the benefit of a third party at any time. Therefore, a detailed legislative scheme could settle a point in time after which contracting parties are not able to vary or cancel a contract in a way that could affect third party rights without the consent of the third party beneficiaries. In determining when the third party rights should be considered crystallized, it is important to "strike a balance between the interests of the contracting parties to vary the contract and the interests of the third party in securing the promised benefit".[70]

[77] The "crystallization test" differs from one jurisdiction to the next: (1) at the moment the contract is formed; (2) after the contract has been accepted or adopted by the third party either expressly or impliedly; (3) if the third party has materially altered its position in reliance on the promise made, when the promisor can reasonably have foreseen that the third party would rely on the contractual arrangements; (4) or once either contracting party is aware that the third party has assented to the contract, either by word or by conduct.[71] Some of these approaches have been criticized for being too restrictive (unduly limiting the freedom of contract) or too difficult to determine at which point the third party has become aware or has relied on the contract.[72]

[78] Contracting parties should always remain free to include in their contract a clause providing for the variation or cancellation. For instance, a contract could reserve to the

contracting parties (or one of the contracting parties) an unlimited right to vary or cancel the contract.

[79] In order to avoid situations where contracting parties are "locked in" to a contract because the third party cannot consent to a variation or cancellation of the contract, it could be advisable adopt a safeguard conferring on the courts the discretion to authorize such a variation or cancellation in appropriate circumstances.[73]

iv) Third party Rights Subject to the Terms of the Contract and other Defences, Set-offs, Counterclaims and Remedies

[80] It is said that a third party beneficiary should not be placed in a better position than the contracting parties. Consequently, a detailed legislative scheme could specify that the right of the third party to enforce a contract should be subject to the terms of the contract.[74] This would not mean that contracting parties can impose obligations upon third parties; it would only indicate that contracting parties can subject third party rights to certain conditions.

[81] Similarly, third party beneficiaries should be bound by any arbitration or jurisdiction agreements insofar as contracting parties are free to impose such conditions. Thus, detailed legislation could confirm that a third party who wishes to enforce a contract made for its benefit should be obliged to refer to arbitration and/or exclusive jurisdiction when the contract so provides.[75]

[82] Furthermore, a promisor should be able to invoke against the third party the usual defences or set-offs which would have been available if the third party had been a party to the contract or the promisee had enforced the contract. A third party should also be entitled to the remedies which would have normally been available in an action for breach of contract if the promisee had sued on the contract. Such defences, set-offs and remedies should be clearly limited to situations arising out of the contract which the third party is seeking to enforce. In addition, a promisor should be free to counterclaim when the promisor has a right of action against the third party. However, the promisor should not be able to counterclaim against the third party for a matter relating to the promise.[76]

[83] Nevertheless, difficulties might arise where the forfeiture of a contracting party could penalize an innocent third party beneficiary or where the recourse to a defence, set-

off or counterclaim could result in an inequity.[77] Here again, it might therefore be advisable to confer on the courts a measure of discretion in particular contexts.[78]

v) Overlapping Claims

[84] One of the arguments in support of the privity rule relates to the risks of double liability against the promisor and/or double recovery for the third party.[79] Therefore, detailed legislation could make it clear, on the one hand, that a promisor cannot face double liability because both the promisee and the third party have the right to enforce the contract; and, on the other, that a third party cannot obtain double recovery because both the promisor and the promisee are liable.[80] Once a promisor has wholly fulfilled its contractual obligations to either the third party or the promisee, the promisor should to be discharged from its obligations under the contract. Likewise, once a third party has recovered its losses from either the promisor or the promisee, the third party should to that extent be stripped of its rights under the contract.[81]

vi) Possibility to Expressly Contract Out

[85] It is generally acknowledged that “most rules of contract law are voluntary default rules that the parties can bargain around if they so choose”.[82] Therefore, a third party rule should be fashioned to give effect to the contracting parties’ intentions, either when they intend to confer to an enforceable benefit upon a third party or preclude any third parties from enforcing the contract.[83] A detailed legislative scheme could affirm that contracting parties remain free to “contract out”, that is, exclude any rights in favour of third party beneficiaries.

[86] However, difficulties could arise when an “anti-third party beneficiary clause” appears to functionally contradict the contracting parties’ intentions to confer to the third party a right to enforce the contract.[84] Furthermore, excluding a third party beneficiary regime could also be problematic where one of the contracting parties cannot “freely” choose to contract out, such as in the context of a contract of adhesion. Detailed legislation could provide a solution to such problems.

vii) Types of Contract to which a Reform would not Apply

[87] In addition to the contracting parties’ right to opt out, a detailed legislative scheme could also explicitly exclude particular contracts from its application. For

instance, the Law Reform Commission of Ireland had concluded that certain types of contract "should be excluded, either for policy reasons or because third parties already have enforceable rights and/or obligations under existing rules, and the creation of additional rights could cause uncertainty and undermine the policy behind the existing rules".[85]

[88] Carving out exceptions to a new third party rule as part of a detailed legislative scheme could, however, become a lengthy and complex process.[86] A simpler solution could be to specify that the proposed legislation is a mere "fall back rule", that is, a rule that only applies when the other recognized exceptions or devices do not offer a satisfactory remedy against the consequences of the privity rule.[87] Thus it could still be possible to reform the doctrine of privity without having to set out a list of excepted contracts in cases where circumventing the privity rule could create inequities or jeopardize well-established principles.[88]

viii) Existing Exceptions to the Privity Rule

[89] The question is whether a new provision in regards to third party rights would supplant or preserve the current statutory and common law exceptions to the privity rule.[89] If the exceptions were abolished, it might be essential to pinpoint in a detailed legislative scheme situations where existing exceptions should be retained because they give more secure rights, serve additional functions or facilitate a transition in ways of doing business. If the exceptions were retained, it might again be necessary to indicate that proposed legislation provides an alternate rule which only comes into play when the current exceptions do not apply in order to prevent third parties from cherry-picking the most advantageous settlement.[90]

C. CONCLUSIONS AND RECOMMENDATIONS

[90] As previously mentioned, the mandate of the Working Group was to prepare a report examining the issues and options set out in the 2007 study paper, and containing recommendations for consideration at the 2008 annual meeting.[91]

[91] The Working Group report lays out a series of issues in regards to the doctrine of privity of contract: (1) Does the privity rule create enough problems in the Canadian context that it needs to be reconsidered at the present time? (2) Would a reform be better achieved through judicial developments of third party rights or legislative intervention if

the need arises? (3) What option would be best suited if a legislative intervention is deemed a better alternative? Specific legislative intervention in particular circumstances? A general provision? Or a detailed legislative scheme?

[92] In regards to first issue, a thorough analysis of the legislation (statutory exceptions) and case law (common law exceptions, especially the principled exception, and other means to work around the privity rule) leads the Working Group to conclude that privity in its current form does not represent an urgent matter or, at any rate, a legislative priority at present.[92] Privity does not, at this time, create enough difficulties to justify reform to implement stand alone legislation. Therefore, the Working Group believes that a better course of action is for legislatures to stand back and let the common law take its course, at least for now, given the potential for further clarification and expansion of third party rights by the courts.

