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Backgrounder

LRC 31—Report on Waiver of Conditions Precedent in Contracts

Date: April 1977

Between the late 1950s and the mid-1970s the Supreme Court of Canada had to consider in a number of cases concerning whether or not a condition precedent inserted in a contract for the benefit of one party could be waived by that party. Simply stated, the rule that was enunciated and applied in the cases provided that a true external condition precedent could not be waived unilaterally by the party for whose benefit it was inserted in the contract. A "true external condition precedent" was defined in the case of *Turney v. Zhilka*[1] as an external future and uncertain event upon which the contractual obligations of both parties depend, and the happening of which depends entirely upon the will of a third party. An example would be a contract for the sale of land that was subject to the land being rezoned.

One issue that the Canadian courts did not consider in applying the rule was whether the "event" was one upon which the contractual obligations of both parties depended. The courts appeared to have considered only whether the happening of the "event" was dependent upon the will of a third party. In doing so, the courts held that conditions, even if included in the contract solely for the benefit of one party, could not be waived by that party. The other party to the contract would thus be free to treat it as being at an end if the condition was not fulfilled. The end result was frequently inequitable and contrary to the manifest intention of the parties.

The approach of the Canadian courts was also at odds with established common-law principles regarding waiver. This approach was also not seen in the case law of other jurisdictions, where generally speaking if a condition was inserted for the benefit of one party that party could waive the condition. The fact that performance of the condition was dependent on the will of a third party was irrelevant to the question of waiver.

This report examined the origin and development of the rule in Canada. It is divided into six chapters. The first chapter provides a general introduction and explanation of the topic. Chapter two then moves on to discuss the nature of conditions precedent in greater detail

1. [1959] S.C.R. 578.

and in particular explains the difference between some of the commonly used terminology, such as a condition precedent, a condition subsequent, a promissory condition, and a contingent condition.

In chapter three the report considers more closely the origin of the rule and the jurisprudence, charting its subsequent development and scope. Chapter four examines the different approach taken by the courts in England, New Zealand, and Australia. In these jurisdictions the primary concern was whether a binding contract had been concluded. If so, then the right to waive a condition precedent depended upon whether the condition was inserted for the benefit of the party seeking to waive it. If it was, then, generally speaking, it could be waived and the contract enforced.

Chapter five sets out the argument for reform in Canada. Broadly speaking, the conclusion reached is that the rule is both unjustified and unnecessary. Chapter six contains the recommendations for reform. The view taken by the commission is that where a binding contract has been concluded but performance is suspended until the fulfillment of a condition precedent, then, if the condition is severable and was inserted for the sole benefit of one of the parties, the party for whose benefit it was inserted should be able to waive fulfillment of that condition and enforce the contract. Such a right of waiver should exist regardless of whether fulfillment of the condition depends upon the will or actions of a third party.

Further Developments

Attorney-General Statutes Amendment Act, 1978, S.B.C. 1978, c. 11, s. 8 (see now *Law and Equity Act*, R.S.B.C 1996, c. 253, s. 54)