LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON

WAIVER OF CONDITIONS PRECEDENT IN CONTRACTS

LRC 31

1977

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning 1970.

The Commissioners are:

Leon Getz, Chairman
Ronald C. Bray
Paul D.K. Fraser
Peter Fraser
Douglas Lambert

Arthur L. Close is Counsel to the Commission.

Anthony J. Spence is Legal Research Officer to the Commission.

Patricia Thorpe is Secretary to the Commission.

The Commission offices are located on the 10th Floor, 1055 West Hastings Street, Vancouver, B.C. V6E 2E9

British Columbia Cataloguing in Publication Data
British Columbia. Law Reform Commission.

Report on Waiver of Conditions Precedent in Contracts.
"LRC 31."

1. Conditions (Law) Canada.
2. Contract - Canada.
I. Title.

law 346.7102

TABLE OF CONTENTS

TO THE HONOURABLE GARDE B. GARDOM, Q.C.
ATTORNEYGENERAL FOR BRITISH COLUMBIA

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
WAIVER OF CONDITIONS PRECEDENT IN CONTRACTS

It is not uncommon to find in contracts, and particularly contracts for the sale of land, a provision that the performance of the obligations of one party or both of the parties is made conditional upon the *happening* of some event beyond their control for example, that the land in question be rezoned by a local authority from one form of land use to another. These provisions are known as conditions precedent, and in a series of decisions commencing with that of the Supreme Court of Canada in *Turney* v. *Zhilka* in 1959, the Canadian courts have held that such a condition, even if included in the contract solely for the benefit of one party, cannot be waived by that party. The other party to the contract is thus free to treat it as being at an end if the condition is not fulfilled, and is free, therefore, to resell the property. This result is frequently inequitable, and subverts the manifest intentions of the parties.

Canadian law in this respect is unique in the common law world, and has not escaped criticism.

In this Report the origin and development of this rule is examined, and the Commission recommends that the rule be modified by statute.

In view of the narrow compass of the issue considered in this Report, the Commission departed from its usual practice of distributing for comment a working paper containing tentative proposals for change.

CHAPTER I INTRODUCTION

In recent years the Supreme Court of Canada has had to consider, in a number of cases, whether or not a condition precedent inserted in a contract for the benefit of one party may be waived by that party. The latest of these is *Barnett* v. *Harrison*, in which the Court applied a rule first enunciated by Judson J. in *Turney* v. *Zhilka* and which was reaffirmed in *F.T. Developments Ltd*. v. *Sherman*
[1969] S.C.R. 741. *and O'Reilly* v. *Marketers Diversified*.
For a discussion of the case law in other jurisdictions see Chapter IV *infra*.

Simply stated the rule is that a "true external condition precedent" may not be waived unilaterally by the party for whose benefit it was inserted in the contract. In *Turney* v. *Zhilka* a true external condition precedent was defined 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. For example, a contract for the sale and purchase of land might be made subject to the land being rezoned. Such a condition is a true external condition precedent as envisaged by the Supreme Court, as the power to rezone the land is entirely within the control of a third party, namely the zoning authority. Thus, even if this condition was inserted for the benefit of the purchaser, the purchaser cannot waive it and enforce the contract.

In applying this rule, however, the courts in Canada, including the Supreme Court, have not sought to determine, as a separate issue, whether the "event" is one upon which the contractual obligations of both parties depend. The only issue they have sought to determine is whether the happening of that “event" is dependent upon the will of a third party. If so, the courts appear to have treated this alone as being sufficient to create a "true external condition

precedent" upon which the contractual obligations of both parties depend. In the result, such conditions have been held to be incapable of waiver by the party for whose benefit they were inserted. The courts in Canada have not considered it necessary to examine the real purpose of such a condition or whether it was inserted for the benefit of one or both parties to the contract. In the result, there has developed a formalistic and artificial rule which is at odds with the established common law principles relating to waiver, and is unknown to the case law of other jurisdictions.

In other common law jurisdictions it has, generally speaking, been held that if a condition is inserted for the benefit of one party that party may waive that condition. The fact that performance of such a condition is dependent on the will of a third party has been held irrelevant to the question of waiver.

In this Report we examine the origin and development of this rule, and its scope and application. By way of comparison we also examine the law in other common law jurisdictions to determine the extent to which they offer an alternative approach to waiver of conditions precedent.

CHAPTER II THE NATURE OF CONDITIONS PRECEDENT

An understanding of the nature of conditions precedent is essential to an appreciation of the issues involved in the law concerning their waiver.

In the law of contract "condition" is a word of many meanings. One writer, indeed, has discerned no fewer than twelve senses in which the word is used.

Alphonse Well et Frires v. *Collis Leather Co*. [1927] S.C.R. 326, 335, [1927] 2 D.L.R. 141; *Schofield* v. *EmersonBrantington Implement Co*., (1918) 57 S.C.R. 203, 43 D.L.R. 509; *Preload Co. of Canada* v. *City of Regina* [1959] S.C.R. 801; *California Prune and Apricot Growers Inc*. v. *Baird & Peters*, [1926] S.C.R. 208.

HudsonMattagami Exploration Mining Co. v. *Weltlaufer Bros*. (1928) 62 O.L.R. 387 (C.A.); *Cook*. v. *Jones* (1921), 61 D.L.R. 524 (N.S.).

See, e.g., s. 17(2) *Sale of Goods Act,* R.S.B.C. 1960, c. 344. *Bentsen* v. *Taylor Sons & Co*. [1893] 2 Q.B. 274. The distinction between "conditions and "warranties" has been the subject of continual academic interest and criticism, for a history and analyses of these two classes of contractual terms *see* Prosser, *The Implied Warranty of Merchantable Quality*, (1943) 21 Can. Bar Rev. 466; 447451; Stoljar, *Conditions, Warranties and Descriptions of Quality in the Sale of Goods* (1952) 15 M.L.R. 455, (1953) 16 M.L.R. 174; Reynolds, *Warranty Condition and Fundamental Terms*, (1963) 79 L.Q.R. 534; Montrose, *Conditions, Warranties and Other Contractual Terms*, (1937) 15 Can. Bar Rev. 389; Grieg, *Condition* or *Warranty*, (1973) 89 L.Q.R. 93.

It is interesting to note that the distinction is not accepted in the United States, which can make the understanding of U.S. works difficult. Williston referred to the use of the word "condition" in this sense as "astonishing," lit cannot be too strongly deprecated," *Contracts* rev. ed. s. 665.

The Law Reform Commission of New South Wales in its recent working paper on *The Sale of Goods*, (1975) 2131; has recommended that in relation to the sale of goods the distinction be abolished and that it be replaced with a single category of warranty to cover all the seller's obligations, express or implied, with regard to the kind or quality of goods, and that the term "condition" be restricted to the fact of event which limits or qualifies either the seller's promise to deliver or the buyer's promise to accept the goods. As they point out this is the solution which was adopted in the United States by Williston as the draftsman of the *Uniform Sales Act* and one which has been retained by the framers of the *Uniform Commercial Code* (s. 2313(l)(a)). "Condition" is frequently used to mean a promise in a contract that is so important that a failure to perform it entitles the other party to rescind the contract as well as to sue for damages. In this sense, it is to be contrasted with "warranty" which also means a promise, but one not so vital, so that a breach of it entitles the injured party to damages only and not rescission. Generally speaking, the question whether a particular term of a contract is a condition or warranty depends upon the intention of the parties at the time the contract was made, this intention being gathered from the language which they used.

The word "condition" is also used, however, to describe some fact or event on the existence or occurrence of which some or all of the rights and duties under the contract are made to depend. It is this meaning with which we are concerned in this Report. As is explained in Halsbury:

> A contractual promise may be either absolute or conditional. A conditional promise is one where the liability to perform the promise depends upon some thing or event; that is to say it is one of the terms of the contract that the liability of the party shall only arise, or shall cease, on the happening of some future event, which may or may not happen, or one of the parties doing or abstaining from doing some act.

If this liability only arises on the happening of a future event, or when one of the parties does some act, the condition is usually termed a *condition precedent*.

n. 5 *supra*. *See, e.g., Princess Copper Mines* v. *Trelle* [1922] 3 W.W.R. 59 (Alta.); *Brooks, Biddle and Whettal Ltd*. v. *Att. Gen. for B.C*. [1923] 1 W.W.R. 1150, [1923] A.C. 45 (P.C.); *Booth* v. *Callow* (1913) 4 W.W.R. 73, 18 B.C.R. 499 affd. 4 W.W.R. 1379; *New Federal Oils Ltd*. v. *Rowland* [1929] 1 D.L.R. 472; *see also Griffiths* v. *Canonica* (1896), 5 B.C.R. 67 (C.A.) for a discussion of the distinction between conditions precedent and conditions subsequent. *Stoljar*, n. 1 *supra*, argues that this antithesis between conditions precedent and conditions subsequent is misleading; he takes the view that conditions subsequent are little more than a reference to part of the law relating to discharge.

See, e.g., Nfld. Associated Fish Exporters Ltd. v. *Aristomenes Th. Karelas* (1963), 49 M.P.R. 49 (Nfld.); *Crawford* v. *Law* (1908) 11 O.W.R. 613; *Counter* v. *McPherson* (1845), C.R. [1] A.C. 230 (P.C.); *New Hamburg Mfg. Co*. v. *Klotz* (1905) 1 W.L.R. 471 affd. 3 W.L.R. 404; *Commercial Union Assurance Co*. v. *Margeson* (1899), 29 S.C.R. 601.

E.g., s. 15(i) of the *Sale of Goods Act*, R.S.B.C. 1960, c. 344 price to be fixed by a third party and if he fails to fix a price the contract is to be void; *see also McDonald* v. *Bell* (1965) 53 W.W.R. 449 (B.C.S.C.); *Leroy* v. *Smith* (1901) 9 B.C.R. 293; *Picbell Ltd*. v. *Pickford & Black*, Ltd. [1951] S.C. 757. For a discussion of the differences between "promissory" and "contingent" conditions, *see Eastham* v: *Leigh London and Provincial Properties, Ltd*. [1971] Ch. 871.

10. *Nfld. Associated Fish Exporters Ltd*. v. *Aristomenes Th. Karelas*, *supra* n. 8. It should be pointed out that the use of the words condition precedent to encompass both "promissory " conditions and "contingent" conditions is not favoured by all writers. *Williston* has said "the difference between conditions and promises is so radical in its consequences that there is no excuse for nomenclature that fails to recognise this distinction," because of this difference another writer (*Reynolds supra* n. 3) has said:

There seems no point, then, in subsuming these ideas under the same name, even if the first is called a "contingent" and the second a "promissory" condition. For a contingent condition is an event for which no one undertakes legal liability, but upon which the main obligation of the contract depends, whereas a "promissory" condition is an actual promise, the performance of which is a condition of the liability of the other party. If the liability ceases thereon, the condition is usually termed a *condition subsequent*.

