COURT OF APPEAL FOR ONTARIO

CITATION: Brown v. Belleville (City), 2013 ONCA 148
DATE: 20130312
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Cronk, Armstrong and Epstein JJ.A.

BETWEEN

Graeme Brown and Monica Brown

Plaintiff (Respondents)

and

The Corporation of the City of Belleville

Defendant (Appellant)

R. Benjamin Mills, for the appellant

Robert J. Reynolds, for the respondent

Heard: December 7, 2012

On appeal from the judgment of Justice Gary W. Tranmer of the Superior Court of Justice, dated May 15, 2012, with reasons reported at 2012 ONSC 2554.

Cronk J.A.:

[1] This appeal concerns the enforcement of an agreement entered into in 1953 between a municipality and a local farmer. Under the agreement, the municipality agreed to perpetually maintain and repair that part of a storm sewer drainage system that it had constructed on and near the farmer's lands. About six years after it entered into the agreement, and in breach of its covenants under

it, the municipality ceased all maintenance and repair work on the drainage system.

[2] After the farmer's death in 1966, the affected lands were sold by his heirs to third parties. When the third parties sought in 1980 to hold the municipality to its obligations under the agreement, the municipality unilaterally repudiated the agreement.

[3] As a result of a corporate amalgamation carried out in the late 1990s, the appellant, the Corporation of the City of Belleville (the "City"), stepped into the shoes of the original municipality under the agreement.

[4] In 2003, the lands were again sold, this time to the respondents, Graeme and Monica Brown. Within months of their acquisition of the lands, the Browns requested the City to honour its maintenance and repair obligations under the agreement. The City refused and, in mid-December 2004, again unilaterally repudiated the agreement.

[5] The Browns eventually sued the City for specific performance of the agreement or, in the alternative, damages for its breach. The City defended the action, asserting that the agreement was unenforceable, on numerous grounds.

[6] After the exchange of pleadings, the parties stated a Special Case under Rule 22 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, seeking the court's opinion on 14 questions concerning the agreement. The parties

ultimately agreed on the proper determination of six of the questions posed for the court's consideration and the motion judge's answers to those questions proceeded on consent. The motion judge granted various declarations of right in favour of the Browns in relation to the remaining eight questions.

[7] The City appeals to this court in respect of three issues. Contrary to the motion judge's rulings, the City argues that: (1) the Browns' claims concerning the agreement are statute-barred; (2) the Browns have no standing to enforce the agreement since they have no privity of contract with the City; and (3) the agreement is contrary to public policy and, hence, unenforceable.

[8] For the reasons that follow, I would dismiss the appeal.

I. Facts

[9] The background facts are set out in the Special Case and are undisputed. As relevant to the issues on appeal, the agreed facts are as follows.

(1) The Agreement

[10] The Browns are the owners of approximately 230 acres of farmland in the City (formerly in the Township of Thurlow ("Thurlow")). Their property forms part of lands that were owned in the 1950s by Roy W. Sills.

[11] In 1953, Thurlow constructed a storm sewer drainage system along the frontage of Mr. Sills's lands and those of his neighbours, and on one of several lots owned by Mr. Sills. In order to maintain and repair the drainage system, as

needed, the municipality required continuing access to Mr. Sills's lands. Accordingly, on April 27, 1953, Thurlow entered into a written agreement with Mr. Sills (the "Agreement"), whereby Mr. Sills agreed to provide the necessary access on an indefinite basis in exchange for Thurlow's covenants that:

> (1) it would maintain the storm sewer in good working condition "at all times"; and
>
> (2) it would make good "any and all damage caused the Owner either by virtue of the original construction of the said sewer interfering now or in the future with the Owner's use and enjoyment of his land in any way or as a result of lack of repair or of acts done at any time by the Corporation in maintaining and repairing the said sewer".

[12] The Agreement identifies Mr. Sills as the "Owner" of the affected lands and Thurlow as the "Corporation". The recitals to the Agreement state that Mr. Sills had or would receive "material benefits from the construction of the ... sewer" and that he paid the sum of $200 to Thurlow in consideration for these benefits.

