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Thomas Heintzman specializes in alternative dispute resolution. He has acted in trials, appeals and arbitrations in Ontario, Newfoundland, Manitoba, British Columbia and New Brunswick and has made numerous appearances before the Supreme Court of Canada.

Mr. Heintzman practiced with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, broadcasting and telecommunications, construct and environmental law

Thomas Heintzman is the author of ***Heintzman & Goldsmith on Canadian Building Contracts,*** 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Who Is A Successor To A Contract?

Most commercial agreements contain a clause stating that the contract is binding upon and for the benefit of "successors." For example, Article 10.1 of the **CCDC Cost Plus Contract** states that the contract "shall enure to the benefit of and be binding on…successors".

What does the word "successors" mean? Who are "successors"? Do those who enter into the contract know who the successors are?

Recently, the Ontario Court of Appeal considered this issue in ***Brown v. Belleville (City).*** I dealt with that case in an article last week. In that article I was concerned with whether inaction could amount to acceptance of a repudiation of a contract.

Factual Background

Let's remind ourselves of the facts in ***Brown v. Belleville***. In 1953, a municipality signed an agreement with a farmer under which the municipality agreed to maintain and repair a storm sewer drainage system that it had constructed on and near the farmer's lands. Six years later, the municipality stopped maintaining and repairing the drainage system. Over the next 50 years, the original municipality and successor municipality clearly and repeatedly repudiated the agreement.

The lands were sold from owner to owner and each owner unsuccessfully sought to have the municipality repair and maintain the drainage system. Finally, in 2011 the then owners of the lands, the Browns, sued the municipality for breach of contract. The municipality, the Town of Belleville, defended the action on a number of grounds. It said that the limitation period had expired because the Browns or their predecessors had long ago accepted the municipalities' repudiation of contract. The trial judge and the Court of Appeal rejected that position. I dealt with that issue last week.

Belleville also said that the Browns had no standing to sue because they were third parties to the 1953 agreement, and that contract law does not entitle third parties to enforce agreements. Belleville also said that the Browns were not "successors" of the original farmer who entered into the agreement. That agreement said:

> "THIS INDENTURE Shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, administrators, successors and assigns."

The agreement was never registered against the title to the land. The City said that the agreement was never assigned or otherwise transferred to the plaintiffs or the other owners of the land after the original farmer who entered into the agreement. The City asserted that the Browns were third parties to the original agreement and did not fall within any of the accepted category of persons who could enforce the agreement.

Court of Appeal Decision

The Court of Appeal held that, on its face, the contract created a category of persons who could enforce the contract as parties to the contract, namely, successors of the owner who entered into the agreement. In that sense, the Browns did not have to demonstrate the application of the "third party beneficiary rule". They were effectively parties as much as the original party.

The court stated it this way:

> "…the broad and unqualified language of the enurement clause constitutes an express stipulation by the contracting parties that they intended the benefit of the Agreement to be shared by future owners of Mr. Sills's lands, as his successors or assigns or by way of inheritance. The language of the enurement clause unequivocally confirms that the contracting parties intended and agreed that the benefit of the Agreement would extend to an aggregation or class of persons that includes successor landowner of Mr. Sills. On the admitted findings of the motion judge, the Browns are Mr. Sills's successors. In this sense, the Browns are not strangers or 'third parties' to the Agreement. Rather, they step into Mr. Sills's shoes and have standing to enfore the Agreement as against the City as if they were the original covantee(s) to the Agreement…given the intention of the contracting parties stipulated in the Agreement under the enurement clause, I conclude that 'relaxing' the doctrine of privity in this case does not frustrate the reasonable expectations of the parties at the time the Agreement was formed. To the contrary, it gives effect to them."

Belleville relied upon a 1980 decision of the Supreme Court of Canada in ***Greenwood Shopping Plaza***. It said that that decision precluded the Browns from relying on the 1953 agreement to which they were not a party. The Court of Appeal held that, in light of more recent decisions of the Supreme Court, the *Greenwood* case had been largely over-ruled. In any event, having regard to the enurement clause, the prohibition against third party enforcement of the agreement had little or no application. If necessary, the court said that it would apply the exceptions to the rule prohibiting third party enforcement of a contract and allow the Browns to enforce the drainage agreement when they so clearly fell within the category of persons who were intended to have its benefit.