[93] Furthermore, the case for legislative intervention should outweigh by some measure the case against. In other words, one should be persuaded that there is a problem which needs to be dealt with, and if there is, that legislation is a valid option before recommending the allocation of legislative resources. The Working Group is of the opinion that the sensible conclusion here is that this criterion has not been met, and the first issue should consequently be answered in the negative.

[94] The report does not provide definitive answers to the second and third issues set forth above, since the Working Group view is that there is no problem which calls for reform in the Canadian context.[93] However, the report outlines and briefly discusses those issues and the available options, as well as some secondary issues ensuing from the development of third party rights in order to allow provincial delegates to form their own assessments, and perhaps provide guidance for legislatures and courts in the future.

[95] In short, the Working Group recommends that the ULCC should not commit to reform the doctrine of privity of contract at the moment because it has not been found that there is currently a problem serious enough to require legislative intervention. Therefore, the Working Group considers that it is not appropriate at this point to make specific legislative recommendations for consideration at the 2008 ULCC meeting.[94]

ENDNOTES

[1] Uniform Law Conference of Canada, *Privity of Contract and Third Party Beneficiaries* by M. Lavelle, (Charlottetown: Uniform Law Conference of Canada, Civil Section, 2007), online:
Uniform Law Conference of Canada
<http://www.ulcc.ca/en/poam2/Privity_of_Contract_and_Third_Party_Beneficiaries_En.pdf>.
[2] Uniform Law Conference of Canada, *Civil Section Proceedings - Resolution 15. Privity of Contract,* (Resolutions) (Charlottetown: Uniform Law Conference of Canada, 2007).
[3] *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd*., [1915] A.C. 847 (H.L.), at 853 (UK). A number of commentators have, however, suggested that consideration, in its own terms, says nothing about who may enforce an enforceable bargain, and it should not prevent a third party from enforcing a bargain made to his or her benefit. Such a view seems consistent with the doctrine of consideration insofar as "the consideration requirement is material only to the question of whether a promise is contractually enforceable; if the promise that the third party is permitted to enforce is part of a contract (supported by consideration), there is no weakening of the consideration requirement": John N. Adams, Deryck Beyleveld & Roger Brownsword, "Privity of Contract - the Benefits and Burdens of Law Reform" (1997) 60:2 Mod. L. Rev. 238 at 248. See also S.M. Waddams, *The Law of Contracts*, 5th ed., (Toronto: Canada Law Book, 2005) at 193-206.
[4] *Currie v. Misa*, (1875), 10 L.R. Exch. 153 (Ex.) at 162 (UK): "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other".
[5] *Vandepitte v. Preferred Accident Insurance Corporation of New York*, [1933] A.C. 70 (P.C.); *Beswick v. Beswick*, [1968] A.C. 58 (H.L.).
[6] *Greenwood Shopping Plaza v. Beattie*, [1980] 2 S.C.R. 228.
[7] *Tweddle v. Atkinson*, (1861) 121 E.R. 762 (Q.B.) (UK).
[8] John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 298. In other words it could be said that the third party who has suffered a loss has no standing to enforce the promise, and the contracting party who has standing to enforce the contract has suffered no real loss. In many cases, then, the third-party beneficiary rule will leave the third party without any effective redress against the person who promised, for good consideration, to confer a benefit on the third party. See *Coulls v. Bagot's Executors and Trustees Co. Ltd.* (1967), 119 C.L.R. 430 (H.C.) (AUS); *Jackson v. Horizon Holidays Ltd.*, [1975] 1 W.L.R. 1468 (C.A.) (UK); *Woodar Investment Development Ltd. v. Wimpey Construction UK Ltd.*, [1980] 1 W.L.R. 277 (H.L.) (UK); *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.*, [1994] 1 A.C. 85 (H.L.) (UK); *Darlington Borough Council v. Wiltshier Northern Ltd.*, [1995] 1 W.L.R. 68 (C.A.) (UK). See also Robert E. Forbes, "Practical Approaches to Privity of Contract Problems" (2002) 37 Can. Bus. L. J. 357, at 376-377.
[9] It should be noted that such a result can also be obviated by adding a clear "anti-third-party clause" in the contract.
[10] J.D. McCamus, *The Law of Contracts*, *supra*, note 8, at 299. McCamus also points out that "the doctrine of privity of contract is not followed in American law and has been abrogated by statute in a number of Commonwealth jurisdictions, including one Canadian province, the traditional doctrine of privity remains generally applicable in other common law jurisdictions": *Ibid*, note 8, at 217.
[11] It is not always clear whether an exception to the privity rule has been created. Nonetheless, in some of the cases cited hereafter, courts appear to have chosen to relax the privity doctrine or, at any rate, opened the door to further exceptions to the doctrine in their dicta.
[12] Michael Trebilcock, "The Doctrine of Privity of Contract: Judicial Activism in the Supreme Court of Canada" (2007) 57 U.T.L.J. 269, at 272.
[13] For instance, should the privity rule be relaxed "if [the] recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties": see American Law Institute, *Restatement of the Law of Contracts* 2d (St. Paul: American Law Institute, 1981), § 302(1)).
[14] For instance, a promise to pay an annuity or an amount of money to a third party made by a contracting party in exchange of a valid consideration cannot be enforced by the intended third party beneficiary: see *Keoughan v. Holland*, [1948] 1 D.L.R. 605 (P.E.I.S.C.); *Beswick v. Beswick*, *supra*, note 5; *Vandewal v. Vandewal*, [2002] O.J. No. 393 (S.C.J.), aff'd. [2003] O.J. No. 3269 (C.A.). A contract can also be

unenforceable by a third party, even where the contracting parties have intended to confer to the third party a right to directly enforce the contract: see *Tweddle v. Atkinson*, *supra*, note 7. In a commercial context, privity can sometimes prevent the intended third party beneficiary of a contract of service, guarantee, right to redeem, escrow agreement, indemnity or provision of a note indenture from being able to enforce it: see *RDA Film Distribution Inc. v. British Columbia Trade Development Corporation*, [1999] B.C.J. No. 1516 (S.C.), aff'd [2000] B.C.J. No. 2550 (C.A.); *Logozzo v. Toronto-Dominion Bank*, [1999] O.J. No. 4088 (C.A.); *Higgins Estate v. Security One Alarm Systems Ltd.*, [2001] O.J. No. 2447 (S.C.J.); *Cheong v. Futama*, [2002] B.C.J. No. 2214 (S.C.); *MacNeil v. Fero Waste and Recycling Inc.*, [2002] N.S.J. No. 166 (S.C.), aff'd [2003] N.S.J. No. 95 (C.A.); *Stelco Inc. (Re)*, [2006] O.J. No. 3219 (S.C.J.), aff'd [2007] O.J. No. 2533 (C.A.).