[13] The Agreement also contains an 'enurement clause'. It reads: "THIS INDENTURE Shall [*sic*] inure to the benefit of and be binding upon the parties hereto and their respective heirs, administrators, successors and assigns."

[14] The Agreement was never registered on title to the affected lands.

[15] Mr. Sills died on June 26, 1966. By deed dated August 11, 1973, his heirs sold the property now owned by the Browns to John and Wendy Pleizier. No

express assignment of the Agreement in favour of the Pleiziers formed part of this transaction.

[16] The drainage system functioned satisfactorily for some years. However, when Thurlow ceased maintaining it after 1959, the system gradually began to deteriorate. As a result, over time, the Pleiziers and other affected landowners became unable to effectively drain their lands.

(2) Thurlow's 1980 Repudiation of the Agreement

[17] In the fall of 1980, the Pleiziers brought the Agreement to Thurlow's attention. On December 10, 1980, Thurlow's solicitors wrote to the Pleiziers, indicating that Thurlow was "no longer bound" by the Agreement and that Thurlow was "not prepared to take any action with respect to the repair or maintenance of the ditch".

[18] The parties agree that the Pleiziers took no action to enforce the Agreement or to otherwise pursue it with Thurlow. Indeed, there is no evidence that the Pleiziers responded in any way to the December 1980 letter from Thurlow's solicitors.

[19] Thurlow and the City of Belleville amalgamated in 1998. The City acknowledges that as a result of the amalgamation, by operation of law, it is bound by Thurlow's obligations under the Agreement. The City also accepts that those obligations are perpetual.

(3) The City's Subsequent Repudiations of the Agreement

[20] The Browns purchased their property from the Pleiziers on August 27, 2003. As with the Pleiziers' acquisition in 1973, no express assignment of the Agreement formed part of this transaction.

[21] The Browns were unaware of the existence of the drainage system and the Agreement when they agreed to buy their property from the Pleiziers. However, the Browns were provided with a copy of the Agreement around the time of the closing of the sale transaction.

[22] On September 20, 2004, the Browns requested that the City "meet its obligations under the Agreement". By letter dated December 15, 2004 to the Browns, the solicitors for the City responded: "[D]ue to the considerable lapse of time of approximately 45 years, it is Council's position that they are not bound by the Agreement and are not prepared to take any action in constructing or maintaining the drainage works."

[23] There is no evidence in the Special Case regarding what, if anything, transpired between the City and the Browns concerning the Agreement for about the next five and one-half years. The agreed facts merely stipulate that after the City's December 2004 letter, "further discussions went nowhere", and that this litigation followed.

[24] Correspondence cited in the Special Case includes a letter to the Browns dated August 3, 2010, in which the City's solicitors mentioned a meeting among the parties and their solicitors held on May 31, 2010. In the same letter, the City's lawyers reiterated: "[I]t is the City's position that it bears no responsibility to the present landowners under the 1953 Agreement and accordingly the City is not prepared to take any action in constructing or maintaining the drainage works."

(4) The Special Case

[25] On July 20, 2011, the Browns sued the City for specific performance of the Agreement or, in the alternative, for damages for its breach. The City defended the action, asserting, on numerous grounds, that it is not bound by the Agreement and that the Agreement is unenforceable as against it. Shortly thereafter, the parties agreed to submit a Special Case to the Superior Court of Justice for determination of a variety of their respective rights and obligations in relation to the Agreement.

[26] Fourteen questions were posed by the parties for the opinion of the court on the Special Case. The City conceded that six of the questions should be answered in favour of the Browns and the motion judge issued declarations of right in the Browns' favour, on consent, in respect of those questions. After

argument, he also granted declarations of right in favour of the Browns concerning the remaining questions on the Special Case.

II. Issues

[27] On this appeal, the City challenges the motion judge's rulings on three issues. It contends that the motion judge erred by holding that:

(1) there is no statutory limitation period that acts to bar an action by the Browns;

(2) the Browns, as "successors of the Agreement", are entitled to enforce the Agreement without an express assignment; and

(3) the Agreement is not void as against public policy as fettering the City's discretion with respect to future uses of public roads and road allowances.

