RE-DEFINING PRIVITY OF CONTRACT: *BROWN V. BELLEVILLE (CITY)*

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I. INTRODUCTION

The classical definition of the common law doctrine of privity states that "a contract cannot (as a general rule) confer rights or impose obligations arising under it on any person except the parties to it."[1] The latter part of the proposition is uncontroversial since it is universally acknowledged to be unjust for parties to agree to impose an obligation on an unsuspecting other and thereby be able to sue to enforce that obligation. The former part of the proposition is controversial, particularly where the expressed purpose of the contract is to bestow a benefit on another. The controversial part of that proposition is the implication that a third party could, by virtue of the contract, obtain a legal right to sue to enforce an agreement made for the third party's benefit when the third party is not a party to the consideration, that is, has contributed nothing to the exchange, and, therefore, should not be entitled to enforce the agreement. By definition, contract law is about the enforcement of promises exchanged by the parties who have voluntarily consented and contributed to that exchange, and anticipate benefiting from it in a way meaningful to each other. The doctrine of consideration serves the important function of identifying the parties to the exchange, but it does not necessarily identify who is to benefit from it; a party to the consideration could well have entered the agreement to purchase something to bestow as a gift on another in the future. Thus, it is difficult to distinguish this situation from one where the gift is to be bestowed directly upon the third party by the other party to the contract, except by the presence of consideration. Ordinarily, the beneficiaries will be the parties to the consideration, but in those cases where the purpose of the exchange is to benefit a third party, consideration is a poor tool for deciding whether that party may sue to enforce it. A promised gift which fails to materialize does not bestow a right to sue to enforce the promise. The purpose of the doctrine of privity, then, is to perform that subsidiary function to consideration, by providing that only the parties to the consideration may enforce the agreement. As classically stated, the doctrine of privity reinforces the principle that only parties to the consideration, who have given something, may sue to enforce the contract, that is, may get something.

The doctrine of privity has proven to be a barrier to the enforcement of a contract made for the benefit of a third party by that third party with the result that both courts and legislatures have devised numerous "exceptions" to the principle in situations where the parties to the contract have been found to intend, as a fact, to benefit a third party by their contract. These exceptions are well-known:[2] trust, agency, collateral contract, restrictive covenants of land, and insurance. The creation of exceptions raises the question of discerning a new exception and what legal criteria should be employed to create a new exception. In response, the Supreme Court of Canada in *London Drugs v. Kuehne & Nagel International*

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1 HG Beale, ed, *Chitty on Contracts*, 31st ed, vol 1 (London: Sweet & Maxwell, 2012) at 1374.

2 See the chapters on privity in any contract text for these.

Ltd.[3] suggested the so-called "principled" exception rule which has been applied in various cases since.[4] Whether any of these are real exceptions is doubtful. It is equally possible to view them as situations in which a court has found that the doctrine of privity in its narrow sense does not apply and other well-established principles, such as agency or trust, do. To put it differently, in those situations it is not a matter of permitting strangers to a contract to enforce the contract but of finding the so-called third party to be a principal, *cestui que trust*, party to a collateral contract, or purchaser of encumbered real property. In short, the issue is not only one of the application of the privity rule but also of determination of the boundaries of operation of privity by virtue of the constraining impact of other long-established legal principles. The rule that only parties to a contract should be permitted to enforce it is too important to the integrity of the contract, as a voluntary agreement of the parties to be bound to one another, to cast aside. Rather, it may simply be a matter of positioning that principle within the complex mesh of principles that is the common law.

The test for determining whether the doctrine of privity should be applied, as set out in *London Drugs*, is that of intention: was it the intention, express or implied, of the parties to the consideration to benefit a third party?[5] Tests of intention are inevitably problematic because their resolution requires a court to impute intention to express words or to imply words into the agreement. Yet, intention is key to numerous aspects of contract law from formation to performance to termination. Intention can be more difficult to discern where third parties are not referred to expressly in the contract. Thus, the test of intention tips over into one of reasonable foreseeability which is equally problematic as a means for determining the limits of the intention to benefit. Alternative tests have been proposed, variously expressed as "community of interest," "joint venture," and "enterprise,"[6] but these are reducible to the question of whether it was the original objective intention of the parties to benefit the third party, that is, to include them in the enterprise, so it is difficult to see how they advance the analysis. Moreover, where contracts occur within certain contexts in which other bodies of law are involved, such as trust or real property, special rules specific to those contexts may operate to define the content and scope of the intention. Such was the situation in *Brown v. Belleville (City)*,[7] in which the Ontario Court of Appeal decided that an enurement clause was enforceable 60 years after it was given by a party who was three parties away from the original grantor in successive ownership of the property for whose benefit the promise was originally given. The case was framed as one of privity of contract in which a principled exception was found and it raised questions about the doctrine of privity to be addressed further here.