A condition, whether precedent or subsequent, may therefore be promissory, i.e. something which one party is expressly or impliedly bound by the contract to do or refrain from doing; or contingent, that is to say something altogether outside the control of the parties, such as an event the happening of which is dependent on the will of a third party. Whether a condition precedent is contingent or promissory, its effect is to suspend the obligations of one or both of the parties until its fulfilment. Where, however, a contract is subject to a promissory condition precedent and the party bound to perform the condition fails to do so, that party will also be liable in damages.

Conditions precedent are often classified as being precedent to performance of an already binding contract, and should be distinguished from conditions which are precedent to the creation of the contract. This distinction was referred to by Denning L.J. in *Transtrust S.P.R.L*. v. *Danubian Trading Co*. Ltd. where there was a condition in a contract for the sale of goods whereby the buyer was to open a confirmed credit in favour of the seller. Denning L.J. said:

See also judgment of Denning L.J. in Wickman case, *supra* n. 1, in Court of Appeal at 1180 and Nfld. *Associated Fish Exporters Ltd*. v. *Aristomenis Th. Karelas, supra* n. 13. *But see Stoljar*, (1953) L.Q.R. 490.

See, e.g., Fabbi v. Jones, [1973] S.C.R. 42; *Aberfoyle Plantations* v. *Cheng*, [1960] A.C. 115; *Browning* v. *Masson Ltd*. (1915), 52 S.C.R. 377; *see also Dawson Helicopter Exploration Co. Ltd*. [*1955*], S.C.R. 868, in particular Rand J. it 875. For the development of the law in Canada on the formation of contracts, see P. Clayton; *The Supreme Court of Canada and the Common Law of Contract*, (1971) 17 McGill L.J. 476, 479485.

VonHatzfeldWilaenburg v. *Alexander* [1912] 1 Ch. 284; *Green* v. *Ainsmore Consolidated Mines Ltd*. [1951] 3 D.L.R. 632 (B.C.) ; *Block Bros. Realty* v. *Occidental Hotel Ltd*. (1971), 19 D.L.R. (3d) 194 (.C) ; *Knowlton Realty Ltd*. v. *Wyder* [1972] 1 W.W.R. 713, 23 D.L.R. (3d) 69 (B.C.).

Marten v. *Whale* [1917] 1 K.B. 544; Cherwick v. *Moore see also Deslippe* v. *Maguire* [1955] 2 D.L.R. 492 (B.C.); *see also Construction Ltd*. (1976) 66 D.L.R. (3d) 130; *Calvan Consolidated Oil & Gas Co*. v. Manning, [1959] S.C.R. 253, 17 D.L.R. (2d) 1; *Sturgeons* Ltd. v. *Municipality of Metropolitan Toronto*, [1968] 2 O.R. 526.

n. 5 supra, para. 264.

> What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases, the stipulation "subject to the opening of a credit" is rather like a stipulation "subject to contract". If no credit is provided, there is no contract between the parties. In other cases a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit.

It is not always easy to decide, however, whether the nonfulfilment of a condition precedent precludes the formation of a binding contract or only suspends the obligations created by an already binding contract. It is a question of construction, to be answered according to the circumstances of each case, whether a condition is precedent to the creation of a contract or to its performance. Generally speaking the question is decided on the basis of whether or not the parties have completed the process of reaching agreement, and contemplate that a binding obligation will arise from the time of the conclusion of the agreement.

The principles involved are illustrated by those cases in which the parties have made an agreement subject to the execution of a formal contract. In some instances it has been held that such a condition precludes the formation of a binding contract, the court taking the view that this is evidence of the parties' intention not to be bound until such a contract is signed; in others such, a condition has not prevented the court from finding an intention to enter into a binding albeit conditional agreement. As Halsbury says:

Similarly, it is not necessarily conclusive that the parties make their agreement subject ... to a certain condition ... for the same words may signify a different intention in different circumstances.

The concept of conditions precedent to the creation of a contract, however, has been criticized:

Benjamin points out that this usage comes from the Roman Law, "where the position was slightly different and the term consequently more appropriate" *ibid*. That this is the orthodox meaning of the word condition is not disputed, however, as Cheshire and Fifoot point out the orthodox application of the word is by no means unknown to English lawyers, G. Cheshire and C. Fifoot *The Law of Contract,* 115, 116 (8th ed. 1972), the classic example is as they have cited *Pym* v. *Campbell*, (1856) 6 E. & B. 370; *see also Browning* v. *Masson*, n. 14 supra; *Knight* v. *Cushing* (1912), 46 S.C.P. 555; *Constructing, Design and Management Ltd*. v. *New Brunswick Housing Corporation* (1973), 36 D.L.R. 458.

[1968] 1 Q.B. 680, noted 31 M.L.R. (1968) 78, A.R. Carnegie.

G. Cheshire and C. Fifoot, *The Law of Contract*, 117 (8th ed, 1972).

n. 18 supra. Two recent Canadian cases illustrate this dichotomy, in *Hefferton* v. *Grundex Industries* Ltd. (1971)

> It is sometimes suggested that die term should also be used to refer to something upon which the existence of a contract depends, but if the position really is that there are no binding obligations until the condition occurs, i.e. either party can withdraw *pendente condicione*, there is no legal relationship at all until the condition occurs and no need for the use of the concept.

There is no doubt that the concept can raise particular difficulties, as the English case of *Bentworth Finance Ltd.* v. *Lubert* shows. In that case, the plaintiffs let a secondhand car under a hirepurchase agreement to the defendant, who was to pay 24 monthly instalments. The car was delivered to die defendant but without a log book. The defendant neither licensed nor used it and refused to pay the instalments whereupon the plaintiffs repossessed the car and sued for the instalments. The English Court of Appeal held that the plaintiffs could not sue the defendant as the delivery of the log book was a condition precedent upon which the liability to pay instalments depended. It has been said of this case:

The decision itself may readily be supported. But it is hard to accept the Court's view that, until the log book was supplied, there was no contract at all. The parties would surely have been surprised to learn that, in the absence of the book, their words and their conduct were without legal significance.

Thus, as we have pointed out, conditions precedent may prevent the coming into existence of a binding contract or may merrily suspend performance of an

already binding contract, but it is not always easy to reconcile the authorities on this question.

It is clear, however, that the classification of conditions precedent as contingent or promissory has no effect upon the determination by the court as to whether that condition prevents formation of a binding contract or merely suspends the performance of an already binding contract. For example, the Supreme Court of Canada in *Fabbi* v. *Jones*

Ibid., 4748.

See also Smallman v. *Smallman*, [1971] 3 W.L.R. 588 where a husband and wife, whose marriage was foundering, entered into an agreement covering the custody and maintenance of their children, the sale of the home and the division of the proceeds. This agreement was made "subject to the approval of the court". Before any steps were taken to obtain the court's approval, the husband sought to withdraw from the agreement contending that there was no binding contract. The English Court of Appeal refused to accept this contention, for as Lord Denning observed (at 593)

If the parties have reached an agreement on all essential matters, then the clause subject to the approval of the court does not mean that there is no agreement at all. There is an agreement, but the operation of it is suspended until the court approves it. It is the duty of one party or the. other to bring the agreement before the court for approval. If the court approves, it is binding on the parties. If the court does not approve, it is not binding. But, pending the application to the court, it remains a binding agreement which neither party can disavow.

held that there was a subsisting contract despite a condition making it subject to the issuance of a licence by the Public Utilities Commission. The licence was not issued until May 7, 1963 and prior to that time the defendant had been engaged in acts inducing breach of contract. Mr. Justice Laskin (as he then was) delivered the opinion of the unanimous court:

> It was contended by the defendant Fabbi that there was no contract between Jones and the producers until May 7, 1963, and that, consequently, even if there were acts of inducement as alleged, they were not directed to any subsisting contract. I do not accept this contention. The parties in entering into the executory agreements had left nothing to further negotiation; they were bound to one another, and it was the performance of the contracts and not their existence that was dependent upon a licence from a governmental agency.

The fact that fulfilment of a condition is dependent upon the will of a third party, is not therefore a decisive factor in determining whether or not a condition is precedent to a contract's existence or merely precedent to its performance. The classification, nonetheless, seems to be regarded as crucial when a Canadian court has to decide whether a condition precedent may be waived. In *Turney* v. *Zhilka*, and subsequent cases, the Supreme Court has held that if fulfilment of a condition precedent is dependent on the will of a third party, i.e. if it is a contingent condition, that fact alone precludes any right of waiver. It is the development of this rule that will be considered in the following chapter.

CHAPTER III THE RULE IN TURNEY V. ZHILKA

A. The Origin of the Rule

The rule was first enunciated by Judson J. in *Turney* v. *Zhilka*,

[1892] 3 Ch. 359.

[1913] 2 Ch. 648.

See e.g. Fry on Specific Performance, 175 (6th ed. 1923); Chitty *on Contracts*, Vol. 1, para. 1248 (23rd ed. 1968).

n. 1 *supra*, 583, 584. a case which concerned a contract of sale of land containing the following condition: "Providing the property can be annexed to the Village of Streetsville and a plan is approved by the Village Council for subdivision." The date for the completion of the sale was fixed for 60 days after approval by the Village Council. Neither party undertook to fulfil this condition and neither reserved any power of waiver.

The purchaser made an attempt to secure the approval but made little progress and received little encouragement and it appeared that the prospect of annexation was very remote. He therefore purported to waive the condition on the grounds that it was solely for his benefit and was severable, and sought specific performance.

At the trial it was found that the condition was one introduced for the sole benefit of the purchaser and that he could waive it. In the Supreme Court of Canada Judson J. doubted that the evidence supported such a conclusion, but in any event said that the case fell to be decided on wider grounds. He distinguished two cases, *Hawksley* v. *Outram* and *Morrell* v. *Studd* and *Millington*. Upon which the trial judgment had been founded, and which have often been cited as authorities for the proposition that a condition precedent may be waived by the party for whose sole benefit it was inserted. He said they were cases in which the condition was merely a part of the promised performance of one of the parties, and as such it was a "right" which could be waived by a party if it was for his sole benefit and severable from the rest of the contract.