III. Analysis

(1) The Limitation Period Arguments

[28] The City's principal limitation period argument, set out in its factum, concerns Thurlow's unilateral 1980 repudiation of the Agreement. The City submits that the Pleiziers "accepted" this repudiation by reason of their inaction in the face of Thurlow's repudiation. As a result, the City says, the applicable six-year limitation period under the *Limitations Act*, R.S.O. 1980 c. 240 (the "1980 Act") began to run in December 1980 and expired in 1986.

[29] During oral argument, the City expanded its limitation period argument to include a second, alternative submission regarding the Browns. It maintained

that even if the Pleiziers did not accept Thurlow's 1980 repudiation of the Agreement, the Browns accepted the City's subsequent repudiation of it when they failed to respond to the City's notice, in its solicitors' letter of December 15, 2004, of its position that the Agreement did not bind it and that it was not prepared to take any action regarding the drainage system.

[30] Based on the admitted 2004 repudiation and its alleged acceptance by the Browns, the City argues that if the applicable limitation period did not expire in 1986, it must be taken to have expired either in 2010 under the *Limitations Act*, R.S.O. 1990, c. L.15 (the "1990 Act") (a six-year limitation period) or in 2006 under the *Limitations Act, 2002*, S.O., 2002, c. 24, Sch. B. (the "Current Act") (a two-year limitation period). Under either scenario, the City asserts, the lawsuit commenced by the Browns in July 2011 is statute-barred.

[31] In essence, therefore, the City contends that some limitation period must apply to the Agreement and that, on the agreed facts, it expired either in 1986, 2006 or 2010 by reason of the acceptance of the municipality's repudiations of the Agreement by the Pleiziers and/or the Browns.

[32] The motion judge disagreed. Question 13 on the Special Case stated:

> Whether or not a statutory limitation period acts to bar an action by the Plaintiff [*sic*] (or its predecessors in title) and to what extent it should apply if at all (performance of the contract and/or consequential damages).

The motion judge answered this question this way: "[T]here is no statutory limitation period that acts to bar an action by the Plaintiffs." He granted declaratory relief in the same terms.

[33] For the reasons that follow, I see no error by the motion judge on this issue.

(a) City's Pleading and Questions on the Special Case

[34] I begin with the City's pleading and the questions posed on the Special Case. In its statement of defence, the City alleged that the Browns' claims were statute-barred under the Current Act. It did not invoke either the 1980 or the 1990 Acts or plead the expiry of a limitation period in 1986 or 2010. Rather, it claimed that the applicable limitation period was that provided for under the Current Act, which would have expired in 2006, two years after the City's 2004 repudiation of the Agreement.

[35] It is true that the City alleged in its pleading that "Thurlow and later Belleville had maintained that the Agreement was at an end and that they were no longer obliged to perform any work stipulated in the Agreement." However, this allegation was pleaded in connection with a claim by the City that any losses suffered by the Browns were avoidable. It was not advanced in relation to an acceptance of repudiation claim. In other words, the termination of the Agreement was pleaded in connection with the City's claim that the Browns had

failed to mitigate their damages. The City did not plead the acceptance by the Browns or the Pleiziers of a repudiatory breach or an anticipatory repudiation of the Agreement.

[36] Nor did the agreed questions on the Special Case expressly refer to any repudiation of the Agreement by Thurlow and, later, by the City, or to any acceptance by the Pleiziers or the Browns of such a repudiaton. Indeed, before the motion judge, the City agreed to affirmative answers to the following questions:

> Question No. 1:
>
> 1. Did the Agreement of April 27, 1953, properly interpreted, impose a perpetual obligation on the Township of Thurlow to maintain the drainage system it has installed in good working condition at all times and to make good any and all damage caused to the property owner whoever that may be from time to time as a result of lack of repair or of acts done at any time by the corporation in maintaining and repairing the system.
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> Question No. 2:
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> 2. Whether as a result of the amalgamation of the Township of Thurlow and the Defendant City in 1998, the Defendant City is bound by the contractual obligations of the former Township which are found to have been created by the Agreement.

[37] The motion judge answered these questions in the manner agreed by the parties, and granted declaratory relief accordingly, in the language of the questions as posed.