[15] Even before *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108., it seems that courts were already open to the idea of allowing a third party beneficiary to enforce a contract or term of a contract in insurance context (either to bring a claim against a contracting party or to defend itself against a action brought by a contracting party), notwithstanding the lack of privity between an insured and an insurer (and thus ignoring *Vandepitte v. Preferred Accident Insurance Co. of New York*, *supra*, note 5): *Commonwealth Construction Co. v. Imperial Oil Ltd.*, [1978] 1 S.C.R. 317; *Trans Canada Credit Corporation Ltd. v. Royal Insurance Co. of Canada*, [1983] N.S.J. No. 440 (S.C.A.); *Scott v. Wawanesa Mutual Insurance Co.*, [1989] 1 S.C. R. 1445, and the Australian case *Trident General Insurance Co. Ltd. v. McNeice Bros. Pty. Ltd*. (1988), 165 C.L.R. 107 (H.C.) (AUS). See also Uniform Law Conference of Canada, *Privity of Contract and Third Party Beneficiaries*, *supra*, note 1, as well as J.D. McCamus, *The Law of Contracts*, *supra*, note 8, at 294-321; S.M. Waddams, *The Law of Contracts*, *supra*, note 3, at 176-216; G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Carswell, 2006) at 175-201; John Swan, *Canadian Contracts Law,* 1st ed., (Markham: LexisNexis Butterworths, 2006); and Law Reform Commission (of Ireland), *Privity of Contract and Third Party Rights*, Final Report, LRC88-2008 (Ireland: Law Reform Commission).

[16] Although not limited the insurance or pension and benefit contexts, the main statutory exceptions to the privity rule regarding intended third party beneficiaries are typical of this areas of law. See Uniform Law Conference of Canada, *Privity of Contract and Third Party Beneficiaries*, *supra*, note 1, as well as J.D. McCamus, *The Law of Contracts*, *supra*, note 8; S.M. Waddams, *The Law of Contracts*, *supra*, note 3; G.H.L. Fridman, *The Law of Contract in Canada*, supra, note 15; John Swan, *Canadian Contracts Law supra*, note 15; and Law Reform Commission (of Ireland), *Privity of Contract and Third Party Rights*, *supra*, note 15.

[17] *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, *supra*, note 15.

[18] *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, *supra*, note 15.

[19] *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, *supra*, note 15, at para 32.

[20] *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd., supra*, note 15, emphasized the general nature or open texture of the principled exception. Thus, it is said that "[t]he purpose of the exception is to confer upon courts, in cases where the traditional exceptions of agency and trust do not apply, a discretion to "undertake the appropriate analysis, bounded by both common sense and commercial reality, in order to determine whether the doctrine of privity with respect to third party beneficiaries should be relaxed in the given circumstances" ": J.D. McCamus, *The Law of Contracts*, *supra*, note 8, at 314.

[21] In the words of McCamus: "We should note in passing that the second branch of the test, as formulated in *Fraser River*, does not appear to apply neatly to all cases in which third-party beneficiaries seek to enforce, as plaintiffs, promises that are intended to benefit them. Although the "insured" plaintiffs in *Vandepitte* and *Trident General* may appear to be engaged in the "very activity" envisaged by the agreement, that is, they suffered the defined loss or injury, the agreement in *Beswick* does not envisage that the widow will engage in any particular activity, other than the receipt of money": J.D. McCamus, *The Law of Contracts*, *supra*, note 8, at 316.

[22] *Vandepitte v. Preferred Accident Insurance Co. of New York*, *supra*, note 5.

[23] On that point, J.D. McCamus, *The Law of Contracts*, *supra*, note 8, at 312 wrote: "This was the problem in *Vandepitte*, which held that the doctrine of privity prevented third-party insureds from enforcing such provisions. Although, as noted above, the decision in *Vandepitte* was abrogated by legislation in the context

of automobile insurance, the reasoning in *Vandepitte* created a potential hazard in other insurance contexts. Nonetheless, Canadian courts appear to have adopted the practice of ignoring *Vandepitte*". See also *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, *supra*, note 15, at para. 40: "In this respect, it is time to put to rest the unreasonable application of the doctrine of privity of contracts of insurance established by the Privy Council in Vandepitte, supra, a decision characterized since its inception by both legislatures and the judiciary as out of touch with commercial reality" [emphasis added]. See *Commonwealth Construction Co. v. Imperial oil Ltd.*, *supra*, note 15; *Trans Canada Credit Corporation Ltd. v. Royal Insurance Co. of Canada*, *supra*, note 15; *Scott v. Wawanesa Mutual Insurance Co.*, *supra*, note 15; *Trident General Insurance Co. Ltd. v. McNeice Bros. Pty. Ltd.*, *supra*, note 15; *Downtown Pontiac Buick (1983) Ltd. v. Marshall*, [2007] O.J. No. 4352 (S.C.J.).

[24] J.D. McCamus, *The Law of Contracts*, *supra*, note 8, at 316.