With regard to the contract in question, however, he said:

> But here there is no right to be waived. The obligations under the contract, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party the Village Council. This is a true condition precedent an external condition upon which the existence of the obligation depends. Until the event occurs there is no right to performance on either side. The parties have not promised that it will occur. In the absence of such a promise there can be no breach of contract until the event does occur. The purchaser now seeks to make the vendor liable on his promise to convey in spite of the nonperformance of the condition and this is to suit his own convenience only. This is not a case of renunciation or relinquishment of a right but rather an attempt by one party, without the consent of the other, to write a new contract. Waiver has often been referred to as a troublesome and uncertain term in the law but it does at least presuppose the existence of a right to be relinquished.

Judson J. correctly distinguished between two kinds of condition precedent, that to be performed by one of the parties to the contract (which we have referred to earlier as "promissory") and that where performance is subject to the will of a third party (which he calls a "true" condition precedent and which we have earlier described as "contingent"). It would appear, however, that this was the first time that such a distinction had been considered relevant to the question of waiver. Judson J. concluded that as the purchaser could not insist on the performance of the condition, then there is no "right" capable of waiver, apparently on the basis that such a condition is not strictly a benefit arising under the contract. This reasoning, together with his statement that "there can be no breach of contract until the

event occurs", suggests to us that he may have been of the view that there was no concluded contract until the condition was fulfilled, i.e. that the condition was precedent to the creation of the contract and not merely to its performance. If this is the basis of the decision then we agree that the condition cannot be waived for, as has been said, if there is no contract "no amount of waiver can make one".

Fabbi v. *Jones*, [1973] S.C.R. 42, and see discussion in Chapter II.

(1961) 27 D.L.R. (2d) 275.

The real basis for the decision in *Turney* v. *Zhilka* may indeed be that the condition in that particular case was precedent to the existence of the contract. Nonetheless, Canadian courts, including the Supreme Court, have subsequently interpreted it as establishing the rule that a true condition precedent can never be waived by the party for whose benefit it was inserted. This rule has been rigidly applied without regard to whether the condition was precedent to the performance or to the existence of the contract in question.

If in applying this rule so rigidly the courts are to be taken as suggesting that true conditions precedent are always precedent to the existence of a contract, then they are clearly wrong, for, as we have pointed out, the Supreme Court of Canada has held, in our view correctly, that there can be a valid and binding contract notwithstanding the fact that it is subject to a true condition precedent.

The only doctrinal basis on which the rule might be justified is that there is no contract in existence until the condition is satisfied. As we shall see, however, the courts in subsequent cases have not addressed themselves to this question; they have instead proceeded on the basis that it is axiomatic that true conditions precedent are always incapable of waiver.

B The Development of the Rule

Turney v. *Zhilka* was soon applied in two Ontario cases. *Jackson* v. *Executors of Farwell Estates* involved a contract for the sale of land which was made conditional upon the land being rezoned prior to the closing date. This condition had not been fulfilled and the Ontario Court of Appeal held that it could not be waived by the purchaser even though inserted for his sole benefit. The Court concluded that *Turney* v. *Zhilka* was decisive:

> That condition was a true condition precedent on the fulfilment of which the contract depended. It was not a condition to be performed by either party.

In *Daron Construction Ltd.* v. *Kaskoulis*,

11. *Ibid*. 406, emphasis added.

12. (1968) 63 W.W.R. 65.

13. [195]1 N.Z.L.R. 684.

14. n. 12 *supra*, emphasis added. a contract for the sale of land contained a provision that.the contract was subject to the purchaser being able to obtain a rezoning of part of the land to be purchased. The application for rezoning was refused and, again, it was held, relying on *Turney* v. *Zhilka* and *Jackson* v. *Executors of Farwell Estates*, that this was a "true" condition precedent

which could not be waived by the purchaser, despite the fact that it was inserted for his sole benefit. In his judgment Evans J. appears to suggest that these decisions rested on the basis that no binding contract comes into existence until the condition is fulfilled. Echoing Judson J., he said:

> This is a true condition precedent in that it is an external condition upon which the existence of the obligation depends, and until the event occurs, there is no right of performance on either side. The parties have not promised that it will occur and in the absence of such promise *there can be no breach of contract until the event occurs*.

In British Columbia the first reported case in which the rule was applied was *G & R Construction* v. *Southern Slope Holdings Ltd.* In this case the plaintiff offered to purchase certain property if adequate mortgage finance was forthcoming from Imperial Life Assurance Company of Canada; it gave no promise or undertaking that finance would be available, and in the event it was not. The question for decision was whether the purchaser was entitled to waive the condition and hold the vendor to the sale. Aikins J. was of the view that the condition in question was partly for the benefit of the vendor, and on this assumption plainly it could not be waived unilaterally. But the case was not decided on this interpretation of the facts; instead Aikins J. preferred to hold that even if fulfilment of the condition was beneficial only to the purchaser, it was nevertheless not entitled to waive it. In adopting this view he followed the reasoning of Judson J. in *Turney* v. *Zhilka* that this was a true condition precedent from which it followed that there could be no question of waiver.

One of the interesting aspects of this case is that Aikins J. stated that he was unable to reconcile the principle in *Turney* v. *Zhilka* with that stated by Hutchison J. in the Supreme Court of New Zealand case of *Donaldson* v. *Tracy*. That case had been cited by counsel for the plaintiff in support of his argument that the condition could be waived. As Aikins J. said:

> In the *Donaldson* case the plaintiff made an offer to purchase a hotel upon the condition that the licensing commission approve the hotel and its appointments in their then state and did not recommend any hotel being erected or hotel business being carried on within a radius of two miles of the hotel which was the subject matter of the sale. The commission while approving the hotel and its appointments concluded that it should authorize three further publicans' licences, one in the particular area where the hotel being sold was located. The purchaser sued for specific performance. It was held that it was open to the purchaser to waive the condition as the condition or stipulation was inserted in the contract entirely for the benefit of the purchaser. *It was held, further, that it made no difference whether the failure in fulfilment of the condition was due to the action of one of the parties or to the action of an outsider.*

This was the first occasion on which a Canadian court suggested that the rule laid down in *Turney* v. *Zhilka* is peculiar to Canada.

In 1969 the Supreme Court of Canada reaffirmed the rule in two cases, *F.T. Developments Ltd.* v. *Sherman*

16. [1969] S.C.R. 741, noted (1971) U.B.C.L.R. 431.

17. n. 15 *supra*, 207.

18. (1975) 57 D.L.R. (3d) 225, 233. and *O'Reilly* v. *Marketers Diversified Ltd.* In the first, F.T. Developments Ltd. ("F.T.") offered to purchase land from Sherman and paid $2,509 on deposit. The offer, which was "conditional upon the purchaser obtaining rezoning ... Such rezoning to be obtained within 6 months from the date of the acceptance of the offer, was accepted by Sherman. F.T. was not able to obtain the rezoning, but ultimately purported to waive the condition and, on meeting resistance from Sherman, brought an action for specific performance. In the Supreme Court there were a number of issues upon which F.T. was defeated, but on the issue of the right to unilateral waiver Judson J. said:

> The next question is whether there was a unilateral right to waive the condition. I do not think that there was. By its express terms the offer was conditional upon the purchaser obtaining rezoning of the lands on a named zoning basis. The condition was very carefully drawn. It provided for a term of six months from the date of acceptance together with a right to an extension in a certain event. The obligations of both parties under this contract were conditional upon,the happening of these events. This depended upon the Will of the Township of North York. The case is squarely-within the decision of this Court in *Turney et al.* v. *Zhilka*.

This case illustrates the Supreme Court's willingness to stand by the principle formulated in *Turney* v. *Zhilka*. There was no discussion in the judgment as to whether the condition was inserted for the sole benefit of the purchaser, or for the benefit of both the purchaser and vendor. Neither did the Court consider whether this condition was precedent to the creation of the contract or merely to its performance. If it had done so, the decision could. probably have been justified on the ground that no contract had been created, for, as Laskin C.J.C. pointed out in his dissenting judgment in *Barnett* v. *Harrison*:

> It may be noted that the situation in the *F.T. Developments* case was different from that in (*Turney* v. *Zhilka*) in that there [i.e. F.T.] the very offer of the purchaser was made conditional upon obtaining the rezoning while in the latter there was a concluded contract, performance of which depended on a certain condition, but this difference did not enter into the Court's assessment of the issue. However, Cartwright C.J.C. did not find it necessary to decide whether the condition could be unilaterally waived because on the evidence and, findings of fact, there was no waiver declared until the time for closing had passed.

Indeed, the reasons given by Cartwright C.J.C. in the *F.T. Developments* case are of particular interest. He said:

20. *per* McKenzie J. in *Bonaventure Construction Ltd.* v. *Baldissi* (1975), W.W.D. 97.

n. 4 *supra*. The passage referred to reads as follows: "Where a contract contains stipulations which are simply and solely for the benefit of the purchaser, and are severable, the purchaser may waive them, and obtain judgment for specific performance of the rest of the contract."

22. *Hawksley* v: *Outram*, n. 2 *supra; Marrall* v. *Studd and Millington*, n. 3 *supra*.

> I agree with the conclusion of my brother Judson and, subject to one reservation, with his reasons.
>
> I do not find it necessary to decide whether, in the particular circumstances of this case, the appellant could have invoked the maxim, *quilibet potest renunciare juri pro se introducto*, waived unilaterally the condition as to obtaining a rezoning of the lands agreed to be purchased and elected to pay the purchase price in full in cash instead of giving back a mortgage

> to secure part of that price. On the evidence and the findings of fact made in the Courts below it cannot be said that the appellant declared such waiver and election until after the date set for closing the transaction had passed.
>
> I would dispose of the appeal as proposed by my brother Judson.

As one judge has commented, this is a "tantalizing statement". It suggests that Chief Justice Cartwright was of the view that in certain circumstances the purchaser might have been able to waive or renounce a true condition precedent introduced by or for himself. The Chief Justice, however, closed the door to that because the unilateral waiver, made the day after the closing date, was too late.

In *O'Reilly* v. *Marketers Diversified Ltd.*, a contract for the sale of land was conditional upon the purchasers being able to purchase an adjacent lot from a different vendor by a certain date. They were unable to do so, and purported to waive the Condition and then proceeded to bring an action for specific performance against O'Reilly.

In the Supreme Court the purchasers relied on certain English authorities referred to in a passage in *Fry on Specific Performance*. These were the same authorities that had been distinguished by Judson J. *in Turney* v. *Zhilka*. Judson J., however, held that this case was on all fours with *Turney* v. *Zhilka* and *F.T. Developments Ltd*. v. *Sherman*, and said:

> In the passage relied upon as the foundation for the judgment of the Court of Appeal the learned author is saying that when there is a stipulation or term in a contract nonfulfillment of which would render the contract incomplete and hence unenforceable, but which is for the benefit of the purchaser and severable, then the purchaser is entitled to waive it in order to be able to obtain a decree of specific performance. The authorities quoted and reviewed in *Zhilka* support this proposition. However, this is far removed from the case where the agreement is subject to a condition precedent.
>
> The vendor in the present appeal had no enforceable contract without performance of the condition. Neither had the purchaser. With the consent of the vendor, he could have introduced a term permitting him to waive the condition. Such terms are common.