[38] In his reasons on the Special Case, the motion judge observed, at para. 71, that the parties' agreement regarding the answers to these two questions "would appear to defeat or bar any limitation period defence".

[39] I agree that the consent responses to Question Nos. 1 and 2 on the Special Case significantly undercut the City's limitation period arguments. By consenting to these answers, the City acknowledged that it was bound by Thurlow's obligations under the Agreement (Question No. 2) and that the Agreement imposed "*a perpetual obligation*" "to maintain the drainage system...in good working condition *at all times*" and "to make good any and all damage caused to the property owner *whoever that may be from time to time*" as a result of the City's conduct (Question No. 1) (emphasis added). This is not the language of a finite or terminable obligation.

[40] That said, the motion judge's reasons confirm that all the City's limitation period arguments were live issues during argument of the Special Case. It appears that, before the motion judge, the City acknowledged that it is bound by Thurlow's obligations under the Agreement, and that those obligations are perpetual, but it nevertheless maintained its position that the Agreement is unenforceable on several grounds. These grounds included the claim that Thurlow and the City had repudiated the Agreement and that the Pleiziers and/or the Browns had elected to terminate the Agreement in the face of those repudiations. This had the effect, the City says, of bringing the parties' future

obligations under the Agreement to an end, thereby triggering the commencement of a limitation period in respect of the municipality's breach of the Agreement.

[41] As I read the record, there was no dispute before the motion judge as to whether a repudiation or repudiations of the Agreement had occurred. Nor is the fact of these repudiations challenged on appeal. The critical issue, therefore, is whether the repudiations were accepted or adopted by the relevant property owners: the Pleiziers and, later, the Browns. In these circumstances, I will first address the governing principles regarding the consequences of a repudiatory breach or anticipatory repudiation of contract.

(b) Governing Principles

[42] A repudiatory breach or an anticipatory repudiation of contract does not, in itself, terminate or discharge a contract. In *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 40, the Supreme Court explained:

> Contrary to rescission, which allows the rescinding party to treat the contract as if it were void *ab initio*, the effect of a repudiation depends on the election made by the non-repudiating party. If that party treats the contract as still being in full force and effect, the contract "remains in being for the future on both sides. Each [party] has a right to sue for damages for *past or future breaches*" (emphasis in original): *Cheshire, Fifoot & Furmston's Law of Contract* (12th ed. 1991), by M.P. Furmston at p. 541. If, however, the non-repudiating party accepts the

> repudiation, the contract is terminated, and the parties are discharged from future obligations. Rights and obligations that have already matured are not extinguished. Furmston, *supra*, at pp. 543-44.

See also *Canada Egg Products, Ltd. v. Canadian Doughnut Co. Ltd.*, [1955] S.C.R. 398, at pp. 406-7; *Place Concorde East Limited Partnership v. Shelter Corp. of Canada Ltd.*, [2006] O.J. No. 1964 (C.A.), 270 D.L.R. (4th) 181, at para. 49.

[43] In his leading textbook, *The Law of Contracts* (Toronto: Irwin Law Inc., 2005), John D. McCamus refers to the election right of the innocent party on repudiation as an option to disaffirm or affirm the contract. Disaffirmation of the contract, in this sense, constitutes an election to terminate the contract in the face of the non-innocent party's repudiation of the contract. In the applicable authorities, it is frequently said that an election to disaffirm the contract is an 'acceptance'[1] or 'adoption' of the repudiation. On this view, an election to affirm the repudiated contract constitutes rejection or denial of the repudiation and a decision to treat the contract as subsisting and on-going.

[44] Professor McCamus puts it this way, at p. 654:

> [I]n the context of a repudiatory breach of an agreement, the victim of the breach is entitled either to affirm or disaffirm the agreement and, in either event,

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[1] Professor McCamus, at p. 658, queries the appropriateness of this term, suggesting that it can be misleading. He emphasizes that the right of the innocent party on repudiation is to elect to terminate (disaffirm) or affirm the contract.