[25] After more than ten years, the extent of the application of the principled exception still entails a great deal of uncertainty. In some cases, courts stated that the principled exception can only be used as a shield and not as a sword: see, for instance, *RDA Film Distribution Inc. v. British Columbia Trade Development*, *supra*, note 14, at paras. 358-360 (BCSC), as well as paras. 67, 68 and 76 (BCCA); *Parwinn Developments Ltd. v. 375069 Alberta Ltd.*, [2000] A.J. No. 68 (Q.B.) at para. 33; *375069 Alberta Ltd. v. 400411 Alberta Ltd.*, [2000] A.J. No. 71 (Q.B.) at para. 43; *Geiger v. 803577 Ontario Ltd. (c.o.b. Exerspa Zure Son Holdings Ltd.*, [2000] O.J. 111 (S.C.J.) at para. 23; *804977 Alberta Ltd. v. Lowrie*, [2003] A.J. No. 343, at para. 29; *Marble (Litigation Guardian of) v. Saskatchewan*, [2003] S.J. No. 479 (Q.B.) at para. 54; *Kitimat (District) v. Alcan Inc*., [2005] B.C.J. No. 58 (S.C.) at paras. 62, 65, 70 and 71; *Kitimat (District) v. Alcan Inc.*, [2006] B.C.J. No. 376 (C.A.) at paras. 69-70; *Sunshine Valley Developments Ltd. v. Hendrichs*, [2006] B.C.J. No. 624 (S.C.) at para. 66; *Waterloo (City) v. Wolfraim*, [2006] O.J. No. 3147 9 (S.C.J.) at paras. 74-76; *Design Services Ltd. v. Canada*, [2006] F.C.J. No. 1141 (C.A.) at para. 38. In other cases, courts allowed plaintiffs to rely on the principled exception in support of their claims or, at any rate, contemplated using the principled exception as a sword: see, for instance, *Hawman v. Regina Exhibition Assn. Ltd.*, [1999] S.J. No. 700 (Q.B.) at para. 21; *Higgins Estate v. Security One Alarm Systems Ltd.*, *supra*, note 14 at para. 33 (it is not clear whether this decision is based in tort, i.e., a breach of a duty of care arising from the initial contract or in contract, i.e., an application of the principled exception allowing the third party to sue for breach of contractual duties); *Cheong v. Futama*, *supra*, note 14, at para. 60; *Deleeuw v. Deleeuw*, [2003] B.C.J. No. 2284 (S.C.) at paras. 82-84; *Vandewal v. Vandewal*, *supra*, note 14 at paras. 17-18 (S.C.J.) (it is not clear whether this decision is based on the conclusion to the effect that there was simply a new contract between all the initial contracting parties, including the father who accepted the new agreement, or on the application of the principled exception allowing the father, the intended third party beneficiary of the new contract, to sue upon it) (ONCA dismissed the appeal because the argument for restitution was neither tried nor pleaded at trial, and there was no fault in the judge's analysis and findings without motivating its decision); *MacNeil v. Fero Waste and Recycling Inc.*, *supra*, note 14 at paras. 53-55 (S.C.) (NSCA concluded to an independent contract of indemnity between contracting party and third party); *Fenrich v. Wawanesa Mutual Insurance Co.*, [2004] A.J. No. 458 (Q.B.) at para. 20-22, as well as *Fenrich v. Wawanesa Mutual Insurance Co.*, [2005] A.J. No. 788 (C.A.) at para. 29 (both QB and CA concluded that even though the plaintiff was a third party beneficiary falling under the definition of "insured", he had no right to sue in his own name because the contracting parties did not intend to extend the benefit of suing to third parties. The policy expressly limited the right to sue to individuals named in the declaration. Therefore, the principled exception to privity did not apply); *Frontenac Institution Inmate Committee v. Canada (Correctional Services)*, [2004] F.C.J. No. 703 (C.A.) at para. 18 (in the its reasons for dismissing the application for summary judgment, the Court stated that there was a reasonable argument that inmates were either third-party beneficiary with a right to enforce the contract of cable television services or that the government was acting as an agent or trustee); *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (S.C.J.) at paras. 21-23; *Stelco Inc. (Re)*, *supra*, note 14, at para. 75 (ONCA affirmed the creation of an exception through a trust device only and concluded that it was unnecessary to decide on extension of the principled exception); *King v. Shuniah Financial Services Ltd.*, [2006] F.C.J. No. 799, at para. 20 (CAFC).

[26] In *Parlette v. Sokkia Inc.*, [2006] O.J. 4085 (S.C.J.) at paras. 26-27, G.F. Day J. concluded: "A genuine issue of law is one that is "arguable", for instance, where there are conflicting authorities or no authorities

directly on point. The court should not dispose of matters of laws that are not fully settled in the jurisprudence. See *Colantino v. Kuhlmann*, [2006] O.J. No. 903 at paragraphs 22 & 23 (Ont. S.C.). The law in this area is at a fairly well developed state of evolution in the United States. It is far from settled in Ontario, let alone the other provinces of Canada. The Supreme Court in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 ("*London Drugs*") did an analysis of third party rights in the American experience. It also did an examination on the doctrine of privity and whether it should be relaxed in Canada. It cautioned that the exception to the doctrine of privity functions as a "shield" rather than a "sword". My reading of *London Drugs*, indicates the reserve expressed by the Supreme Court in dealing with matters of privity of contract which is one perspective with which to view the issue under adjudication in this matter. I do not get a sense of certainty out of *London Drugs* to be determinative in this motion".

[27] *Civil Code of Quebec*, S.Q. 1991, c. 64, s. 1444 and *Law Reform Act 1993*, S.N.B. 1993, c. L-1.2, s. 4(1). In the words of G.H.L. Fridman, *The Law of Contract in Canada*, *supra*, note 15, at 188-189: "Other systems of law have discovered that to adopt the idea that contracts are personal to the contracting parties is to frustrate the object of the contract, and to cause very practical difficulties, which the demands of logic, as it were, do not justify, having regard to legitimate commercial and other needs. Hence their acceptance of the notion of stipulation for third parties". *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, *supra*, note 15, at 427, also referred to the exception to the privity rule in Scottish law when a *jus quaesitum tertio* is created, that is, "a right vested in and secured to a third party in and by contract a contract between two other parties." In the words of the Court, "[i]f an intention to confer a benefit on a third party can be gathered from the terms of the contract and the conduct of the parties, a jus quaesitum tertion will arise and the third party will have a right to enforce the contractual provision". See *Ivanhoe Inc. v. United Food and Commercial Workers, Local 50*, [2001] 2 S.C.R. 565 and Martin Boodman, "Third-Party Beneficiaries in Quebec Civil Law" (2001) 35 C.B.L.J. 216. See also The Law Reform Commission (of Ireland), *Privity of Contract and Third Party Rights*, *supra*, note 15, at paras. 2.46-2.50.

[28] Section 1440 of the *Civil Code of Quebec*, *supra*, note 27, provides that "a contract has effect only between the contracting parties; it does not affect third persons, except where provided by law" is a close equivalent of the common law doctrine of privity of contract. However, the civil law principle of privity of contract (principle of relativity) is supported by the autonomy of the will, that is, the principle that people are free to determine their own civil rights and obligations, whereas the common law doctrine of privity of contract is first and foremost underpinned by the lack of consideration passing from the third party to the promisor.

[29] See *Identification of the Third Party*, *infra*, section B.2.c.ii).

[30] It could be argued that a corporation's contractual obligations can only be undertaken through employees, agents or servants or that it can only be guilty of negligence through its directors or employees: see, for instance, *Greenwood Shopping Plaza Ltd. v. Beattie*, *supra*, note 6; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, *supra*, note 15; *Madison Developments Limited v. Plan Electric Co.*, [1997] O.J. No. 4249 (C.A.); *Laing Property Corporation v. All Seasons Display Inc.*, [1998] B.C.J. No. 255 (S.C.), varied *Orange Julius Canada Ltd. v. Surrey (City)*, [2000] B.C.J. No. 1655 (C.A.); *Tony and Jim's Holdings Ltd. v. Silva*, [1999] O.J. No. 705 (C.A.); *Dryburgh v. Oak Bay Marina* (1992) Ltd., [2000] F.C.J. No. 1314 (T.D.), [2001] F.C.J. No. 1002 (T.D.).

[31] There are many examples of "implicit agency" or "plurality of promisees" where a contracting party contracts on behalf of one or several third parties: see S.M. Waddams, *The Law of Contracts*, *supra*, note 3, at 197-198; G.H.L. Fridman, *The Law of Contract in Canada*, *supra*, note 15, at 179-180 & 187-188.

[32] See comments, s*upra*, note 21.