It appears to us that Judson J. was once again suggesting that there is no binding contract until the condition is fulfilled. If this is correct, however, it would mean that if a contract for the sale of land was, at the purchaser's request, made subject to rezoning by a certain date, the vendor could with impunity resile from his agreement before that date and turn around and sell to another. This it seems to us would be viewed by most as a startling proposition. The parties may indeed not intend to be bound by such an agreement in any particular case, but this seems to us unlikely to be true in the majority of cases. The true nature of such an agreement in most cases is that it is binding but the obligations of both or either party are suspended until the land is rezoned. If the land is not rezoned, then the agreement dies.

The learned judge, however, also held that it is permissible to introducd a specific term permitting a party to waive such a condition. Yet the efficacy of such a term must surely depend on whether there is a binding contract the obligations under which are suspended. If a true condition precedent has the effect of delaying the creation of a binding contract, a term permitting waiver of the benefit of that condition would appear to be nugatory and *unenforceable*.

In comparing the *Turney* and *O'Reilly* cases in *Barnett* v. *Harrison*, Laskin C.J.C. in his dissent, said:

 n. 18 *supra*, 233, 234.

> I would not myself have found any consonance between the condition in the *F.T. Developments* case and that in *Turney and Turney* v. *Zhilka*. Even less of a consonance appears to me to exist between the condition in *Turney and Turney* v. *Zhilka* and that in the *O'Reilly* case *supra*. In the latter case, a purchaser had agreed to buy Lot 7 in a certain area from a vendor, and the contract included a provision as to the purchaser being able to purchase Lot 8 from a third party on terms and conditions satisfactory to the purchaser and prior to a named date on the question whether this was a condition for the purchaser's sole benefit and open to waiver by him, the British Columbia Court of Appeal so held in reversal of the trial Judge. This Court, again speaking through Judson J., held that *Turney and Turney* v. *Zhilka* and the *F.T. Developments* case governed the legal issue. It was his view, to quote his words, that "the vendor in the present appeal had no enforceable contract without performance of the condition. Neither had the purchaser." In short, the view was taken that the provision as to the purchase of Lot 8 was a condition of the duty of performance of both the vendor and the purchaser. I cannot so read the provision which, on its face, seems so clearly to be directed to the duty of the purchaser and not to any duty or interest of the vendor. Being, in my opinion, for the purchaser's benefit alone, it was one which he could forego in asserting a claim to specific performance against the vendor. The provision was there to enable the purchaser to defend against the vendor if it was unperformed and not vice versa.
>
> I cannot but think that if the condition in the present case and the condition in the *O'Reilly* case are not instances of conditions which can be waived by the one party to whose duty of performance they go, there can hardly be any case in which waiver can be lawfully effected short of an express provision therefore in the contract of sale. No doubt this is a salutary procedure, but the law of contract has long ago ceased to depend on exact expression of every consequence of a contractual provision.

The Chief Justice, in this passage, highlights the practical and logical effects of the rule, showing how a contractual provision clearly intended to serve as protection for the purchaser, has become subverted to the entirely different purpose of allowing the vendor to escape his obligations.

Barnett v. *Harrison* is the most recent case in which the Supreme Court of Canada has addressed itself to the question of waiver of conditions precedent in contracts, and emphasizes that Court's determination to stand by the strict rule developed in its previous decisions. It is an interesting case in that additional arguments were offered in support of the rule and these, together with the Chief Justice's thoughtful dissent, provide the most careful and broad analysis thus far of the issues involved.

The case involved an agreement for the sale and purchase of land, which was subject to a number of conditions relating to zoning and other actions of a municipality. Some of the conditions in the agreement concluded with the following words: "In the event that these conditions are not complied with, then notwithstanding anything herein contained, the agreement of purchase and sale *shall be null and void* and the deposit monies returned to the purchaser." Other conditions concluded with these words: "In the event that any of the above conditions are not complied with, the purchaser shall *have the option to declare this agreement null and void* and to have the deposit returned or to accept the changes and complete the agreement." A condition relating to zoning approval involved the earlier form of words, and as it turned out, it was this condition which could not be met. The purchaser attempted to waive the condition, but the vendor resisted the sale, and an action for specific performance was brought. It was admitted by the vendor that the reason for his resistance was that he had received a better offer for his land.

Dickson J., delivering the judgment of the majority of the Court, held that the action for specific performance should fail. In doing so he conceded that the rule in *Turney* v. *Zhilka* runs counter to cases decided in other jurisdictions, but in addition to relying on Canadian precedent for his decision he offered some arguments of his own in support of the rule.

Firstly, he stated that the distinction between promissory conditions and true conditions precedent for the purposes of waiver is valid and worth preserving.

C.S. Barnett, *Barnett* v. *Harrison - Unilateral Waiver of Conditions Precedent*, (1976) 3 Dalhousie L.J. 596, 598. But as one commentator has cogently observed:240.

28. *Ibid*.

> ... is not that the question not the answer? Why is the distinction valid? If a condition is for the sole benefit of the party seeking to waive it, what difference does it make to the other party how the condition may be satisfied or even if it is satisfied at all or waived?

He was also of the view that the words of the parties, particularly when they have been aided by legal advisers, must be honoured; if they wish to stipulate for an option to waive, they can always do so by using precise words. He noted that in this case the parties had so stipulated with regard to the conditions for water and sewer requirements; if all the various conditions in this contract were to be placed on the same footing, the court would simply be rewriting the agreement. We agree that it could be argued that the parties did in fact attach differing consequences to the nonfulfilment of the different conditions precedent. Rather than using this to justify the rule that a condition inserted In the contract for the sole benefit of one party can never be waived by that party, however, it could be argued that this is an indication that the condition was intended to be for the benefit of *both* parties.

He also argued that if the purchaser is allowed to waive a condition inserted for his sole benefit he would, in effect, be acquiring an option to purchase, for which he had paid nothing. Furthermore, the vendor's land may be tied up for months while he is waiting to see whether the purchaser is going to waive some condition which has not been fulfilled:

> If what has been termed an agreement of purchase and sale is to be in reality an option, the purchaser will take the benefit of the appreciation in land value during the intervening months but if the agreement takes effect in accordance with its terms the vendors will have that benefit. I can see no injustice to the purchaser if the contract terms prevail and possible injustice to the vendors if they do not.

It is not clear why it should have been thought that there is a lack of consideration for such a right of waiver, even if it does amount, as Dickson J. suggests, to an option. If such a right is expressed or implied it is a term of the contract included by the parties, and therefore part of the whole bargain. It is moreover difficult to see what hardship was suffered by the vendor. He signed a document in which he agreed to await a certain time for the outcome of the zoning application, and must be taken to have known that such applications take time. He must also be taken to have known that land may rise, or decline, in value over such a period of time. By its very nature this type of agreement is one in which the vendor will not know until the condition is fulfilled, or by the date stipulated for fulfilment, whether performance is required of him. If the purchaser waives the condition before the stipulated date he has put an end to the vendor's uncertainty. This hardly seems unjust. The reasoning employed by Dickson, J., indeed, appears to lead to a rewriting of the contract (in this case in favour of the vendor), a result earlier rejected by the learned judge as improper.

Dickson J. also pointed out that the rule avoids determination of two difficult questions: (i) whether the condition precedent is for the benefit of the purchaser alone or for the joint benefit and (ii) whether the conditions precedent are severable from the balance of the agreement. We agree that the first question is not always an easy one to answer. The court's role however, has always been to provide an authoritative forum for the construction of contracts. The trial judge *in Turney* v. *Zhilka*, Mr. Justice Spence, found no difficulty in rejecting the defendant's contention in that case that the condition precedent was also for his benefit;

32. n. 18 *supra*, 247.

33. It would appear that *O'Reilly* is the decisive case on *this* whole question - while *Turney* v. *Zhilka* and *F.T. Developments Ltd*. v. *Sherman* could be distinguished on their facts, it is the unequivocal judgment in *O'Reilly* which firmly establishes the rule that in no circumstances can a true condition precedent be waived unilaterally, *see Matrix Construction Ltd*. v. *Chan Go See et al* [1976] 2 W.W.R. 764 (B.C.C.A.).

34. n. 18 *supra*, 232. neither have the courts in other jurisdictions. As to the second question, the Supreme Court has in each case drawn the distinction between "severable and waivable" provisions and the nonwaivable "true condition precedent". If the courts have been able to rule on this distinction, it does not seem that they should have any great difficulty in distinguishing between those true conditions precedent which are severable and those which are not.

Neither has the Supreme Court suggested that there is any difficulty in making such a distinction when the right to waive has been expressly reserved.

Finally, he observed that the rule has been in effect since 1959 and has been applied many times, and:

In the interests of certainty and predictability in law the rule should endure unless compelling reason for change be shown.

With respect, we do not consider this to be a very compelling argument. If there is no justification for a rule, the length of its history and the number of times it has been applied cannot justify that rule. Whatever merit there may be, as a canon of judicial behaviour, in the proposition that because a rule leads to certainty and predictability it should be retained even if otherwise unsound, it seems to us to have little merit in relation to the desirability of legislative change.

As we have pointed out, Laskin C.J.C., in his dissenting judgment, attempted to distinguish *Turney* v. *Zhilka* on the ground that it was really a case where the condition was for the benefit of both parties. He also distinguished *F.T. Developments Ltd*. v. *Sherman* on the ground that the purchaser's "waiver" of the condition, which was for his sole benefit, was a day too late. He was forced to admit, however, that the *O'Reilly* case was directly on point and incorporates the reasoning of its predecessors. The Chief Justice suggested, however, that that case was decided wrongly and should not be followed.

Laskin C.J.C. disagreed with the proposition that a condition precedent whose performance is subject to the actions of a third party can never be waived by the party for whose sole benefit the condition was inserted. He pointed out that such a proposition is peculiar to Canada and contended that in this class of case:[1969] 1 O.R. 694.

(1972), 23 D.L.R. (3d) 505. *See also Canadian Marketplace Ltd*. v. *Fallowfield*, (1977) 13 O.R. 456.

n. 36 *supra*, 699.