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3 [1992] 3 SCR 299 [*London Drugs*].

4 As will be discussed below.

5 *Supra* note 3 at 449, Iacobucci J. This statement generalizes the test proposed in relation to the specific issue of whether a third party could shelter behind a limitation of liability clause.

6 These phrases are found in various formulations (see e.g. *Design Services Ltd v Canada*, 2008 SCC 22, [2008] 1 SCR 737 [*Design Services*]; *Commonwealth Construction Co Ltd v Imperial Oil Ltd*, [1978] 1 SCR 317; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988), 165 CLR 107 (HCA) [*Trident*]); and are proposed as better than the principled exception approach by Angela Swan & Jakub Adamski, "Design Services Ltd. v. Canada" (2008) 47:1 Can Bus LJ 87; Angela Swan & Jakub Adamski, *Canadian Contract Law*, 3rd ed (Markham: Lexis Nexis, 2012) at 216-24. The enterprise test proposed by Swan and Adamski would work well where employer-employee relationships are at issue but not necessarily in other contexts, suggesting the need for one generally applicable test. Intention remains that test.

7 2013 ONCA 148, 114 OR (3d) 561 [*Brown*].

II. THE CASE

The facts were slightly complex. In 1953, the municipality of Thurlow built a storm sewer drainage system along the frontage to Sills' land, he being the original landowner. To service the system, the municipality required access to the land and entered an agreement with the landowner whereby the municipality received access to the land for an indefinite period in exchange for promises to service the system, including a typical enurement clause that the promise shall "inure to the benefit of and be binding upon the parties hereto and their respective heirs, administrators, successors and assigns."[8] The promise was personal and did not run with the land as a covenant. The agreement was never registered on title. The municipality maintained the system for six years. Sills died in 1966 and his heirs sold the property to the Pleiziers in 1973. There was no express assignment of the agreement. In 1980, the Pleiziers asked the municipality to maintain the system but the municipality responded that it was "no longer bound" by the agreement.[9] In 1998, Thurlow amalgamated with Belleville which acknowledged that it was bound by Thurlow's obligations generally. In 2003, the Pleiziers sold the property to the Browns, again without an assignment of the agreement, although a copy was given to them at the time of the closing. In 2004, the Browns asked the city to maintain the system but the city took the position it was no longer bound to do so. Further discussions followed without fruit and, in 2011, the Browns sued the city for specific performance or damages in lieu. The motions judge found, among other things, that the Browns' action was not statute barred in relation to time; that the Browns were successors in title and entitled to enforce the agreement without an assignment; and that the agreement was not void on public policy grounds as fettering the city's discretion in relation to future uses of public roads and allowances. On appeal, there were three issues: (1) the expiry of a limitation period within which to sue the city; (2) the absence of privity of contract between the Browns and the city; and (3) the public policy of fettering the city's discretion perpetually in relation to land use.

In respect to the first issue, the city argued that the Pleiziers had accepted the repudiation of the agreement in 1980 by virtue of their inaction in response to the city's refusal to maintain the system. This resulted in the expiry of the then six-year limitation period in 1986. The city also argued that the Browns had accepted repudiation in 2004 when they failed to respond to the city's refusal at that time with the result that the limitation period had expired either in 2006 under the new two year limitation period or in 2010 under the old six-year limitation period. The Ontario Court of Appeal agreed that the city had repudiated the agreement in 1988 and 2004, but the real question was whether they had been accepted by the property owners at the time of the repudiation. The Court found that acceptance of repudiation must be clearly and unequivocally communicated to the repudiating party within a reasonable period of time, either directly, orally, in writing, or by conduct.[10] With regard to the alleged 1980 repudiation, the Court found that silence, inactivity or acquiescence did not amount to unequivocal repudiation. There was no evidence that the Pleiziers were unwilling to permit the municipality to come onto their property; of mutual abandonment of the agreement; of conduct inconsistent with the continuation of the agreement; or of steps to

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8 *Ibid* at para 13.
9 *Ibid* at para 17.
10 *Ibid* at para 45.

terminate. Nor was there an express or implied term in the agreement that it could be terminated by mere notice, nor could there be an implied term because of the perpetual nature of the enurement clause.[11] Again, in relation to the alleged 2004 repudiation, there was no evidence of acceptance.[12]

In respect to the third issue of whether the agreement was void on public policy grounds, the city made two arguments: (1) as a perpetual contract, the agreement offended public policy and was unconscionable, and (2) as a perpetual contract, the agreement fettered the city's discretion as to future uses of public roads and road allowances and thereby offended public policy. The Court rejected both arguments, the first on the ground that it was only raised orally on appeal, and the second on the ground that there was no evidence that the city's discretion would be fettered in the future.[13]