[33] In *Greenwood Shopping Plaza v. Beattie supra*, note 6, for instance, the employees of a tenant who negligently caused a fire were not entitled to the benefit of a limitation clause in the lease to protect them against the landlord's claim. The Court distinguished *Greenwood* from *London Drugs* because the negligent acts were unrelated to the performance of the "very activity" envisaged in the initial agreement. The Supreme Court of Canada subsequently declined to overrule *Greenwood* in *London Drugs* and neglected to mention it in *Fraser River*. However, in *Tony and Jim's Holdings Limited v. Sylva*, *supra*, note 30, the Court of Appeal of Ontario applied the principled exception in a case similar to *Greenwood*. See also *Orange Julius Canada Ltd. v. Surrey (City)*, *supra*, note 30, at paras. 117-118.

[34] J.D. McCamus, *The Law of Contracts*, *supra*, note 8, at 315.

[35] *RDA Film Distribution Inc. v. British Columbia Trade Development*, *supra*, note 14. See also *MacNeil v. Fero Waste and Recycling Inc.*, *supra*, note 14.
[36] *Ibid*.
[37] This category includes a variety of contexts where it could be argued that practical necessity or community of interests creates an indirect privity of contract, such as group travelling, household purchase, collective agreement, tender process, corporate contract, shopping centre lease, condominium association: see, for instance, *Coulls v. Bagot's Executors and Trustees Co. Ltd.*, *supra*, note 8; *Jackson v. Horizon Holidays Ltd.*, *supra*, note 8; *International Airport Industrial Park Ltd. v. Tanenbaum*, [1977] 2 S.C.R. 326; *London Drugs Ltd. v. Truscan Realty Ltd.*, [1988] B.C.J. No. 28 (S.C.), [1988] B.C.J. No. 1366 (S.C.); *C.T.R.E.F. Investments Ltd. v. H.G.O. Real Estate Ltd.*, [1993] O.J. No. 1194 (Gen.Div.); *Salmon Arm Pharmacy Ltd. v. R.P. Johnson Construction Ltd.*, [1994] B.C.J. No. 1266 (C.A); *Liquor Depot at Riverbend Square Ltd. v. Time for Wine Ltd.*, [1997] A.J. No. 660 (Q.B.); *Mann-Tattersall (Litigation Guardian of) v. Hamilton (City)*, [2000] O.J. No. 5058 (S.C.J.); *Hansen v. Overwaitea Foods Ltd.*, [2003] B.C.J. No. 3018 (Prov.Ct.); *Marshall v. Artree Developments Inc.*, [2006] O.J. No. 1633 (S.C.J.); *Resh v. Canadian Tire Corp.*, [2006] O.J. No. 1505 (S.C.J.). See also J.D. McCamus, *The Law of Contracts*, *supra*, note 8, at 317; and G.H.L. Fridman, *The Law of Contract in Canada*, supra, note 15, at 176, 187.
[38] See, for instance, *Anchor Fence Inc. v. Polaris Realty Corp*., [1994] A.J. No. 482 (Q.B.)) (exclusion of liability extended to the "selling" agent where the plaintiff had entered into an agreement with the "listing agent"); *Seven Oaks School Division No. 10 v. GBR Architects Ltd.*, [2002] M.J. No. 512 (Q.B.) (limitation clause extended to an architect who was the principal and shareholder in a firm of architects); *British Columbia (Workers' Compensation Board) v. Neale Staniszkis Doll Adams Architects*, [2004] B.C.J. No. 2636 (S.C.) (limitation of liability available to the primary provider of the services extended to a subconsultant engineering firm); *Harlon Canada Inc. v. Lang Investment Corp.*, [2008] O.J. No. 1279 (S.C.J.) (waiver of subrogation extended to landlord's trade (contractor)). On the other hand, see *Centennial Realities Ltd v. Westburn Industrial Enterprises Ltd.*, [1978] N.S.J. No. 697 (S.C.T.D.) (owner suing the wholesaler of a furnace installed by contractor); *BDC Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228 (recipient of a letter suing the courier for failure to deliver on time); *Solway v. Davis Moving & Storage Inc.*, [2001] O.J. No. 5049 (S.C.J.), [2002] O.J. No. 4760 (C.A.) (company (corporate plaintiff) cannot enforce a contract for moving and storage of the content of individual plaintiffs' home where they also operate their business); *Blagdon v. Pender*, [2004] N.J. No. 228 (Nfld. Prov. Ct.) (principal of a company cannot sue in own capacity on a contract made with company).
[39] In *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, *supra*, note 15, at para. 43, Iacobucci J. wrote: "As was noted in *London Drugs*, supra, privity of contract is an established doctrine of contract law, and should not be lightly discarded through the process of judicial decree. Wholesale abolition of the doctrine would result in complex repercussions that exceed the ability of the courts to anticipate and address. It is by now a well-established principle that courts will not undertake judicial reform of this magnitude, recognizing instead that the legislature is better placed to appreciate and accommodate the economic and policy issues involved in introducing sweeping legal reforms". See also *Sunshine Valley Developments Ltd. v. Hendrichs*, *supra*, note 25, at para. 63.
[40] See *Legal Devices Ousting the Privity of Contract Rule*, *infra*, section A.3.
[41] Michael Trebilcock, "The Doctrine of Privity of Contract: Judicial Activism in the Supreme Court of Canada", *supra*, note 12, at 271, comments: "Even if parties are fully informed of the rule and its effects, structuring their contracts to circumvent the rule entails wasteful transaction costs that different rule could eliminate, thus increasing the total surplus from the exchange to be shared amongst the parties". See also John N. Adams & Roger Brownsword, "Privity of Contract and the Idea of a Network Contract" (1990) 10 L.S. 12.
[42] In *Manitoba (Hydro Electric Board) v. John Englis Co.*, [1999] M.J. No. 506 (C.A.) at para. 63, the Court of Appeal of Manitoba dismissed an appeal by a third party seeking to rely on a limitation period clause: "There is no express language suggesting that the contract and limitation of liability clause was meant to benefit anyone else. Likewise, it does not appear that it can be implied that the limitation of liability clause was meant to benefit English Electric. The circumstances here are not analogous to those of employees actually charged with doing the work contemplated by the parties to the contract, as in London Drugs, or a specifically named beneficiary in a complex commercial arrangement as in Fraser River Pile &

Dredge Ltd. Rather, similar to Edgeworth Construction, English Electric was a separate large professional firm which had the ability to protect itself in a variety of ways, if it chose to do so. Doubtless, it chose not to do so because of the very limited nature of its contractual relationship with Hydro". See also *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*, [1993] 3 S.C.R. 206 at 216; *Thunder Mountain Drilling Ltd. v. Denmar Equipment Rentals Ltd.*, [1993] B.C.J. No. 2263 (S.C.); *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 at para. 47; *British Columbia v. R.B.O. Architecture Inc.*, [1995] B.C.J. No. 587 (S.C.) at paras. 111-112; *Haldane Products Inc. v. United Parcel Service Canada Ltd.*, [1999] O.J. No. 2851 (S.C.J.); *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860 at para. 108; *RDA Film Distribution Inc. v. British Columbia Trade Development Corporation*, *supra*, note 14. See to the opposite effect *Sylvan Industries Ltd. v. Fairview Sheet Metal Works Ltd.*, [1994] B.C.J. No. 468 (C.A.); *Madison Developments Ltd. v. Plan Electric Co.*, *supra*, note 30; (builder's risk policy's commercial purpose can only be served if the subcontractor is taken by necessary implication to be an unnamed insured); *British Columbia (Workers' Compensation Board) v. Neale Staniszkis Doll Adams Architects*, *supra*, note 38, at para. 33; *Beaulieu v. Day & Ross Inc.*, [2005] N.B.J. No. 77 (C.A.) (a carrier was allowed to raise a limitation clause contained in the bill of lading as a defence against a suit in contract by a third party, the eBay purchaser).