> Whether it be action or conduct by one of the parties that is involved or action or conduct of a third party, what is important is whether that action or conduct is a condition of an obligation of one of the parties only or of both. If of one only, there is no reason why he should not be able to offer performance of his own obligation or duty without insisting on the condition and then call on the other to perform his side of the bargain.

To the Chief Justice, therefore, the only question with regard to a party's right to waive a condition precedent is whether such a condition is precedent to that party's obligation to perform, i.e. whether it was inserted for his sole benefit. He admitted that application of this principle has sometimes been complicated by the fact that in some cases the question has arisen as to whether there is a concluded contract. It was his view, however, that if there is a concluded contract, then a party has the right to waive a condition precedent inserted for his sole benefit regardless of whether performance of that condition was dependent on the actions of a third party or on the actions of one of the parties to the contract. This is the view reflected in the case law of other common law jurisdictions. In *Harrison*, the Chief Justice found the conditions to be solely for the benefit of the plaintiff and, consequently, waivable by him.

C. ___Scope of the Rule

The scope of the rule in *Turney* v. *Zhilka* has been limited in a number of cases. Some of these are difficult to reconcile with others in while the rule has been applied, and this suggests that there is some judicial discomfort with it. They emphasize its artificial and dogmatic characteristics.

As we have pointed out, the Supreme Court of Canada has agreed that it is always open to the parties to provide expressly in the contract that a condition may be unilaterally waived by the party for whose benefit it has been

inserted. In the result it has been held, in such cases as *Genern Investments Ltd*. v. *Back et al*., and *GaywoodHall Developments* v. *Wilkes*, that where the right to waive a condition is expressly reserved, then such a condition does not constitute a "true condition precedent" that is incapable of waiver. The nature of the condition in such circumstances was considered by Hartt J. in *Genern Investments Ltd*. v. *Back et al*. where, in discussing an agreement for the sale of land, he said:

> The agreement itself expressly gave to the purchaser a right of waiver and the contract was thereby made conditional upon the municipality rezoning the land unless so waived by the purchaser. This power of waiver takes the condition outside the realm of a true condition precedent for the purchaser was given the express right by the vendors to relinquish that benefit. The rezoning condition did not form the basis for completion of the contract because the parties consented to the possibility of its waiver by the purchaser. The vendors having so agreed cannot now claim that the performance of the agreement terminated solely on the enactment of a rezoning bylaw.

Such a condition, however, must be waived prior to the date stipulated for its fulfilment.

The Supreme Court of Canada has approved such cases by citing them by way of example in support of its argument that a "true condition precedent" can only be waived unilaterally if the contract so provides.

40. (1972) 23 D.L.R. (3d) 625.

41. *Ibid*., 627.

42. (1972) 32 D.L.R. (3d) 693; affd. 40 D.L.R. (3d) 160n.

This reasoning, however, serves only to emphasize the artificial nature of the rule in *Turney* v. *Zhilka*, for it suggests that a binding contract has been created, with the right to waive the condition being an integral term of that contract. In the result a true condition precedent, as defined by the Supreme Court, does not affect the creation of a binding obligation, its only significance being to preclude any right of waiver.

It has also been held that the terms of the contract may be interpreted as giving an express power to waive a condition unilaterally. For example, in *Dennis* v. *Evans* the plaintiff had agreed to purchase certain lands from the defendant. The agreement was stated to be conditional upon the purchaser obtaining severance of a 25acre plot to be retained by the vendor. If, however, the plaintiff did not obtain severance, he was given the alternative of purchasing the entire parcel subject to a life estate in the 25acre plot in favour of the vendor for a period not exceeding 20 years.

In an action for specific performance or damages, Addy J. ordered specific performance, holding that in view of the options that were open to the purchaser should a severance not be granted, the condition was not a true condition precedent as contemplated by the Supreme Court of Canada. Consequently:

> ...the condition on the present contract is clearly severable, is solely for the benefit of the purchaser and is expressly declared to be subject to other options which are open to the purchaser. The purchaser, in other words, is entitled to waive the condition and exercise alternative rights.

The condition was viewed as being similar to that considered *in Genern Investments Ltd. v. Back et al*., and not, therefore, a condition precedent incapable of waiver as defined in *Turney* v. *Zhilka*.

A group of cases which are less easy to reconcile with those in which the rule in *Turney* v. *Zhilka* has been applied are those following the decision of the Ontario Court of Appeal in *Beauchamp* v. *Beauchamp*.

See also Brooks v. *Alker*, [1976] 9 O.R. 409; *Whitehall Estates Ltd*. v. *McCallum and Keehan* (unreported, B.C.C.A.8.9.75, Vancouver Registry 400/74) *L'Estrange* v. *Juda* (1976) 11 O.R. (2d) 702.

[1975] W.W.D. 157 (B.C.). In that case an agreement for sale and purchase of land was made conditional on the purchasers being able to obtain certain mortgage financing within fifteen days of the acceptance of the offer. As events turned out, the purchasers were able to obtain mortgage financing, but not on the terms referred to in the agreement. The

vendors attempted to resist the sale, on the ground that the condition precedent had not been met, and the traditional action for specific performance followed. Gale C.J.O., said:

> We point out, as did the trial judge, that the condition was solely for the protection of the appellants, and all the respondents were interested in was receiving the sum of $15,500 in cash. The notice to which I have referred brought home to the respondents the fact that payment of the $15,500 in cash would be made and that the appellants had met the condition referred to in the offer, or, alternatively, were waiving it.
>
> In those circumstances, we are of the view that the learned trial Judge erred in declining to order specific performance. Counsel for the respondents relied upon the cased of *Turney et al*. v. *Zhilka*, [1959] S.C.R. 578,18 D.L.R (2d) 447,.and *Aldercrest Developments Ltd*. v. *Hunter et al*., [1970] 2 O.R. 562, 11 D.L.R. (3d) 439, for the proposition that a true condition precedent cannot be waived, even though it is in favour of one party only and the fulfilment of the condition is completely within the control of that one party. We do not think that those cases are appropriate to the circumstances here; they are distinguishable, as the condition herein is not such as is dealt with in those cases.
>
> The appeal will therefore be allowed and judgment given for specific performance, with costs to the appellants throughout.

This decision was upheld, without reasons, in the Supreme Court of Canada, although Dickson J. did comment in *Barnett* v. *Harrison* that *Beauchamp* v. *Beauchamp* "should, I think, be regarded as [a case] in which the condition precedent was satisfied and not as one in which it was waived. This, however, is by no means cigar. On its face the condition was a "true condition precedent," the fulfilment of which depended upon the will of a third party, i.e. the prospective mortgagee. It could plausibly be argued that there was an implied promise by the purchaser that he would make some effort to obtain such financing, and that performance of this promise was vital if the condition was to be fulfilled. On this view, the condition was to some degree promissory, and, therefore not strictly a "true condition precedent". While perhaps tortuous, this reasoning appears to provide the only basis on which *Beauchamp* v. *Beauchamp* can be reconciled with the rule in *Turney* v. *Zhilka*. Of course any other result would have been patently ridiculous and it may be that this consideration was a significant influence on the decision. The vendor had no interest in the type of financing that the purchaser was to obtain. His only interest was in obtaining the agreed price for the sale.

As a result of *Beauchamp* v. *Beauchamp* similar "subject to financing" conditions have been held not to be true conditions precedent as defined by the Supreme Court of Canada and, consequently, have been held capable of being waived by the party for whose sole benefit they are inserted.

R.S.B.C. c. 330.

See also, Anglin, J. in *Davidson* v. *Norstrant* (1921); 61 S.C.R. 493; *Wright*. v. *Shattuck* (1901), 4 Terr. L.R. 455, affd. 5 Terr. L.R: 264 (C.A.); *Jankin* v: *Western Contractors Ltd*. v. *Tetra Steel,* [1975] W.W.D. 56 (B.C.); *Mitchell & Jewell Ltd*. v. *Canadian Pacific Express Co*. (1974), 44 D.L.R. 603.

S. Stoljar, *Prevention and Cooperation in the Law of Contract*, (1953) 31 Can. B.R. 231, 232.

Hotham v. *East India Co*. (1787), 1 Term Rep. 638, 645; *MacKay* v. *Dick* (1881), 6 App. Cas. 251. Similarly, a clause whereby a contract is to be void on the happening of a certain event (a condition subsequent) is inapplicable where the event is brought about by the act or omission of the party contending that the contract is void. *see e.g., Commissioners of Agricultural Loans* v. *Irwin* [1940], O.R. 489, 49495, affd. [1942] S.C.R. 196; *New Zealand Shipping Co*. v. *Societe des Ateliers*, [1919] A.C. 1 (P.C.). *Beitel* v. *Sorokin*, [1973] 5 W.W.R. 639, affirmed [19741 2 W.W.R. 767. In such cases, however, no attempt has been made to reconcile the *Beauchamp* decision with *Turney* v. *Zhilka*.

Where performance of a condition has not been subject to the will of a third party, the courts have not hesitated to allow the party for whose bendfit the condition is inserted to waive that condition. The unreported British Columbia case of *Jordan Development Corporation* v. *Barwell Development Ltd*. provides an example. In that case an offer to purchase property accepted by the defendants contained the following: "Subject to inspection of building records by 12:00 noon November 28, 1973." The plaintiffs inspected the building and found it to be satisfactory, but as no profit and loss statement was provided in accordance with section 29 of the *Real Estate Act,* the defendants refused to complete (they had received a further offer for a larger amount from a third party). Section 29 of the *Real*

Estate Act requires that a seller of business property must deliver to the purchaser a profit and loss statement and other material information, and the defendants contended that the plaintiffs could not unilaterally waive this condition.

Toy J. had no hesitation in finding that the obligation of the vendor under section 29 of the *Real Estate Act* was not a "true condition precedent" as defined in *Turney* v. *Zhilka*, and that on the fact there had been an effective waiver of the inspection of records requirement by the plaintiffs before the completion date. He was unable to see how the requirement for inspection of records was anything but exclusively for the benefit of the purchaser, and accordingly made a decree of specific performance.

The rigour of the rule in *Turney* v. *Zhilka* has been mitigated, in some instances, by the application of a basic principle in the law of contract, that of mutual cooperation. There are two aspects to this basic requirement of cooperation, the first of which is explained by Stoljar as follows:

> Reduced to its lowest terms, the general duty to cooperate becomes but a duty not to prevent or hinder the occurrence of an express condition precedent upon which the performance by the promisor depends; for if the promisor prevents the happening of the condition, he will fall under an immediate duty of performance (usually of payment) as if no condition had ever qualified his promise.

(1973) 37 D.L.R. (3d) 649, [19731 3 O.R. 629, case note by H.R. Nathan, (1973) 12 Osgoode Hall L.J. 650. *See also Hargreaves Transport* v. *Lynch*, [1969] 1 All E.R. 455, for an example of where this duty to cooperate was held to have been discharged.