In respect to the second issue of an absence of privity, it was agreed that the Browns had no privity of contract with the city. There was no express assignment or transfer of the agreement to them. The city argued that the Browns had no standing to sue because of the absence of privity. The city also argued: (1) the covenant was a positive covenant which cannot run with the land, (2) without an assignment there was no equitable basis on which the Browns could sue, and (3) even if there was an equitable basis, it was defeated by laches. In response, the Browns argued that: (1) by the enurement clause the benefit flowed to the Browns, (2) the benefit runs with the land to benefit the Browns as successors in title, and (3) the principled exception to privity is applicable.[14]

In its assessment of these arguments, the Court, at the outset, noted the "considerably diminished force"[15] of the doctrine of privity in Canadian contract law and that "it persists only in weakened form."[16] The Court then turned immediately to the question of intention at the time the enurement clause was executed, stating that the language used was critical to the case, although the enurement clause did not fit into any of the recognized exceptions to the privity rule.[17] The Court concluded that the clause already confirmed that the benefit of the clause could be enjoyed by the successors of the original property owner, so that the Browns were not strangers or third parties.[18] The Court characterized this finding as relaxing the privity rule and within the reasonable expectations of the parties when the agreement was first made.[19] The Court further dismissed the city's reliance on *Greenwood Shopping Plaza Ltd. v. Beattie*,[20] on the grounds that it was overtaken by the subsequent decisions of the Supreme Court in *London Drugs* and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*;[21] that there was clear intention to benefit the successors in title here whereas there was no intention to benefit the employers in *Greenwood*; that the successors here were not

11 *Ibid* at paras 60-67.
12 *Ibid* at paras 68-72.
13 *Ibid* at paras 113-15.
14 *Ibid* at paras 74-75.
15 *Ibid* at para 79.
16 *Ibid*.
17 *Ibid* at para 80.
18 *Ibid* at para 84.
19 *Ibid* at para 85.
20 [1980] 2 SCR 228 [*Greenwood*].
21 [1999] 3 SCR 108 [*Fraser River*].

complete strangers or third parties; and that the expressed purpose of the enurement clause was to benefit the successors in title.[22]

Having first decided on the basis of the expressed intention in the clause alone that it provided successors in title the right to sue to enforce the enurement clause in perpetuity as successors in title rather than as third parties, the Ontario Court of Appeal turned to the question of whether or not the principled exception to privity also applied. The Court acknowledged that this was not necessary,[23] and then applied the two-part test set out in *London Drugs* and further explained in *Fraser River* to determine where exceptions should be made to the privity rule: (1) presence of an intention by the parties to the contract to extend the benefit in question to the third party, and (2) the conduct of the third party comes within the scope of the contract or the provision at issue in particular.[24] The Court concluded that intention was present to benefit successors in title and that, provided a successor in title was willing to perform their part and permit access to their land, as the Browns were, they were within the scope of the contract. The city argued that to satisfy the second limb of the test, the property owners must call on the city to request it to perform maintenance on the sewer system. But the Court rejected this argument both on the basis that the contract did not expressly require such conduct and that when the property owners did so, the city responded with unilateral repudiations of the agreements.[25] The Court also rejected the city's laches argument because the case was about breach of contract by the city and any delay by the Browns was irrelevant.[26]

The Court concluded that, as successors in title to the original covenantee, the Browns had a right under the agreement to enforce the covenantor's obligations. The Browns stood ready to comply by providing access to the land. In short, this was a situation for making a principled exception to the privity rule.[27]

III. DISCUSSION

Although *Brown* was concerned with real property it is important to recall at the outset that it was a contract case, thus the Ontario Court of Appeal quite rightly did not consider the city's argument about the enforceability of the enurement clause as a positive covenant, an argument drawn from real property law. Had the clause been contained in a conveyance of real property, the city could have argued that, as a burden, it could only have been enforced by the original covenantee against the original covenantor. The reasons for this rule and the problems associated with it have been canvassed elsewhere,[28] and are of no further relevance here. Nevertheless, the decision prompts several observations about the enurement clause per se, because its interpretation was a key to the Court's findings.

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22 *Brown*, *supra* note 7 at paras 92-94.
23 *Ibid* at para 95.
24 *Ibid* at para 99.
25 *Ibid* at para 105.
26 *Ibid* at paras 107-108.
27 *Ibid* at para 111.
28 Bruce Ziff, *Principles by Property Law*, 4th ed (Toronto: Carswell, 2006) at 389-95.