[43] Exceptions have developed in contexts, such as intellectual property (*Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142), shipment and carriage (including Himalaya clause in the bill of lading) *Dunlop v. Lambert* (1839), 7 E.R. 824 (H.L.) (UK); *Midland Silicones Ltd. v. Scruttons Ltd.*, [1962] A.C. 446 (H.L.) (UK); *Albacruz v. Albazero*, [1977] A.C. 774 (H.L.) (UK); *ITO-International Terminal Operators v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752; *Valmet Paper Machinery Inc. v. Hapag-Lloyd AG Inc.*, [2002] B.C.J. No. 1271 (S.C.); construction (including Builders' risk policy) *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.*, [1994] 1 A.C. 85 (H.L.) (UK); *St. Martin's Property Corp. Ltd. v. Sir Robert McAlpine Ltd.*, [1994] 1 A.C. 85 (H.L.) (UK); *Darlington Borough Council v. Wiltshier Northern Ltd.*, *supra*, note 8; *Madison Developments Limited v. Plan Electric Co.*, *supra*, note 30; *Daishowa-Marubeni International Ltd. v. Toshiba International Corp.*, [2000] A.J. No. 1453 (Q.B.), rev'd [2003] A.J. No. 1189 (C.A.); *Alfred McAlpine Construction Ltd. v. Panatown Ltd.*, [2001] 1 A.C. 518 (H.L.) (UK); *Secunda Marine Services Ltd. v. Fabco Industries Ltd.*, [2005] F.C.J. No. 1918 (C.A.). See also S.M. Waddams, *The Law of Contracts*, *supra*, note 3, at 199-201.

[44] *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, *supra*, note 15, at 453. See John N. Adams & Roger Brownsword, "Privity of Contract and the Idea of a Network Contract", *supra*, note 41; Michael Trebilcock, "The Doctrine of Privity of Contract: Judicial Activism in the Supreme Court of Canada", *supra*, note 12.

[45] See, for instance, *Civil Code of Quebec*, *supra,* note 27, s. 1443 and *General Motors Products of Canada Ltd. v. Kravitz*, [1979] 1 S.C.R. 790.

[46] Uniform Law Conference of Canada, *Privity of Contract and Third Party Beneficiaries*, *supra*, note 1. See also J.D. McCamus, *The Law of Contracts*, *supra*, note 8; S.M. Waddams, *The Law of Contracts*, *supra*, note 3; G.H.L. Fridman, *The Law of Contract in Canada*, supra, note 15; John Swan, *Canadian Contracts Law supra*, note 15; as well as Law Reform Commission (of Ireland), *Privity of Contract and Third Party Rights*, *supra*, note 15. See *Vandewal v. Vandewal*, *supra*, note 14 (creation of a new contract between all the initial contracting parties); *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.*, [2001] A.J. No. 1222 (Q.B.) (arguments related to privity, assignment and novation); *Marden Mechanical Ltd. v. West-Con Developments Inc.*, [2007] O.J. No. 1018 (S.C.J.) (consent to assignment to sister company). See also *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410.

[47] See, for instance, *Donoghue v Stevenson*, [1932] A.C. 562 (UK); *Anns v. Merton London Borough Council*, [1978] A.C. 728 (UK); *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2. As pointed out by J.D. McCamus, *The Law of Contracts*, *supra*, note 8, at p. 306; "Although [the] tort duties relating to the supply of defective goods and structures typically arise independently of the contractual duties imposed by the initial contract of supply, there are other cases in which the tort duty owed to the third party appears to arise directly from the breach of contract. […] Their claim in tort, which avoids the third-party beneficiary rule, appears to flow directly from the initial breach of contract". See *Ross v. Caunters*, [1980] Ch. 297 (UK) (solicitor liable to prospective beneficiary for failure to execute a will properly); *Junior Books Ltd. v. Veitchi Co. Ltd.*, [1983] 1 A.C. 520 (UK) (flooring subcontractor liable to factory owner for cost of

repairing defective flooring); *White v. Jones*, [1995] 2 A.C. 207 (UK) (solicitor liable to prospective beneficiary for failure to draw up a will); *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, *supra*, note 42 (builder liable in tort to subsequent owner for the economic loss involved in repairing defect). See also *Higgins Estate v. Security One Alarm Systems Ltd.*, *supra*, note 14 (claim in tort, i.e., a breach of a duty of care arising from the initial contract). See also Bruce. Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss*, 4th ed., (Toronto: Carswell, 2000).

[48] *Darlington Borough Council v. Wiltshier North Ltd.*, [1995] 1 W.L.R. 68, at 77-78 as quoted in *RDA Film Distribution Inc. v. British Columbia Trade Development*, *supra*, note 14, at para. 62.

[49] J.D. McCamus, *The Law of Contracts*, *supra*, note 8, at 319. See also comments, *supra*, note 25.

[50] Uniform Law Conference of Canada, *Privity of Contract and Third Party Beneficiaries*, *supra*, note 1. See also Law Reform Commission (of Ireland), *Privity of Contract and Third Party Rights*, *supra*, note 15.

[51] *Ibid.*

[52] *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, *supra*, note 15, at 439. On this point, he added: “Without doubt, major reforms to the rule denying third parties the right to enforce contractual provisions made for their benefit must come from the legislature Although I have strong reservations about the rigid retention of a doctrine that has undergone systematic and substantial attack, privity of contract is an established principle in the law of contracts and should not be discarded lightly. Simply to abolish the doctrine of privity or to ignore it, without more, would represent a major change to the common law involving complex and uncertain ramifications. This Court has in the past indicated an unwillingness to sanction judge-made changes of this magnitude: see, for two recent examples, *Watkins v. Olafson*, [1989] 2 S.C.R. 750, at pp. 760-61, and *R. v. Salituro*, [1991] 3 S.C.R. 654, at pp. 665-70”: *Ibid*, at 436-437. Iacobucci J. later reiterated the same idea in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, *supra*, note 15, at para. 43.

[53] Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Toronto: Ministry of the Attorney General, 1987) at 67-68. See also *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, *supra*, note 15, at 437.

[54] *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, *supra*, note 15, at 438.