The Court of Appeal considered one further objection of Belleville, namely, that the Browns were using the 1953 agreement as a sword – to bring an action and positively enforce rights – rather than as a shield – or as a defence. In the modern cases in the Supreme Court recognizing the rights of third parties to rely on contract they had not signed, those third parties were asserting the contract as a defence.

The Court of Appeal held that this distinction made no difference in the presence of the enurement clause:

> "I recognize that ***London Drugs*** and ***Fraser River*** were cases where the third-party beneficiaries sought to rely, by way of defence, on the benefit of the contractual provisions at issue to resist claims brought against them – they were not seeking to enforce the affirmative benefit of the relevant contractual provisions…..
>
> Nonetheless, it is my view that the Browns' status as the successors of the original covenantee under the Agreement affords them the right to seek to enforce the original covenantor's contractual obligations, as against the original covenantor. In effect, for the purpose of enforcement of the Agreement, the Browns are Mr. Sills

> and the City is Thurlow. Further, insofar as the performance of the City's obligations under the Agreement are concerned, there is a clear identity of interest between Mr. Sills and the Browns. As Mr. Sills's successors, the Browns stood ready to comply with the activity required of them under the Agreement- the provision of access to their lands. In all these circumstances, the application of the principled exception to the privity rule advances the interests of justice." (emphasis added)

Analysis

The ***Brown v. Belleville*** decision answers one of the issues arising from "successor" clauses. Based on that decision, a person falling within the clause does not have to worry about the old rule that contract law does not recognize the rights of third parties. If the contact has an enurement clause in favour of or binding on successors, then successors are parties to the contract as much as the original parties.

The next issue is: who are successors? Clearly, based on ***Brown v. Belleville*****,** a later owner of the same land that is affected by the agreement is a successor. But what about a tenant, or subtenant, of that later owner? If that tenant has exclusive possession of the affected property, and is the person who is really affected by a breach of the agreement, is that person a successor? What about the owner of other interests in the land such as owners of easements or mortgagees?

The issue becomes even more complicated when one considers building contracts. If the main contract between the owner and the contractor states that it is binding on the "successors" of the contractor, does that word include a subcontractor? What if the owner has given a covenant in the main contract that affects the electrical work and the contractor subcontracts the entire electrical work to an electrical subcontractor? Is the electrical subcontractor the "successor" of the contractor? Why not?

If the contractor assigned the electrical part of the main contract to the electrical subcontractor (if it were permitted to do so), then the enurement clause would likely apply because that clause would likely be expressed to include assignees. If the clause includes both successors and assigns, then the word "successors" must be given a wider meaning than "assisgns", but who does it include?

A further issue is this: if the enurement clause is also expressed to be binding on successors, then third parties may find themselves bound by obligations under the contract even though they never signed the contract. In fact, a good test as to whether the contract enures to the benefit of a third party may be whether it should be binding on that party. Clearly, the Browns were willing to be bound by the 1953 agreement and allow Belleville access to their land to repair and maintain the drainage system, so it was not difficult to find that the Browns were

successors. Similarly, a subtenant or mortgagee of the Brown's property would be willing to grant such access, so they may well be successors.

But what parties would be willing to be bound by the contractor's building contract with an owner? Would a subcontractor or supplier? Likely not, especially if that includes the payment obligations. Often the subcontract will state that the main contract is incorporated into the subcontract, but at least one line of authority holds that some of the terms of the main contract (such as arbitration, insurance and guarantee clauses) are not incorporated into the subcontract unless that intention is specifically set forth in the subcontract.

Now that the Ontario Court of Appeal has held that successors may enforce a contract if there is an enurement clause in the contract to that effect, the clause may be more powerful and dangerous than it was previously. This may be a good reason for the meaning of "successors" to be defined in the contract. The parties may mean that it includes only the successors by virtue of corporate or bankruptcy law. If so, they can say that. But they may mean it to have a broader meaning, such as a successor in title. Again, they can say that. If they do not, then they will leave it up to the court to decide who is bound by or may rely upon the contract.

See *Heintzman and Goldsmith on Canadian Building Contracts,* 4th ed., chapter 1, part 2

***Brown v. Belleville (City),* 2013 ONCA 148**

Construction law – Enforcement – Third Parties – Breach of Contract

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