While the clause itself was a standard clause, the interpretation by the Court of "successors" was not. The clause provided that it was binding on the parties and their "heirs, administrators, successors and assigns."[29] In this sequence, parties, heirs, administrators, and assigns are normally considered to refer to various categories of individuals who own, inherit, or acquire the property by contract, while successors are normally considered to refer to any entity which succeeds a corporation as covenantee by, for example, merger, amalgamation, or change of corporate name.[30] The Court inflated this commonly understood meaning to include individual successors in title in addition to corporations, thereby extending the categories of persons who can enforce such clauses to include any person who purchases the dominant property into the indefinite future. The Court did not propose restrictions either on the categories of persons or the period of time for which the enurement clause might run, thereby leaving open the prospect that the original covenantor could be liable to an indefinite class of persons in perpetuity. This clearly offends the historical common law presumption against indefinite liability in perpetuity, a presumption based on common sense and a bias against unduly restricting future freedom of action. Had this clause been contained in a conveyance of the property, as a burden, it would only have been enforceable as between the original covenantor and covenantee. Until a future court reconsiders this interpretation of a enurement clause, contractual draftsmen should define expressly the meaning of "successor" or omit the word to avoid perpetual liability for a covenantor. That the *Brown* decision came down 60 years after the contract was executed (1953-2013), demonstrates the danger to covenantors of this precedent.

If the reverse situation had been at issue, that is, the city had sought to enforce an enurement clause in a 60-year-old contract against the Browns, it may be wondered if the Court would have come to the same conclusion, especially since the Browns only learned of the clause after purchasing the property because a copy of the contract was handed to them sometime after the closing.

This interpretation of the enurement clause by the Court meant that there was no strong reason to consider the privity issue because, as successors in title, the Browns were effectively a party to the original agreement, if not to the consideration, and able to enforce it like a party. Nevertheless, the Court considered the privity issue as if the Browns were third party beneficiaries, and, as previously observed, did so in two ways. First, by simply discussing the clear intention of the original parties to ensure that successors in title would enjoy the benefit of the enurement clause as a matter of construction, and secondly, by finding the situation to fit into the principled exception rule. Since intention is the key to both approaches, there was considerable overlap in both discussions of the Court. It is not clear that this case was appropriately argued as about privity. To explain why, a brief survey of the present state of the doctrine of privity is necessary.[31]

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29 *Brown*, *supra* note 7 at para 13.

30 There would appear to be no judicial definition and no other writing about this commonly understood meaning — perhaps for that very reason.

31 See generally for greater detail: Beale, *supra* note 1, ch 18; GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 502-509; John D McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012), ch 9; Swan & Adamski, *Canadian Contract Law*, *supra* note 6, ch 3; SM Waddams, *The Law of Contracts*, 6th ed (Aurora, Ont: Canada Law Book, 2010), ch 9. Helpful recent articles include, Norman Siebrasse, "Third-party Beneficiaries in the Supreme Court: Categorization and the Interpretation of Ambiguous Contracts" (1995) 45:1 UTLJ 47; Robert Flannigan, "Privity — The End of an Era (Error)" (1987) 103 Law Q Rev 564; MH Ogilvie, "Privity of Contract

That privity of contract was a mid-nineteenth century addition to contract law is well-known.[32] Equally well-known is its close connection to the rise of the requirement of consideration at the same time, as confirmed by Viscount Haldane in *Dunlop Pneumatic Tyre Company v. Selfridge & Co.*,[33] where he proposed two reasons for the privity doctrine: (1) only a party to a contract can sue to enforce it, and (2) only a person who has contributed to the consideration can enforce a contract.[34] Neither rationale has ever been wholly persuasive because, in relation to the first, it is not clear who is a party to an agreement when the purpose of the agreement is to bestow a benefit on an expressly named third party to the consideration, and, in relation to the second, because the presence of consideration goes to the narrower question of identifying the parties who have contributed to the exchange and says nothing about who may benefit from that exchange or whether a beneficiary ought also to have the right to enforce an agreement in his favour like any party to the consideration.

Expressed as narrowly as possible, the doctrine of privity simply restates the consideration rule: only parties to the exchange are privy to the reception of benefits from the exchange. But even this narrowest expression begs the question of whether an actual party to the exchange receives at least an indirect benefit when his intention to bestow a benefit on a third party is realized by the performance of the agreement, thereby opening up the possibility that there is really another principle operating in these cases. Where consideration and privity are thought to be different means of exploring the same idea, third parties are left without the benefit intended when they have no enforcement rights. But where an expanded formation of the privity rule or the operation of some other rule or rules occurs, then it is possible to incorporate an enforcement right for the third party into contract law.

Fulfilment of the intention of the parties to the consideration to benefit a third party is a good place to start in rethinking what the privity rule should say and is a means of distinguishing privity from consideration. If consideration defines the parties to the exchange then privity might operate as a corollary to define who the parties intended to benefit from the exchange. To ensure that the parties' intention is enforceable, it becomes necessary to re-formulate the privity rule or reconsider how existing rules of contract law can be applied. Since the general purpose of contract law is to enforce the voluntarily exchanged promises of the parties, contract rules should be optimized to achieve that goal. A reformulated privity rule might then be distinguished from the consideration rule and serve a different function in achieving that general purpose. The so-called privity problem would then disappear.