[55] Although it is true that privity can as well raise difficulties in cases where third parties are not express or implied beneficiaries, but situational or relational beneficiaries, such cases are often considered less problematic because less unfair.

[56] *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, *supra*, note 15, at 423.

[57] J.D. McCamus, *The Law of Contracts*, *supra*, note 8, at 319.

[58] As underlined by Robert E. Forbes, “Practical Approaches to Privity of Contract Problems”, *supra*, note 8, at 375: “A drafter’s goal should never be to produce a document that needs to be litigated, even if the litigation is ultimately successful”.

[59] Uniform Law Conference of Canada, *Privity of Contract and Third Party Beneficiaries*, *supra*, note 1. See also Law Reform Commission (of Ireland), *Privity of Contract and Third Party Rights*, *supra*, note 15.

[60] *Ibid*. As J.D. McCamus, *The Law of Contracts*, *supra*, note 8, at 319, pointed out it might as well be “difficult to identify the optimal model of reform” and even more intricate to “fashion a rule that would indicate more precisely in what circumstances a third-party beneficiary should be allowed to enforce [a promise]”.

[61] Whether a presumption of enforcement should be extended to implied third party beneficiaries (see section A.2.b) *Third Party as Contracting Party’s Instrument or Representative*) or relational third party beneficiaries (see section A.2.c) *Chain of contracts*), and situational third party beneficiaries (see section A.2.d) *Rights and obligations follow the “Subject Matter”*) is debatable. See also *Identification of the Third Party*, *infra*, section B.2.c.ii). On that point, one of the differences between the proposed Irish legislation as found in Law Reform Commission (of Ireland), *Privity of Contract and Third Party Rights, supra*, note 15 at 101 and the English *Contracts (Rights of Third Parties) Act 1999*, U.K. 1999, c. 31 is that, under the Irish Bill, the presumption that the contracting parties intended to give the third party a right to enforce a contract only applies when the contract expressly benefits the third party, whereas, under the English Act, this presumption applies when the contract expressly or impliedly benefits the third party. Nonetheless, in the Canadian context, it seems widely accepted that contracting parties who expressly intend to benefit a third party or impliedly intend to benefit a third party acting as their instrument or representative also

intend to confer to the third party beneficiary a right to enforce the contractual provision(s) bargained for its benefit, at any rate, as a defence to a suit: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, *supra*, note 15. However, it is not clear at the present time in what circumstances such a presumption could be extended to other types of implied third party beneficiary, relational third party beneficiaries and situational third party beneficiaries.

[62] See for instance *Fenrich v. Wawanesa Mutual Insurance Company*, *supra*, note 25.

[63] *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, *supra*, note 15 and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, *supra*, note 15.

[64] Similarly, the Ontario Law Reform Commission, *Report on Amendment to the Law of Contract*, *supra*, note 53 at p. 71, recommended a general enabling provision to the effect that “contracts for the benefit of third parties should not be unenforceable for lack of consideration or want of privity”. However, a negative rule has to be carefully formulated. The terms “contracts for the benefit of third parties” should clearly be defined as contracts which confer rights on third parties, not obligations. A negative rule should not deprive third parties of a defence against contracting parties’ claims seeking to enforce a contractual provision directly or indirectly purporting to impose obligations upon third parties or limit their rights. For example, problems could rise if a subcontractor argued reliance on a limitation clause in a subcontract for the renovation of a building as a defence against an action in tort brought by the owner of a building because the limitation clause in question should not be unenforceable for lack of privity.

[65] Nonetheless, as previously stated, it appears that these types of case are often better dealt with by the courts or the legislators on a case-by-case basis, rather than included in a general reform of the doctrine of privity.

[66] See, for instance, Law Commission of England and Wales, *Privity of Contract: Contracts for the Benefit of Third Parties*, Report No. 242, Cmnd. 3329 (London: HMSO, 1996); Attorney-General’s Chambers, Law and Revision Division, *The Contracts (Rights of Third Parties) Bill 2001* (Singapore: Attorney-General’s Chambers, 2001); UNIDROIT, Working Group for the Preparation of Principles of International Commercial Contracts, *Third Party Rights*, Study L - Doc. 83 (Rome: Unidroit, April 2003); Law Reform Commission of Hong Kong, *Privity of Contract*, Report (Wanchai: Law Reform Commission of Hong Kong, 2005); Law Reform Commission (of Ireland), *Privity of Contract and Third Party Rights*, *supra*, note 15.

[67] The Law Reform Commission (of Ireland), *Privity of Contract and Third Party Rights*, *supra*, note 15, at paras. 3.25-3.27.

[68] See *Express Intention to Benefit a Third Party*, *supra*, section A.2.a). Contracting parties could be required to expressly identify any third party beneficiaries by name or description; such a description should include being a member of a class or group of people even when the third parties are not in existence at the time of the formation of the contract. See *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, *supra*, note 15.

[69] See *Third Party as Contracting Party’s Instrument or Representative*, *supra*, section A.2.b); *Chain of contracts*, *supra*, section A.2.c); and *Rights and obligations follow the “Subject Matter”*, *supra*, section A.2.d). It is now clear that intentions to extend the benefit of a limitation clause, waiver or release to third parties can be implied from the relationships between the contracting parties and third parties: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, *supra*, note 15. However, a statutory provision creating a presumption to the effect that third party beneficiaries have the right to enforce contracts expressly or impliedly made for their benefit would not only confirm this exception to the privity rule, but also broaden it to cover other implied third party beneficiaries. It would thus encompass cases where the recognition of a third party rights is appropriate to effectuate the contracting parties’ intentions. The intentions to confer a benefit upon third parties could be ascertained on a proper construction of the contract which could also include looking at the particular terms benefiting the third parties, the contract as a whole, the identity of interests with respect with the contractual obligations, the conduct of the contracting parties and other surrounding circumstances at the time of the formation of the contract: *Manderville v. Goodfellow’s Trucking Ltd.*, [1999] N.B.J. No. 75 (C.A.); *North King Lodge Ltd. v. Gowlland Towing Ltd.*, [2004] B.C.J. No. 677 (S.C.), aff’d [2005] B.C.J. No. 2485 (C.A.). Moreover, it could as well be added that that the absence of a particular intention to benefit a third party should not preclude a (relational or situational) beneficiary to enforce a contract when other factors can support that conclusion, such as the commercial

customs, the legal incidents of a particular class of contract and the necessity to give business efficacy to contractual arrangements: *Double N Earthmovers Ltd. v. Edmonton (City)*, [2007] 1 S.C.R. 116, at paras. 30-31. In any event, the question of whether the benefit of an agreement should be extended to a third party could be decides according to the ordinary rules of contractual interpretation in all cases involving implied, relational or situational beneficiaries. See also The Law Reform Commission (of Ireland), *Privity of Contract and Third Party Rights*, *supra*, note 15, at paras. 3.03-3.10, 3.20-3.24.