> pursue remedies for breach of contract. Similarly, in the context of anticipatory repudiation, the effect of the repudiation is to confer an option upon the innocent party either to disaffirm or affirm the contract. Thus, although the innocent party is entitled to disaffirm the agreement immediately and sue, that party may prefer to affirm the agreement and encourage or insist upon performance by the repudiating party or, more passively, simply wait and see whether the repudiating party does in fact eventually refuse to perform his or her contractual obligations when they fall due. [Citations omitted.]

[45] It appears to be settled law in Canada that where the innocent party to a repudiatory breach or an anticipatory repudiation wishes to be discharged from the contract, the election to disaffirm the contract must be clearly and unequivocally communicated to the repudiating party within a reasonable time. Communication of the election to disaffirm or terminate the contract may be accomplished directly, by either oral or written words, or may be inferred from the conduct of the innocent party in the particular circumstances of the case: McCamus, at pp. 659-61.

[46] In *American National Red Cross v. Geddes Bros.* (1920), 61 S.C.R. 143, rev'g 47 O.L.R. 163 (S.C. (A.D.)), the Supreme Court of Canada addressed the means by which the adoption of a repudiation may be effectively communicated. Sir Louis Davies said, at p. 145:

> The question then, it seems to me, in every such case must be whether under the proved facts adoption of one party to a contract of its repudiation by the other party may be inferred from the proved facts, or whether an

> actual notice of acceptance or adoption must be given by the party receiving notice of the repudiation to the party repudiating.
>
> It seems to me from reading the authorities that such an actual notice of acceptance or adoption is not necessary but that adoption may be reasonably inferred from all the circumstances as proved.

[47] In *American National*, Davies C.J. concluded, at p. 147, that a direct communication to the repudiating party of the election to disaffirm the repudiated contract is not essential "where facts proved allow of a fair inference of acceptance of renunciation [repudiation in this context] being drawn". This view was endorsed by a majority of the Supreme Court in *Kamlee Construction Ltd. v. Town of Oakville* (1960), 26 D.L.R. (2d) 166, at 182.

[48] More recently, in *White v. E.B.F. Manufacturing Ltd.*, 2005 NSCA 167, 239 N.S.R. (2d) 270, at para. 91, Saunders J.A. of the Nova Scotia Court of Appeal accepted the following description of what constitutes 'acceptance' of repudiation, set out in Chitty on Contracts, 28th ed. (London: Sweet & Maxwell, 1999), Vol. I, at p. 25-012:

> Where there is an anticipatory breach, or the breach of an executory contract, and the innocent party wishes to treat himself as discharged, he must "accept the repudiation." It is usually done by communicating the decision to terminate [to] the party in default although it may be sufficient to lead evidence of an "unequivocal overt act which is inconsistent with the subsistence of the contract ... without any concurrent manifestation of intent directed to the other party" ... *Acceptance of a*

> *repudiation must be clear and unequivocal and mere inactivity or acquiescence will generally not be regarded as acceptance for this purpose. But there may be circumstances in which a continuing failure to perform will be sufficiently unequivocal to constitute acceptance of a repudiation. It all depends on "the particular contractual relationship and the particular circumstances of the case."* [Emphasis added.]

(c) The 1980 Repudiation

[49] In this case, the City argues that Thurlow's repudiation of the Agreement was "accepted" by the Pleiziers when they failed to take any steps to enforce the Agreement from the date of repudiation (1980) to the date of the sale of the property to the Browns (2003). Both the passage of time and the sale transaction, the City submits, are inconsistent with the notion that Thurlow continued to be bound to perform the Agreement. I would not give effect to this argument.

[50] The motion judge found that the Pleiziers' conduct "can be viewed as no more than inactivity." The agreed facts on the Special Case lend strong support to this finding. Those facts include the stipulation that when informed by letter dated December 10, 1980, of Thurlow's position that it was "no longer bound by the provisions of the [Agreement]", the Pleiziers "took no action to enforce the Agreement or otherwise pursue the issue of the Agreement with [Thurlow]". The parties also agreed: "There is in fact no evidence that Mr. and Mrs. Pleizier responded in any way to [Thurlow's] letter."