The traditional analysis of privity means that third party beneficiaries cannot enforce a contract because they were not parties to the exchange, and then finding exceptions to that rule in which the third party is permitted to do so on either common sense or equitable grounds. This process suggests that the core conviction of the courts is that privity and

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in the Supreme Court of Canada: Fare Thee Well or Welcome Back?" [2002] J Bus L 163; John D McCamus, "Loosening the Privity Fetters: Should Common Law Canada Recognize Contracts for the Benefit of Third Parties?" (2001) 35:2 Can Bus LJ 173; Robert E Forbes, "Practical Approaches to Privity of Contract Problems" (2002) 37:3 Can Bus LJ 357; JW Neyers, "Explaining the Principled Exception to Privity of Contract" (2007) 52:4 McGill LJ 757.

32 Flannigan, *ibid* at 564-68.

33 [1915] AC 847 (HL).

34 *Ibid* at 853.

consideration are the same rule, notwithstanding judicial statement to the contrary.[35] But it is not clear that the so-called exceptions are truly exceptions other than the simple operation of other legal principles more appropriate in certain fact situations. It is not clear why "privity" needs be implicated at all. Agency is concerned with the recognition that one contracting party had the dual status of also being an agent whose principal, the third party, acquired the right of enforcement. The principal was the other party to the contract all along by virtue of the law of agency and not a genuine third party. The position of the beneficiary of a trust appears to be a genuine exception unless one realizes that the operative body of law is the law of trusts and not of contract. Collateral contract is not a true exception either, because it is actually a two contract situation in which the third party consumer to the contract between the manufacturer and the retailer is also a contracting party directly with the manufacturer in relation to the manufacturer's guarantees or representations in a collateral contract. In those factual situations in which an assignment is permitted, the assignee, in fact, steps into the contractual shoes of the assignor and enforces the contract as a party to it, not as a third party beneficiary. Finally, the insurance situations are all independent statutory exceptions required to ensure that the underlying purpose of purchasing insurance is fulfilled. Life insurance and motor vehicle insurance are obvious examples, but consumer protection legislation permitting consumers to enforce product warranties directly operate in the same manner. An additional example would be in industrial situations in which liability to indemnify has been extended to protect injured workers as incorporated under their employer where the policy expressly named their employer as a beneficiary,[36] or any person covered by a policy although not expressly contemplated at the outset, such as "any charterer" in *Fraser River*.[37]

Therefore so-called exceptions to the privity rule are not true exceptions but rather instances of other principles of law operating so as to permit so-called third parties to sue to enforce an agreement, who are really parties to the contract directly (principals, assignees, or consumers) or indirectly (trust or insurance beneficiaries). The operation of these apparent exceptions does not impact on the narrow doctrines of privity and consideration. Instead, their operation defines the boundaries for the operation of the doctrine of privity. It is still the case that contracts are also enforceable between the parties who have contributed to the exchange themselves, but in those situations where it is the parties' intention to benefit another party, the laws which govern the rights of the third parties can be invoked to provide the intended benefit, not because they are third parties to a contract but because they are principals, assignees, consumers, etc. The laws of agency, trusts, assignment, insurance, etc. should be seen as operating cooperatively with the law of contract in these situations as part of the larger common law.

In light of this analysis, it is plausible to explain *Brown* in at least two other ways involving pure contract principles without resorting to the so-called principled exception. First, it is possible to see the enforcement of the enurement clause against the city as a case of collateral contract insofar as the promise to maintain the drainage system could be said to be made not only to the original owner in contract but also to subsequent owners in a

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35 *Coulls v Bagot's Executor and Trustee Co Ltd* (1967), 119 CLR 460 at 478 (HCA).
36 *Trident*, *supra* note 6.
37 *Supra* note 21.

unilateral collateral promise to maintain if the landowner provides access to the land. Thus, the enurement clause, like a manufacturer's guarantee, could be seen as founding two contracts, the original contract and a unilateral collateral contract. Secondly, it is also plausible to argue that the city was simply estopped from denying enforcement by a "successor" in title of the clause in which it promised to maintain the system in perpetuity.[38] Both suggestions assume that individuals can be successors and that such promises in perpetuity are possible, as questioned earlier. These approaches do not impact on the classical understandings of privity and consideration that only a party to the exchange can enforce the exchange because other doctrines of contract law are now brought into play in the normal fashion so as to ensure the primary purpose of a contract is to enforce the intention of the parties. Again, they simply serve to define the scope of operation of privity and consideration.

This approach suggests that the Supreme Court was on the wrong track when it created the principled exception. Rather than create a test for deciding when more exceptions should be made to privity, it may be more appropriate to decide when and where privity should operate in relation to other principles of contract law.