It is interesting to note that the agreement explicitly reserved a right of waiver for the purchaser, as to which Holland J. said:

> This provision as to waiver, in my view, does not assistthe purchaser since I do not see how the purchaser could waive, or purport to waive this particular condition.

Ibid. 649.

> One commentator, Nathan, *ibid*., has said that if Holland J. meant to say by this that in no circumstances can a party waive a true condition precedent where a general right of waiver has been reserved, he is clearly wrong in lac. We agree that in view of *Genern Investments Limited* v. *Black*, n. 36 *supra*, such a contention is wrong, but we would suggest that what Holland J. was really saying was that this particular term is incapable of waiver in the sense that it was not severable and the agreement could not therefore be completed if the term remained unfulfilled.

It was this aspect of the principle to which Judson J. alluded in *O.'Reilly* v. *Marketers Diversified Inc*.; when he said:

> Throughout the British Columbia Courts and on this appeal, the case was argued on the narrow ground of nonperformance of the condition. I am not overlooking the fact that soon after the contract was executed, O'Reilly wrote to his neighbour, the owner of Lot 8, regretting the fact that he had agreed to sell and notifying him that the contract was subject to a condition. There is very little evidence on this point. A representative of the purchaser company did go to see the neighbour. There is no evidence that he made any offer. The neighbour was not called as a witness.
>
> The case was not put in and not argued on the basis that performance of the condition precedent had been prevented by the act of the vendor. If this had been pleaded and proved, the result here might have been different.

The second aspect of the principle is explained by Stoljar as follows:

> ... the requirement of cooperation may turn into a distinctly positive duty, that is, a duty to take all such necessary or additional steps in the performance of the contract that will either materially assist the other party or will generally contribute to the full realization of the bargain. The failure to give such cooperation amounts to a breach of contract which

will make the noncooperative party liable to damages, or will create a new defence for the benefit of the other.

An opposite and recent example of this is *Metropolitan Trust Co. of Canada* v. *Pressure Concrete Services Ltd.* *See also Whitehall Estates Ltd.* v. *McCallum* (1975), 63 D.L.R. (3d) 320 (B.C.C.A.) This case involved a contract for the sale of land which contained a condition as to the obtaining of the consent of a mortgagee to a new head lease. In the Ontario High Court, Holland J. held that the condition was a "true condition precedent", and was therefore incapable of waiver. The learned judge went on to say, however, that if the contract requires the vendor to attempt to obtain the consent and the vendor fails to use his best efforts in that regard, he will be liable in damages to the purchaser for breach of contract. Furthermore, if the agreement can be completed notwithstanding the fact that the condition remains unfulfilled, the court will order specific performance.

Not only does application of the principle of cooperation to contracts containing "true conditions precedent" mitigate the rigour of the rule in *Turney* v. *Zhilka*, but it also lended weight to our view that in most cases such conditions are properly to be regarded as precedent to the performance of the contract only, and not to its creation. For a court to award a remedy based on a breach of a term of the contract, it must presuppose the existence of a binding contract. If there is no binding contract it would be difficult to find any consideration for the promise to attempt to obtain fulfilment of the condition.

D. __Summary

From the foregoing analysis one thing is certain; in Canada a party to a contract cannot unilaterally waive a "true condition precedent" in the form of an uncertain event, the happening of which neither party has promised to secure. In view of the *Beauchamp* case, however, it appears that if a condition is inserted solely for the benefit of one party, and is to some extent dependent on his own efforts, it will not necessarily be treated as a "true condition precedent" and may be waivable by that party.

Furthermore, an express provision that a party may waive a certain condition in the contract will result in that condition being treated as other than a "true condition precedent", provided such a condition is severable in the sense that the agreement may be completed despite the nonfulfilment of the.condition. A right to waive a true condition precedent may also be implied where there is an alternative open to a party seeking to waive that condition which can be exercised if the true condition precedent remains unfulfilled. It should also be pointed out that it is always open to the parties to agree to the waiver of a condition precedent. To do this is of course to vary the contract by mutual consent.

CHAPTER IV OTHER JURISDICTIONS

The rule in *Turney* v. *Zhilka* is peculiar to Canada. In no other common law jurisdiction does the right to waive a condition precedent turn on whether or not fulfilment of that condition is dependent upon the will of a third party. As a result of this rule the courts in Canada, by holding irrelevant the question whether the condition was inserted for the benefit of one party or both, in our view ignore the purpose of and reason for the inclusion of such conditions. No other common law jurisdiction had adopted such an arbitrary and rigid rule. As Laskin C.J.C. pointed out in *Barnett* v. *Harrison*:

2. [1892] 3 Ch. 359.

3. [1913] 2 Ch. 648.

[1974] 1 All E.R. 421. For a discussion of this case, *see* L.W. Melviller *Conditional Contracts* (1974) 11 New Law J. 615.

> An examination of the case law in England, in Australia, in New Zealand and in the United States disclosed no differentiation in applicable principle between those provisions where action of a third party is involved and those where only the action of the opposite party is involved so far as concerns the right of waiver of a provision which is found to be for the benefit of one party only.

In dealing with the right to waive a condition precedent the courts in other jurisdictions concern themselves with the more fundamental principles of the law of contract. Their primary concern is whether a binding contract has been concluded. If so, then the right to waive a condition precedent depends upon whether the condition was inserted for the benefit of the party seeking to waive it. If it was, then, generally speaking, it may be waived and the contract enforced.

In view of this apparent difference in approach between the Canadian courts and the courts in other jurisdictions, we believe that an examination of the case law in other jurisdictions is warranted.

A. ___England

It has long been settled that whether the terms of a contract include a provision which has been inserted solely for the benefit of one party, he may waive compliance with that provision and enforce the contract as if the provision had been omitted. The classic authorities for this proposition are *Hawksley* v. *Outram* and *Marrell* v. *Studd and Millinquon*. It is true that the conditions in these two cases were, as Judson J. pointed out in *Turney* v. *Zhilka* and *OReilly* v. *Marketers Diversified;* at the most of the promissory type. Unlike the Supreme Court of Canada, however, the English courts do not for the purposes of waiver distinguish these from contingent conditions precedent.

> The approach of the English courts is illustrated in the recent case of *Heron Garage Properties Ltd*. v. *Moss*
> n. 2 *supra*.

n. 4 *supra*, 426. which related to a contract to purchase part of certain garage premises that was conditional on the granting of planning consent to a redevelopment which the purchasers wished to carry out. The vendors operated a filling station and a car sales showroom on the whole site, and it was their intention to sell cars from the part of the land to be retained by them. The contract was conditional on the purchaser obtaining either unconditional planning consent or consent subject to conditions acceptable to the purchaser, and in the event the consent offered should be conditional, the purchaser was allowed 28 days within which to notify the vendor's solicitors whether it accepted the conditions was further provided that if consent was not obtained within six months (or an agreed extension period) either party could terminate the contract whereupon the deposit was returnable to the purchaser.

Planning consent was refused. The purchaser thereupon purported to waive the condition concerning the obtaining of such consent and alleged that, as a result, the contract had become unconditional. The vendors, however, on the expiration of the sixmonth period within which consent was to have been obtained, gave notice terminating the agreement and returned the deposit. The purchasers brought an action for specific enforcement of the agreement.

The significant factor in this case was that the vendors were to retain part of the land and were to use it for a business *related to the purchaser's proposed garage business and proposed redevelopment,* namely a car sale showroom. Brightman J. found that in consequence the vendors were as much concerned with the manner in which the land was proposed to be used as were the purchasers. While he held that the purchasers' contention that planning consent was a condition solely for its benefit was clearly untenable, he accepted that a party to a contract is at liberty to waive performance of a "stipulation" if such "stipulation" is exclusively for his benefit. He referred to *Bennett* v. *Fowler* where a contract was subject to the vendor making a good title but the purchaser was willing to take such title as the vendor had. An objection by the vendor that the condition could not be waived was brushed aside by the Master of the Rolls, Lord Langdale, who held that such a condition was solely for the benefit of the purchaser who could therefore waive it and enforce the contract.

He also referred to *Hawksley* v. *Outram*, which case concerned a term in an agreement to sell a business which provided that the purchaser could continue to use the vendor's name and imposed a restraint upon the vendor. There was an objection relating to the circumstances under which that right and restraint were included in the contract, and so, to overcome any difficulty, the purchaser waived his right to use the name and restrain the vendor, and it was held he was free to do so.

With regard to the general proposition that a party to a contract may waive a stipulation on the ground that it is intended only for his benefit, Brightman J., without seeking to define precise limits, said:

> ... it seems to me that in general the proposition only applies where the stipulation is in terms for the exclusive benefit of the plaintiff because it is a power or right vested by the contract in him alone as in the *Hawksley* case, or where the stipulation is by inevitable implication for the benefit of him alone as in *Bennett* v. *Fowler*.

It is interesting to note that in addition to holding that the planning condition was for the benefit of both parties and could not be waived by the purchaser alone, he was also of the view that the connection between that condition and the completion date precluded waiver because it would leave completion in the air. It is doubtful whether Brightman J. is correct in this in view of the cases holding that where a conditional contract of sale fixes no date for completion, then the condition must be fulfilled within a reasonable time.

See also, Wood Preservation Ltd. v. *Prior* [1969] 1 All E.R. 364; *Panoutos* v. *Raymond Hadley Corporation of New York* [1917] 2 K.B. 473.

Thus a vendor cannot, by waiving a reservation in his own favour, successfully set up an enforceable contract if this had never been contemplated by the parties, *Allsopp v. Orchard* [1923] 1 Ch. 323: *See also Phibbs* v. *Choo* [1977] 1 W.W.R. 352 (Alta. S.C. App. Div.) .

n. 1 *supra*.

Ibid., 232.

We would suggest that, as a corollary, if the condition is capable of waiver and is waived within this "reasonable time", the time for completion of the sale will then arise.

Thus, the fact that performance of the condition had been dependent upon the will of a third party, i.e. the planning authority; never entered into

the court's deliberations. The major issue was whether or not the condition was inserted for the sole benefit of the plaintiff.