[70] The Law Reform Commission (of Ireland), *Privity of Contract and Third Party Rights*, *supra*, note 15, at para. 3.28. In *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, *supra*, note 12, at para. 37, Iacobbuci J. wrote: "I am mindful, however, that the principle of freedom of contract must not be dismissed lightly. Accordingly, nothing in these reasons concerning the ability of the initial parties to amend contractual provisions subsequently should be taken as applying other than to the limited situation of a third-party's seeking to rely on a benefit conferred by the contract to defend against an action initiated by one of the parties, and only then in circumstances where the inchoate contractual right has crystallized prior to any purported amendment. Within this narrow exception, however, the doctrine of privity presents no obstacle to contractual rights conferred on third-party beneficiaries".

[71] *Ibid*, at para. 3.29.

[72] *Ibid*, at paras. 3.30-3.34.

[73] *Ibid*, at para. 3.38.

[74] *Ibid*, at paras. 3.46-3.49.

[75] *Ibid*, at paras. 3.142-3.151. See also *Nisshin Shipping Co. Ltd v. Cleaves & Co. Ltd.*, [2003] E.W.H.C. 2602 (Comm.) (UK).

[76] *Ibid*, at paras. 3.51-3.68.

[77] See, for instance, *Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742; *Goulet v. Transamerica Life Insurance Co. Of Canada*, [2002] 1 S.C.R. 719, at para. 54; *MacNeill v. Fero Waste and Recycling Inc.*, *supra*, note 14.

[78] Courts could have such discretion in particular contexts, such as consumer transactions, contracts of adhesion, insurance and pension beneficiaries, guarantor indemnities, etc.

[79] See *RDA Film Distribution Inc. v. British Columbia Trade Development Corporation*, *supra*, note 14; *MacNeil v. Fero Waste and Recycling Inc.*, *supra*, note 14.

[80] See, for instance, *RDA Film Distribution Inc. v. British Columbia Trade Development Corporation*, *supra*, note 14, at para. 360, Owen-Flood J. pointed out: "Losses occasioned to RS II Productions are the direct result of RDA's failure to provide the revenue guarantee advance that it promised to RS II Productions. In other words, RS II Productions' losses, if any, were directly caused by RDA's breach of contract. RDA had an obligation to provide an advance to RS II Productions. The particular means by which RDA sought to fulfil its obligations was to seek a letter of credit from Bank of Montreal. This in turn required a guarantee from B.C. Trade. However, RDA, failing to obtain funds sufficient to fulfil its contractual obligations to RS II Productions, was thereby obliged to find another source of funds or be in breach of contract with RS II Productions. A concern for double recovery will arise because, if the London Drugs exception were applied to these facts, RS II Productions would have a right of recovery against B.C. Trade under the B.C. Trade Contract, and a right of recovery against RDA under the RDA Distribution Agreement".

[81] See the Law Reform Commission (of Ireland), *Privity of Contract and Third Party Rights*, *supra*, note 15, at paras. 3.69-3.79.

[82] Michael Trebilcock, "The Doctrine of Privity of Contract: Judicial Activism in the Supreme Court of Canada", *supra*, note 12, at 271.

[83] On this point, the Law Reform Commission (of Ireland), *Privity of Contract and Third Party Rights*, *supra*, note 15, at para. 3.152, commented: "The proposed legislation is designed to give effect to the intentions of contracting parties who wish to confer contractual rights on third parties. It is intended to be facilitative, rather than mandatory, in nature. Thus, contracting parties who do not wish the proposed legislation to apply should be able to exclude the proposed legislation, or "contract out" of it". See also *Chambers v. HSBC Securities (Canada) Ltd.*, [2003] O.J. No. 3470 (S.C.J.) at para. 22.

[84] See *Parlette v. Sokkia Inc.*, *supra*, note 26, at para. 7. One could indeed wonder which provision should prevail. However, the problem could be more apparent than real if a general provision only creates a

rebuttable presumption to the effect that an intended third party beneficiary also has the right to enforce the contract: see *General Provision*, *supra*, section B.2.b), at para. 61.

[85] The Law Reform Commission of Ireland had concluded that contracts of employment; contracts between company and its shareholders and between individual shareholders; contracts for the international carriage of goods by air, rail or road; contracts for the carriage of goods by sea; contracts on a bill of exchange, promissory note or other negotiable instrument; as well as documentary credits should be excluded: see the Law Reform Commission (of Ireland), *Privity of Contract and Third Party Rights*, *supra*, note 15, at para. 3.89.

[86] *Ibid*, at paras. 3.89-3.141.

[87] Current and further exceptions to the privity rule would still apply insofar as the new third party rule would simply be a "fall back rule" or "default rule".

[88] For instance, in cases of contracts of adhesion (*Scott v. Wawanesa Mutual Insurance Co.*, *supra*, note 15); contracts under seal (*Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842; *Deleeuw v. Deleeuw*, *supra*, note 25, at para. 74), consumer contracts (*Beaulieu v.Day & Ross Inc.*, *supra*, note 42). The Law Reform Commission (of Ireland), *Privity of Contract and Third Party Rights*, *supra*, note 15, at paras. 3.89-3.153 also suggested that a reform of the privity rule should not, for example, affect mandatory consumer protection (e.g. unfair contracts), confer any third party rights against consumers or give to employers' clients a right to enforce contracts of employment against employees in cases of losses caused by strike or industrial dispute, etc.

[89] As mentioned above, the term "exceptions" does not include the other means of circumventing the privity rule which can be used by the contracting parties or the other courses of action available to the third parties. See *Legal Devices Ousting the Privity of Contract Rule*, *supra*, section A.3.

[90] Law Reform Commission (of Ireland), *Privity of Contract and Third Party Rights*, *supra*, note 15, at paras. 3.80- 3.88.

[91] Uniform Law Conference of Canada, *Civil Section Proceedings - Resolution 15. Privity of Contract*, *supra*, note 2.

[92] There were diverging views among the Working Group members on the interpretation of case law, especially those surrounding the application of the principled exception, and on the appropriateness of legislative intervention as a way to pin these down more quickly and clearly than common law will. However, the collective conclusion is that the analysis of the current law does not sufficiently support the case for privity reform at this time for the Working Group to firmly recommend allocating resources towards the implementation of stand alone legislation.

[93] The existing body of law does not give satisfactory indications on how the law should evolve from this point. It should be noted that most jurisdictions that have reformed, or proposed reform, preceded it by consultations of different stakeholders: see for instance, Law Commission for England And Wales, *Privity of Contract: Contracts for the Benefits of Third Parties*, Consultation Paper No. 121 (London: HMSO, 1991); Law Reform Commission of Hong Kong, *Privity of Contract, supra*, note 66; and Law Reform Commission (of Ireland), *Privity of Contract: Third Party Rights*, Consultation Paper, LRC CP 40-2006 (Dublin: Law Reform Commission, 2006).

[94] In any event, if there were privity issues requiring legislative intervention, there is no clear direction from courts, legislators or scholars at the moment as to where the law should go to settle each of them in a satisfying way.

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