The factual context within which the principled exception arose was of cases where employees sought to shelter behind limitation of liability clauses in an agreement between their employers and the party with whom their employers had contracted to provide a service. Employees as such were rarely mentioned expressly in such agreements, although it would have been understood by both parties that they were necessary to carry out the employer's contractual undertakings. There is no factual evidence of agency or trust on the part of the employer in negotiating the contract, so no other principle could be invoked to permit an employee to enforce the agreement; rather, the employee may be a genuine third party. The Supreme Court of Canada created the principled exception to provide a test for novel fact situations in which exceptions to privity should be permitted,[39] that is, the Court thought traditionally of the general rule and exceptions to the general rule.

The principled exception was first set out in *London Drugs*[40] in which the Supreme Court was faced with its earlier unpalatable decision in *Greenwood*.[41] In *Greenwood*, a lease for property in a shopping centre required the lessor to insure against fire and provided that the lessor would not grant subrogation rights for recovery of loss caused by acts of the lessee to the insurance company with which the lessor insured. Employee negligence while acting in the course of employment caused a fire destroying the leased premises but the Supreme Court found that the employees were liable because they could not invoke the subrogation clause in an action brought by the lessor for recovery on behalf of its insurers by way of subrogation for monies paid to the lessor by the insurers. The Court found that neither the trust nor the agency exception could be used, on the evidence, to protect the employees who were not parties to the lease.

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38 See Neyers, *supra* note 31 at 785-90, for an estoppel explanation of *London Drugs*.
39 Following the High Court of Australia's lead in *Trident*, *supra* note 6.
40 *Supra* note 3.
41 *Supra* note 20.

The harshness of this outcome was alleviated in *London Drugs* in which negligent employees of a warehouse were able to shield themselves from liability behind a limitation clause in a contract between the customer and warehouse limiting liability to a small sum, although they were not referred to expressly in that contract. Writing for the majority, Justice Iacobucci stressed the understanding of the parties that employees were required to carry out the services promised in the contract and that there was an identity of interests between employer and employee in the performance of contractual obligations. The employees were found to be negligent in carrying out their tortious duty owed to the customer but could rely on the limitation clause because they fell within the word "warehouseman" in the agreement as a matter of construction. The Court further found that it would be absurd and a serious injustice to permit the customer to circumvent the purpose of the limitation clause by permitting the customer to enforce the strict version of the privity rule to preclude employee reliance on the limitation clause. *Greenwood* was distinguished, although not overruled, on the grounds that a lease is not performed by employees as a contract is for services and because the clause there was not intended to protect the employees of the lessee from liability.[42] The employees were viewed as complete strangers. In the view of the majority, there were sound policy reasons for relaxing but not abrogating the rule on the facts, arising from commercial reality and justice, in equating the employees with the employers in providing the promised services.[43]

To provide guidance for future cases, the Court then proposed its principled exception to the privity rule that employees may obtain the benefit of an employer's contract where: (1) the limitation clause, expressly or impliedly, extends to the employees; and (2) the employees are acting in the course of their employment *and* performing the very services provided for in the contract.[44] This test was said to be an incremental change because it depended simply on the intention of the parties, was similar to the agency exception, and was limited to fact situations involving employees.[45]

Justice La Forest dissented on the ground that the employers were not liable in tort to the customers and therefore the question of the limitation clause did not arise. In his view, while the first part of the *Anns*[46] test of the reasonable foreseeability of damage was satisfied, the second of policy reasons to limit the scope of the duty was not. Rather, he preferred to find the employer vicariously liable because the employer was better placed to pay damages, is almost always insured, and the imposition of liability on the employee is not likely to deter negligent behaviour any more than the likelihood of dismissal from employment.[47] The employer could then rely on the limitation of liability clause in relation to the customer.

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42 *Supra* note 3 at 431.
43 *Ibid* at 445-46.
44 *Ibid* at 448.
45 *Ibid* at 449-50.
46 *Anns v Merton London Borough Council*, [1978] AC 728 (HL) [*Anns*].
47 *Supra* note 3 at 337-43.

In the subsequent case, *Fraser River*, the Supreme Court of Canada confirmed the general application of its principled exception beyond employee cases.[48] In *Fraser River*, a waiver of subrogation clause in a marine insurance policy was stated to be against "any charterer." A charterer negligently sank the boat and the owner and insurer agreed to suspend the clause so that the insurer brought a subrogated claim against the charterer. The charterer succeeded on the ground that the principled exception applied so that it was included in the "any charterer" phrase and could take advantage of the waiver clause. The Court decided that the principled exception was not limited to contracts of service when it could be assumed that employees would carry out the service, but could be extended to any situation where the third party was intended to receive a benefit under a contract and was carrying out the very activities contemplated by the contract. Here the charterer was a "charterer" and engaged in chartering a boat.[49] The Court further found sound policy reasons to relax the privity doctrine, including correspondence with the commercial reality of sophisticated parties entering into an agreement expressly extending the benefit of the waiver of subrogation clause to an ascertainable class, and that this situation constitutes an incremental change only.[50]