In *Heron Garage Properties Ltd.* v. *Moss* the existence of a binding contract was presupposed, the condition merely suspending the performance of that contract. It has been held, however, that if there is in reality no concluded agreement, i.e. the condition was precedent to the existence of the contract, a party cannot waive the condition and enforce the agreement even though the condition was inserted for his sole benefit. As Laskin C.J.C. pointed out in *Barnett* v. *Harrison*, application of the principle that a party may waive a condition inserted for his benefit has been complicated by those cases which involved not the performance of a concluded contract but rather the question whether there was a concluded contract. For example:

> Lloyd v. Nowell [1895] 2 Ch. 744, is referred to 6th ed. (1921), at distinction. Thus, where a transaction was subject to "the preparation by my solicitor and completion of a formal contract", it could not be said that the vendor could waive this provision and create a contract by his unilateral act. Nor could a purchaser do so under a similar provision respecting the preparation of a formal contract by his solicitor: *see Von HatzfeldtWildenhurg* v. *Alexander*, [1912] 1 Ch. 284.
>
> The English courts have also had to consider whether the introduction of a condition precedent made an agreement too vague in law to be binding. For example, in *Janmohamed* v. *Hassam*, the defendant agreed to sell a house to the plaintiff subject to the condition that if the plaintiff did not obtain an offer of a mortgage upon terms satisfactory to himself within one month, the contract should be rescinded. The plaintiff did obtain such a mortgage, but the defendant sold the property to a third party. Slade J. held that it was the plaintiff who had to be satisfied and it was therefore easy to import a further term that this meant to the satisfaction of the plaintiff acting reasonably. If that further term were imported, the court took the view that the condition was sufficiently certain to be given reasonable effect.

In England it appears well settled that if there is a concluded contract a party may waive a condition precedent inserted for his sole benefit even if fulfilment of that condition is dependent upon the will of a third party.

B. __New Zealand

Reference has already been made to the New Zealand case of *Donaldson* v. *Tracy*, which, in *G & R Construction* v. *Southern Slope Holdings Ltd*., Aikins J. found himself unable to reconcile with *Turney* v. *Zhilka*. *Donaldson* v. *Tracy* arose out of an accepted offer for the purchase of hotel property and the offer was conditional upon the approval of one licensing commission being obtained and that that commission not recommend any other licensed premises within a twomile radius. The commission gave its approval but also approved another licence within the area, but the purchaser sought to waive this provision and sued for specific performance when the vendor contended that the contract was no longer binding.

Counsel for the defendants submitted that a distinction was to be drawn between "pure" conditions and conditions that are nothing more than promises or undertakings and that this was a "pure" condition, depending as it did upon the action of a third party. He submitted that failure

of a pure condition may render a contract void or voidable and that the type of condition in this case was one the failure of which renders the contract wholly void.

The argument thus was that this condition was precedent to the existence of the contrast, and therefore incapable of waiver. The court accepted the distinctions between the various categories of conditions but held that the particular condition in this case was precedent merely to performance of the contract and not to its existence. Hutchinson J. found that the contract between the parties was, subject to the conditions, a complete one, with nothing more formal contemplated required. This being so, and as the condition was inserted in the contract solely for the benefit of the purchasers, they could accordingly waive it and enforce the contract. He also held that it was irrelevant that fulfilment of the condition was dependent upon the actions of a third party.

On this view, the only question to be determined with respect to waiver of a condition precedent, of whatever type, is whether that condition was inserted for the sole benefit of a party. For this purpose, Hutchinson J. took the view that evidence of the surrounding circumstances was admissible. He concluded that on its face the contested provision was for the benefit of the purchaser, and was fortfied in this conclusion by the fact that the vendor would not have been prejudiced had the condition been omitted from the contract.

While *Donaldson* v. *Tracy* established that, for the purposes of waiver, the fact that performance of a condition precedent was dependent upon the will of a third party was irrelevant, the courts in New Zealand have still had to consider the nature and effect of certain types of condition precedent. In particular, a body of case law has developed with regard to "subject to finance" provisions in agreements for the sale of land.

The first case of importance was *Barber* v. *Crickett*
[1965] N.Z.L.R. 656.

(1972) 32 D.L.R. (3d) 693, affd. 40 D.L.R. (3d) 160, and see discussion in Chapter III.

[1966] N.Z.L.R. 527.

where the contract for sale and purchase was made conditional on the purchaser "arranging the necessary mortgage finance to purchase the property". Cleary J. held that, in such circumstances, a purchaser can assert non-fulfilment of the condition only where it occurs without fault on his part, and so, before he can say that a contract is at an end, he must show not only that he has failed to obtain the mortgage finance but also that such failure occurred notwithstanding reasonable efforts on his part. Henry J. in *Mulvena* v. *Kelman* held, in respect of a contract which provided that the sale was "subject to finance being arranged," that this requirement that the purchaser must take all reasonable efforts to obtain his finance was incorporated as an implied contractual term. This view would appear to support our explanation of *Beauchamp* v. *Beauchamp*, that while fulfilment of such a condition is ostensibly dependent upon the will of the mortgagee, as the purchaser must make some attempt to secure the mortgage finance, it is not a "true condition precedent" as envisaged by the Supreme Court of Canada.

In *Scott v. Rania* McCarthy J. held that a particular "subject to finance" clause was a condition precedent and that the purchaser must take reasonable steps to secure his finance. The basis

for this conclusion cannot be permitted to take advantage of a state of affairs produced by his own default. His decision did not depend upon the implication of a contractual term. The purchaser had sought to waive this condition and obtain specific performance. McCarthy J. was of the view that no binding contract came into existence until the condition was fulfilled - hence the reasoning concerning the purchaser's duty to try to obtain suitable financing. Notwithstanding the fact that no binding contract was created until the condition was fulfilled, he held that the condition could be waived by the purchaser as being one inserted solely for his own benefit.

This proposition is quite revolutionary and would appear to depart from basic principles with regard to the creation and nature of contractual obligations.

Gardner v, *Gould*, [1974] 1 N.Z.L.R. 426, 428. For a review of this and other New Zealand "subject to finance" cases, see B. Coote, "*Subject to Finance" Again*, (1974) N.Z.L.J. 392.

See also, Valley Ready Mix Ltd. v. *Utah Finance and Development (N.Z.) Ltd*., [1974] 1 N.Z.L.R. 123. In a recent case,

Ibid.

(1966) 116 C.L.R. 418.

Ibid. 429430, emphasis added. however, McCarthy J. has suggested that he was mistaken and that the existence of a duty on the purchaser to make reasonable efforts to obtain suitable financing must presuppose the existence of a binding contract incorporating this implied term. The learned Judge therefore suggested that in *Scott* v. *Rania*, despite his remarks to the contrary, the fulfilment of the condition was precedent to the performance of the contract and not precedent to its creation.

In summary, the law in New Zealand appears to be comparable to that in England.

Australia

As in England and New Zealand the Australian courts have emphasized that conditions precedent may be precedent to the existence of a contract or its performance. In *Mayhard* v. *Goode*, the High Court of Australia considered a contract which was conditional upon the "transfer of purchaser's block going through in reasonable time" and that in turn depended upon governmental action. Although the Court held this clause to be a condition subsequent, Isaacs J., referring to counsel's argument that the particular stipulation being a condition precedent meant that the relationship of vendor and purchaser could not arise until its fulfilment, said:

> But a condition precedent may have that effect and it may not. We must ask the question "precedent to what?" If it is precedent to the agreement being operative as a contract, it is of the nature urged by counsel. But it may be a condition precedent to the performance of a particular term of the contract, which is a common occurrence.

The fact that performance of a condition precedent is dependent upon the will of a third party has not been considered by the Australian courts to be relevant whether it may be waived. For example, in *Grange* v. *Sullivan*, a contract for sale of certain property was made conditional on planning approval being obtained by a certain date. With regard to this condition, Berwick C.J. said:

[1972] 2 N.S.W.L.R. 827.

Holland J. followed O'Bryan J. in *Jubal* v. *McHenry* [1958] V.R. 406 and Macrorsan J. in *Hines* v. *Good* [19511 Q.W.N. 2 and said that the clause was too uncertain to be given any meaning - "Nor does it assist the plaintiff to point to the condition in the contract considered in *Rama* (sic) v. *Scott* (n. 19 *supra*). The condition "subject to my being able to arrange mortgage finance of $2,000 on the security of the property" was less vague than the present, but thr point was never argued" - at 838.

> I agree with the learned trial judge that the special condition was included in the contract for the benefit of the appellant. There is no suggestion that the respondent was retaining any interest in the subject land, or that he had any interest in any other land, or in any other respect which would be affected in the least by what the appellant was able to do, or did do with or upon the subject land. The expression "This contract is subject to" in the special condition means in this contract, in ny opinion, "The performance of this contract by the purchaser is subject to". Consequently, as the learned trial judge held, the contract would not automatically come to an end, so that both parties were released from the performance, if no approval in conformity with the condition was obtained before 31st May ...
>
> Thus, in my opinion, the appdllant could not be compelled to complete if no approval conformable to the condition was received by 31st May, if he made the appropriate application within the stipulated time and took all other necessary steps to obtain that approval. If he failed in these respects he could be compelled to complete, unless the respondent had waived the appellant's breach in not having applied in time or in otherwise failing to take necessary steps. But*, being a condition for his benefit, the appellant, in my opinion, could waive it and require the vendor to complete notwithstanding that no approval satisfying the condition was received in time.*

Later on, Windeyer J. made the following statement:

> The special condition of the contract was, I think, inserted primarily for the benefit of the purchaser and could be waived by him. But unless before the date set for obtaining the council's approval of the proposed development that approval was in fact given or the purchaser either expressly waived the condition or expressly accepted the communication which he had received as a sufficient fulfilment of it, the vendor could I think avoid the contract. That is because the time within which the approval must be had was stipulated and unless that stipulation was expressly waived by the purchaser it would ensure, I consider, for the benefit of both parties, the vendor being interested to know for how long his liability was to remain unresolved.

The courts in Australia take it as settled that, provided there is a concluded contract, a condition precedent inserted for the sole benefit of one party may be waived by that party so that he can then enforce the contract. Further, the fact that performance of that condition was dependent upon the will of a third party does not affect this right of waiver.

As in England, the courts in Australia have had to consider whether a condition precedent is so uncertain as to prevent the formation of a binding agreement. In *Grime* v. *Bartholomew*; for example, a contract for the sale of a house was made "subject to finance being arranged." It was held that this term was too uncertain to operate as a condition, but too significant to be severed, and that therefore the parties had failed to reach an enforceable agreement of which specific performance could be ordered. The court held further that the plaintiff could not waive the term as being splply for his benefit and sue on the rest of the contract, since the principle of waiver applies only to a clause which is not sufficiently certain to operate as condition.