[51] I agree with the motion judge that the Pleiziers' silence or inaction in the face of Thurlow's repudiation of the Agreement falls short of satisfying the requirement of clear and unequivocal communication to the repudiating party of the adoption of a repudiatory breach or anticipatory repudiation of contract.

[52] As Saunders J.A. of the Nova Scotia Court of Appeal noted in *White*, at para. 91, citing Chitty on Contracts at p. 25-012, "mere inactivity or acquiescence will generally not be regarded as acceptance" of a repudiation. While there are circumstances where some overt act by the innocent party, viewed in the context of all the parties' dealings, may constitute an acknowledgement or affirmation that the repudiated contract has been terminated, there is simply no evidence in this case of such an overt act by the Pleiziers. Unlike some of the authorities relied on by the City, this is not a case where the innocent party, after repudiation, fails to honour the terms of the contract. There is no evidence that the Pleiziers did not comply with the Agreement or stand ready to perform under it.

[53] I underscore that an act of repudiation, in itself, does not terminate the repudiated contract. Rather, as I have indicated, the innocent party must elect to disaffirm or affirm the contract. Where disaffirmation is intended, this election must be clearly and unequivocally communicated to the repudiating party on a timely basis.

[54] Thus, contrary to the City's submission, Thurlow's December 1980 letter to the Pleiziers did not terminate the Agreement. Absent an election by the Pleiziers to disaffirm the Agreement and thereby adopt or accept Thurlow's repudiation of it, the Agreement continued in full force and effect. In my opinion, the fact that the municipality did not seek access to the affected lands to carry out maintenance or repair activities does not mean that such access was unavailable.

[55] Moreover, as the motion judge held, the burden to establish the acceptance of the repudiation of a contract is on the party asserting acceptance: see for example, *Ginter v. Chapman* (1967), 60 W.W.R. 385 (B.C.C.A.), at para. 17, aff'd [1968] S.C.R. 560. On the agreed record, the motion judge found, as a fact, that the City failed to discharge this burden. I see no palpable and overriding error in this key finding. Indeed, in my view, it is firmly supported by the record.

[56] The City relies on *Ginter* and *Picavet v. Salem Developments Ltd.*, [2000] O.J. No. 2806 (S.C.) for the proposition that, in some circumstances, the parties to a repudiated contract will be seen to have mutually abandoned it notwithstanding that the innocent party to the repudiation might have failed to clearly communicate a disaffirmation of the contract. I would not accept this argument in this case.

[57] First, none of the questions on the Special Case addressed the issue of abandonment. Similarly, there were no agreed facts on the Special Case that bear on the issue of abandonment save, arguably, for those relied upon by the City to support its acceptance of repudiation argument. Further, the City acknowledged before this court that a claim of abandonment, *per se*, was neither argued before the motion judge nor pleaded in the manner now asserted by the City.

[58] An allegation of abandonment cannot be evaluated in a factual vacuum. A finding of abandonment must be based on an assessment of the full circumstances of the innocent party's conduct in the aftermath of the other party's repudiation of the contract at issue. This critical assessment was not and cannot be properly undertaken on this record. This is dispositive of the City's ability to raise an abandonment claim on this appeal.

[59] Moreover, and in any event, I do not regard the cases relied upon by the City in support of its abandonment claim as being on all fours with the facts of this case. In *Picavet*, the post-repudiation conduct of the victim of the repudiation was inconsistent with the continuation of the contract at issue: the victim failed to perform any of his post-repudiation obligations under the contract. This conduct strongly supported the conclusion that the victim had accepted and treated the contract as at an end. It was in this context that the court held, at para. 72, that both parties had "walked away from the agreement and abandoned it".

[60] In this case, however, there is no evidence that the Pleiziers, after Thurlow's repudiation, conducted themselves in a manner inconsistent with their obligation under the Agreement to provide Thurlow with access to their lands. This was the landowner's only obligation under the Agreement. I will return to this issue later in these reasons.

[61] *Ginter* is also factually distinguishable from this case. In *Ginter*, the non-repudiating parties sought damages for breach of contract against the repudiating party on the basis that they had disaffirmed the relevant contract when it was repudiated. However, no election to accept or adopt the repudiation was in fact communicated to the repudiating party within a reasonable time. Instead, the victims of the repudiation twice sought to extend the time for their election to disaffirm and attempted to negotiate a new agreement. It was only when these negotiations failed, that they claimed to have disaffirmed the repudiated contract.