After *Fraser River*, two questions remained: (1) the status in law of *Greenwood* to which the Supreme Court of Canada did not refer; and (2) the scope of the application of the principled exception. The status of the doctrine of privity itself remained clearly a part of the law of contract. Since *Greenwood* has never been overruled, it remains part of the law but is likely restricted to its own facts for cases where there is a very clear intention *not* to extend contractual protection to third parties. In at least one similar case, *Tony and Jim's Holdings Ltd. v. Silva*, an appellate court declined to apply *Greenwood* for that reason and preferred to apply *London Drugs* instead.[51] As to the scope of application, subsequent courts have taken *Fraser River* at its word that the principled exception is of general application, and is not confined to cases of negligent employees. Subsequent cases confirm that the key question is the first limb of the *London Drugs* test, of whether it is the intention of the contracting parties, express or implied, to extend the contract to a third party.[52]

Tests of intention are long familiar in the law of contract, but several issues arise in relation to the specific context of privity: (1) whether limitations of time and persons should be placed on third party reliance on a contract and whether reasonable foreseeability is an appropriate test; (2) whether a third party should be permitted to enforce a contract as well as use a limitation clause as a defence, that is, can a contract be a sword as well as a shield; and (3) whether contracting parties must take into consideration the interests of a third party

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48 After *London Drugs*, the lower courts had already begun to do so: *Froese v Montreal Trust Co of Canada* (1996), 20 BCLR (3d) 193 (CA), leave to appeal to SCC refused, 25486 (9 January 1997); *Madison Developments Ltd v Plan Electric Co* (1997), 36 OR (3d) 80 (CA), leave to appeal to SCC refused, 26397 (7 May 1998); *MAN — B & W Diesel v Kingsway Transport Ltd* (1997), 33 OR (3d) 355 (CA); *Tony and Jim's Holdings Ltd v Silva* (1999), 43 OR (3d) 633 (CA).

49 *Supra* note 21 at paras 31-39.

50 *Ibid* at paras 40-44.

51 *Supra* note 48 at 639-40.

52 *Laing Property Corp v All Seasons Display Inc*, 2000 BCCA 467, 79 BCLR (3d) 199 [*Laing*], leave to appeal to SCC refused , 28185 (19 April 2001); *MacNeill v Fero Waste and Recycling Inc*, 2002 NSSC 86, 203 NSR (2d) 186 [*MacNeill*]; *Gull Bay First Natoins v Shuniah Financial Services Ltd*, 2006 FC 632, 295 FTR 301 [*Gull Bay*]; *Kitimat (District) v Alcan Inc*, 2006 BCCA 75, 51 BCLR (4th) 314 [*Kitimat*]; *Holmes v United Furniture Warehouse Ltd Partnership*, 2012 BCCA 227, 32 BCLR (5th) 161.

when deciding whether to vary or end an agreement. The first two issues are particularly relevant to *Brown*.

The first question is partly answered by the second limb of the *London Drugs* test for the principled exception, because participation in the very activities defines who may be a beneficiary of the agreement, and in what respect. The period of time may be more problematic, for example, where successors in title are at issue, as in *Brown*. But it is unclear that a test of reasonable foreseeability would operate to reduce the time within which a contractual obligation could be enforceable where successors in title may be designated into the indefinite future in the agreement. The result in *Brown* is a warning to parties to define precisely who may be able to enforce a contract and for what period of time.

The second question is also apposite in relation to *Brown* since the current landowners were successful in using the enurement clause as a sword rather than a shield in order to enforce the contract against the city. The principled exception was devised in the factual context of a successful defence by employees relying on a limitation clause as defendants, yet in several cases since, various plaintiffs have been able to sue to enforce an agreement to which they were third parties,[53] although in other cases, the courts have found that the principled exception can only be used as a defence.[54] Where the clear intention is that the contract was made for the benefit of a third party, there is no obvious reason to find that the third party cannot sue as a plaintiff to enforce it. This is contrary to the traditional reason given for privity, that a person who is not a party to a contract and cannot be burdened by it should not be permitted the benefit of being able to enforce it. Yet, the logic of the principled exception should permit third parties to enforce agreements for their benefit just as they can where other exceptions to the privity rule apply, such as agency, trust, restrictive covenant, collateral contract, or insurance. There is no obvious reason why the principled exception should be exceptional in this regard and *Brown* is further authority for that possibility.