If there is a binding contract, however, the factors which might be taken into account in determining for whose benefit the condition was inserted are illustrated in a number of recent cases. In a Victoria case *Charles Lodge Pty. Ltd.* v. *Menahem*, [1971] Qd. R. 172. a contract for the sale of land was to become "void and of no effect" if permission for the erection of 15 flats was not obtained within sixty days. Permission was not so obtained as the purchaser had failed to apply for it. The purchaser claimed specific performance and argued that he could waive the condition on the ground that it was inserted for his sole benefit. The court rejected this argument holding that as the condition was also for the benefit of the vendor since it helped to resolve the uncertainty in which he might otherwise find himself for an indefinite period. This argument could, of course, be advanced in relation to any condition with a time limit and would therefore go far towards nullifying the general rule concerning waier. The same court, however, reached a contrary conclusion in a later case involving a contract for the sale of land which was subject to the purchaser receiving building permission, for which he had to apply forthwith. He failed to make such an application, but it was held that the vendor could not rely on the fact that building permission had not been obtained, as the condition was inserted for the sole benefit of the purchaser who could waive it and enforce the contract.

The factors to be taken into account, and the tests used to determine for whose benefit a condition was inserted were considered recently in a Queensland case *Raysun Pty. Ltd.* v. *Taylor*. In this case the court was asked to decide whether a clause in a contract making it conditional upon the purchaser obtaining the local City's permission to subdivide the land was for the purchaser's sole benefit. It became evident that the City's approval would not be forthcoming before the stipulated date, and the purchaser purported to waive this condition contending that it was inserted for his sole benefit. As in *Heron Garage Properties Ltd.* v. *Moss*, the vendor was to retain a small piece of the land, and the court held that the purchaser could not waive this condition and enforce the contract, as he had failed to prove that it was inserted for his sole benefit; the value of the defendant's property would probably be increased if the council were to approve a development plan.

An interesting aspect of this case is that in reaching this conclusion the court set out the tests to be used in determining for whose benefit a condition was inserted. These tests are summarized in the headnote as follows:

> In the first instance the onus is on the party contending that a condition was inserted for his sole benefit to prove this.
>
> 2. If necessary, to solve the question for whose benefit the condition was inserted, evidence of the surrounding circumstances is clearly admissible.
>
> 3. In determining the question whether the condition was inserted exclusively for the benefit of the plaintiff or for the benefit of both plaintiff and defendant, the test was the potential benefit to

> the defendant from the approval, that is, the benefit which a vendor in the position of the defendant might fairly anticipate.

The courts in Australia do not concern themselves, therefore, with whether fulfilment of a condition precedent is dependent upon the will of a third party when seeking to determine a party's unilateral right to waive. They are concerned with whether a binding contract has been concluded. If it has, then the only concern is whether the condition was inserted for the sole benefit of the party seeking to waive it.

From the foregoing it is clear that, to paraphrase Laskin C.J.C., in England, Australia and New Zealand, there is no differentiation in applicable principle between those provisions where the action of a third party is involved, and those where only the action of the opposite party is involved. Provided there is a concluded contract, the sole question for the courts in these jurisdictions is whether the condition was for the benefit of the party seeking to waive it. The position would appear to be the same in the United States,

See e.g., Fox v. *Canadian Bank of Commerce*, [1945] 2 W.W.R. 377.

and moreover, prior to the decision in *Turney* v. *Zhilka* in Canada as well.

CHAPTER V **DESIRABILITY OF REFORM**

It is evident that the case law in Canada concerning the right to waive unilaterally a "true" condition prededent is at odds with the case law in other Commonwealth jurisdictions. This does not of itself justify a conclusion that the law in Canada is in need of reform. The law in Canada must reflect Canadian needs, not those of another jurisdiction, and we agree unequivocally that:

> The Supreme Court of Canada must, as befits the final Court of Appeal of an independent state, be prepared to lay down new principles or modify old ones when Canadian conditions appear to require it.
>
> K. *Webb, Contract: Waiver of Conditions Precedent: Barnett* v. *Harrison*, (1976) 8 Ottawa LLR. 82.

Ibid., 8687. Other writers have been as equally critical of the rule, *see e.g*., C.S. Barnett *Barnett* v. *Harrison - Unilateral Waiver of Conditions Precedent*, (1976) 3 Dalhousie L.J. 595; B. Gibson, *O'Reilly* v. *Marketers Diversified Inc*., case note (1971) 6 U.B.C. L.R. 431; S. Schwartz, *Annual Survey of Canadian Law Contracts*, (1976) 8 Ottawa L.R. 588, 626628.

Whether Canadian conditions require such a rule is, however, questionable. We are unaware of any conditions peculiar to Canada that would warrant the development of such a rule. It appears that the situations in which the rule has been applied occur just as frequently in other jurisdictions. Indeed, there is a striking similarity between such situations and those arising in Canada.

Quite apart from this, however, we find ourselves unpersuaded by the reasoning advanced in support of the Canadian position. On the contrary, considerations of common sense and principle suggest to us that the rule in *Turney* v. *Zhilka* is unsound, it ignores the nature of the bargain struck and, in so doing, permits a contractual provision clearly intended to protect one party to be used by the other to escape his obligations. As one writer has said in a comment on *Barnett* v. *Harrison:*

> What legitimate interest can the other party have in insisting upon the performance of some condition to which at the time of concluding the contract, he either reluctantly or indifferently acceded? That condition was an element of the bargain, and the price was doubtlesh exacted for it. The cases in which the vendor has insisted on the performance of a condition precedent are all founded on the same sham disclosed so blatantly in *Barnett* v. *Harrison*. There the vendor was contesting the purchaser's right of waiver though not because he had the slightest interest in securing a rezoning of the land he was parting with; he simply had a better offer elsewhere and wished to avoid his contract.

As we have pointed out, the courts in other jurisdictions do not approach the question of waiver in such a formalistic manner, but allow a party who has bargained for something to forego the benefit of that thing without abandoning the whole of the contract.

The rule has failed not only to gain the support of several academics, but also certain members of the judiciary. As we have pointed out, Cartwright C.J.C. in *F:T. Developments Ltd.* v. *Sherman,* suggested that in some circumstances it is open to a party to waive a true condition precedent that is inserted in a contract for his sole benefit. Various judges in the lower courts have also expressed some concern about the rule. For example, in the unreported case of Baker and *Baker* v. *Romaine*,

Ibid., 6. Toy J. in the Supreme Court of British Columbia said:
Reasons for judgment, at 6.

> I have some difficulty in accepting the law in its present state.

Again, in *Giouris* v. *Pristouris*, Arnup J. in the Ontario Court of Appeal pointed out that it is difficult to reconcile all the cases. While referring to the cases where the Supreme Court of Canada refused to allow waiver, and then to *Beauchamp* v. *Beauchamp* where waiver was permitted, he said:

> In the light of expressions used in some of the judgments in the three cases in the Supreme Court of Canada, it is not easy to reconcile all the pronouncements made on the subject of conditions precedent, whether they can be waived at all, or on whether they can be waived by the party for whose sole benefit they were originally inserted.

We confess to having experienced the same difficulties.

The most exhaustive and thoughtful critique of the rule is, as we have pointed out, contained in Chief Justice Laskin's dissent in *Barnett* v. *Harrison*, with which Spence J. concurred. In his dissent, the Chief Justice points out that the rule not only defies common sense, but also, in his view, it is wrong in law. He concludes that the correct approach to the question of waiver of conditions precedent is that used in the courts in other common law jurisdictions.

We find that in this regard we are in agreement with Chief Justice Laskin that the rule is unjustified and unnecessary. We recognize that it has, to some extent, brought certainty to a small area of the law, but in our view such certainty cannot be justifidd in the light of its unequitable results. We have therefore concluded that statutory intervention is desirable.

CHAPTER VI RECOMMENDATIONS FOR REFORM

It is the Commission's view that where a binding contract has been concluded but performance is suspended until the fulfilment 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 fulfilment of the condition and enforce the contract. For the waiver to be effective, however, it should be made before the time stipulated for the fulfilment of the condition. Such a right of waiver should exist regardless of whether fulfilment of the condition depends upon the will of actions of a third party. If waiver of a condition precedent is to be effective, the court must be satisfied that a binding contract has been concluded, that the condition was inserted for the benefit of the party seeking to waive it and that it is severable.

We have pointed out earlier that the courts have had long experience in determining whether or not a binding contract has been concluded.

We are confident that they will have no greater difficulty in determining for whose benefit a condition precedent was inserted in the contract than has been encountered in other jurisdictions, or even in Canada prior to 1959.

Mailman v. *Mailman* (1957), 6 D.L.R. 43, 4547.

Canada Law Book Co. v. *Boston Book Co*. (1922), 64 S.C.R. 182.

S.B.C. 1970, c. 17. It is always open to the court to consider the position of the parties at the time the contract was entered into, and the surrounding circumstances which form the context within which the parties made their agreement.

The condition must be severable from the contract as a whole, in the sense that the contract must be capable of being completed notwithstanding the nonfulfilment of the condition. Certain conditions precedent are, by their very nature, nonseverable and therefore incapable of waiver. For example, section 90(2) of *The Land Act* prohibits, *inter alia*, the assignment of Crown lands held by reason of a disposition made under that Act, unless and until the Minister approves the assignment in writing. Thus, the Minister's consent is a condition precedent to the execution of a valid assignment, to which any agreement to assign will be subject. By virtue of section 90(3) of that Act, any assignment made without the Minister's consent is to be "null and void and of no effect". The condition as to the Minister's consent is therefore clearly nonseverable as an enforceable assignment could not be executed without it and, accordingly, may not be waived either unilaterally or by mutual agreement between the parties. The notion of severability is a familiar one to our courts and we are unaware of any novel difficulties that would be presented by its application in this context.

The Commission recommends:

That the Laws Declaratory Act *be amended, by the addition of a new section reflecting the following principles:*

Where the performance of a binding agreement is suspended until the fulfilment of a condition precedent, a party to the agreement may waive the fulfilment of the condition precedent, notwithstanding that fulfilment thereof is dependent upon the will or actions of a person who is not a party to the agreement, if:

(a) the condition precedent was inserted in the *agreement for his sole benefit,* and

(b) the agreement is capable of being performed notwithstanding the nonfulfilment of the condition precedent, and

(c) the waiver is made before the time stipu*lated for the fulfilment of the condition precedent, or* within the *time which would be a reasonable time for the fulfilment of the condition precedent if no such time is stipulated.*

We would like to record our appreciation for his assistance to Mr. Anthony Spence, Legal Research Officer to the Commission. Mr. Spence did all the research upon which this Report is based, and drafted, in the form of the Report, the conclusions of the Commission on this subject.

LEON GETZ, Chairman
RONALD C. BRAY
PAUL D. K. FRASER
PETER FRASER
DOUGLAS LAMBERT

April 25, 1977.