The third issue of subsequent amendment, variation, or termination of a contract with a third party beneficiary is not applicable to *Brown*. In *Fraser River*, the Supreme Court took the position that, once a loss has occurred, a third party's rights have crystallized and the parties to the contract cannot vary or revoke the terms unilaterally. This position might be improved upon by permitting the third party who has detrimentally relied upon the contract to do so and succeed in damages until reasonable notice of the change has been given.[55]

The decision of the Ontario Court of Appeal in *Brown* pushes the principled exception further than previous cases. It understood the exception to apply well beyond its original context of employers and limitation clauses, as *Fraser River* suggested. It permitted a successor in title, who may not have been a true third party, to use the clause as a sword to enforce it against the covenantor. It interpreted the principled exception as reducible to

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53 *MacNeill*, *ibid*; *Gull Bay*, *ibid*.

54 *Laing*, *supra* note 52; *Kitimat*, *supra* note 52; *Design Services*, *supra* note 6. See also Swan & Adamski, "Design Services Ltd. v. Canada," *supra* note 6.

55 This is the solution proposed by McCamus, *supra* note 31 at 329-30. It is also the position taken to protect third party beneficiaries to insurance policies. See e.g. *Insurance Act*, RSO 1990, c I.8, s 244; *Law Reform Act*, RSNB 2011, c 184, s 4(3); *Contracts (Rights of Third Parties) Act 1999* (UK), c 31, s 2.

intention. It enforced an agreement as if it was perpetual in time and in relation to future parties entitled to enforce it. *Brown* was a far-reaching decision.

While it is not unreasonable to expect parties to an agreement to keep their intentional promises, as *Brown* asserted, to do so for a successor in title some 60 years later remains troubling as is, even more so, the reverse situation had the agreement contained a clause requiring the current landowner to perform some duty for the city beyond permitting access some 60 years later, for example, if some building on the property or other property use obstructed access. Yet, intention is the favoured statutory solution in most jurisdictions to the question of whether third parties should be permitted to enforce an agreement made for their benefit.[56] The only alternative approach in the current literature of an enterprise test[57] could only work in limited factual circumstances, such as those involving employer and employee, and cannot be a test of general application.

The significance of *Brown* is that it brings the common law into line with statutory tests in other common law jurisdictions, and largely erases that part of privity which prohibits third parties from suing to enforce the benefit of an agreement between the parties to the exchange from the common law in Ontario. Effectively, this also does away with the principled exception as well and suggests that the doctrine of privity no longer operates on the basis of the classical statement of the rule and of exceptions, including the principled exception to the rule. Rather, there is a new rule of privity, not yet expressly stated as such by the courts, that privity simply means that parties to a contract cannot impose a burden on a third party to the agreement. The approach of the Ontario Court of Appeal shows that there is no need to wait for legislative intervention; a court can make the necessary change simply by enforcing the intention of the parties to a contract to provide a benefit to a third party. The patchwork of provincial and federal legislation that might otherwise be expected is simply avoided.

A re-stated doctrine of privity might be framed in this way:

> A contract cannot impose obligations arising under it on any party except the parties to it. Where the intention, express or implied, of the parties to a contract is to benefit a third party, the third party may sue to enforce the agreement to the extent necessary to receive the promised benefit. Where the third party has detrimentally relied on the agreement, prior to reasonable notice of a variation in it, the third party can sue to enforce the original agreement.

In short, the privity rule remains in a restated way because it serves the important function of supporting the requirement for consideration in the law of contract in order to identify the parties to the exchange for economic value, but where it is the clear intention of those parties

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[56] For an analysis of the American Second Restatement of Contracts, see Melvin Aron Eisenburg, "Third-Party Beneficiaries" (1992) 92:6 Colum L Rev 1358. See also for the UK, *Contracts (Rights of Third Parties) Act, 1999*, *ibid*; for Western Australia, *Property Law Act 1969* (WA); for Queensland, *Property Law Act 1974* (Qld); for New Zealand, *Contracts (Privity) Act 1982* (NZ), 1982/132; for New Brunswick, *Law Reform Act*, *ibid*. In each *Act*, the intention of the parties is the key to the success of a third party claim.

[57] Swan & Adamski, *Canadian Contract Law*, *supra* note 6.

that the purpose of their exchange is to benefit a third party, that third party should enjoy the benefit intended for him by the parties.

IV. CONCLUSION

The decision in *Brown* remains troubling because it involves the enforcement of a contract some 60 years after it was made. In a sense, *Brown* is a challenge to contractual draftsmen to state clearly to whom and for how long a contractual obligation applies. Moreover, the decision, insofar as it related to privity of contract, could be regarded as *obiter dicta* if the Browns as successors in title are considered to be parties to the contract and not, strictly speaking, third parties. The decision brings clarity to the principled exception by confirming that it is essentially about the intention of the parties to the agreement, but in doing so, suggests there is no need for any exceptions to the privity rule, principled or otherwise, because a new understanding of the rule would either incorporate third parties into it or define with greater precision the scope of its application in the law of contract and the common law generally. There is no further need for courts to wait for legislatures to act. Rather, *Brown* offers them the opportunity to work out the significance of the decision in future privity cases.