[62] Again, that is not this case. Here, the Pleiziers did not seek to disaffirm the Agreement by clear and unequivocal communication to Thurlow, nor did they take legal action to recover damages or other relief based on Thurlow's repudiation. Indeed, as essentially agreed by the parties, they took no steps to terminate the Agreement after Thurlow's repudiation. Nor is there any evidence that they otherwise acted in a manner inconsistent with the continuation of the Agreement.

[63] Notwithstanding the City's acknowledgment on the Special Case that the Agreement imposes perpetual obligations, the City argues that a commercially reasonable interpretation of the Agreement requires that it be construed as including an implied term that it could be terminated on notice. As I understood the City's submission, it essentially contends that even if Thurlow's repudiation of the Agreement was not accepted or adopted by the Pleiziers, the City's obligations cannot be viewed as enforceable indefinitely.

[64] While the courts no longer presume that an indefinite term contract is perpetual, the specific terms of the contract as well as the relationship between the parties and the surrounding circumstances may dictate enforcement of an indefinite term contract on a perpetual basis: *1397868 Ontario Ltd. v. Nordic Gaming Corp. (c.o.b. Fort Erie Race Track)*, 2010 ONCA 101, 258 O.A.C. 173, at paras. 13-14. Thus, when the term of a contract is indefinite and there is no provision for termination on reasonable notice, a court may treat the contract as perpetual in nature or the court may imply a provision of unilateral termination on reasonable notice.

[65] In this case, by reason of its consent to the answer to Question No. 1 on the Special Case, the City explicitly conceded that the Agreement imposes perpetual obligations on the City. The suggestion that the Agreement contains, by implication, a termination on notice term is inconsistent with that concession.

In my view, it is also inconsistent with the intentions of the parties as reflected in the express provisions of the Agreement.

[66] The courts are loathe to imply a term in a contract that is inconsistent with the express terms of the contract: see *G. Ford Homes Ltd. v. Draft Masonry (York) Co. Ltd.* (1983), 43 O.R. (2d) 401 (C.A.), at p. 403; *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, at pp. 712-13. This is especially so where, as here, there is no basis on which to reasonably conclude that the parties would have agreed to such a term had it been raised at the time the contract was originally entered into. In this case, the precise purpose of the Agreement – securing indefinite access to Mr. Sills's property – and the specified nature of the obligations created under the Agreement – perpetual maintenance and repair of the drainage system – tell strongly against the implication of such a term.

[67] Accordingly, I conclude that the City's limitation period argument concerning the 1980 repudiation of the Agreement fails.

(d) The 2004 Repudiation

[68] I will also briefly address the City's contention that its 2004 repudiation of the Agreement triggered the running of a limitation period that expired either in 2010, under the 1990 Act, or in 2006, under the Current Act. As I have already indicated, this claim was not advanced directly by the City in its factum and only brief mention of it was made by the City in oral argument.

[69] Like the limitation period argument mounted in respect of Thurlow's 1980 repudiation of the Agreement, the City's limitation period argument in respect of the 2004 repudiation rests on the contention that the innocent parties to the repudiation (the Browns), by their conduct, adopted or affirmed that repudiation, thereby terminating the Agreement. There is no evidentiary foundation for this assertion.

[70] The motion judge rejected the City's claim that the Browns had accepted the City's 2004 repudiation of the Agreement. He stated, at paras. 81 and 83:

> The facts as to the conduct of the [Browns] are less clear [than the facts regarding the Pleiziers' conduct] ... What occurred between the December 15, 2004 letter and the August 3, 2010 letter is not a matter of record. Clearly, there were ongoing discussions that the City saw fit to end in its August 3, 2010 letter.
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> ...
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> On the record before me, I cannot find that the letter of December 15, 2004 started the time of a limitation defence to begin to run. For example, *bona fide* settlement discussions can suspend the commencement of a limitation period and its running in certain circumstances. The onus is on the [City] to prove the date that the limitation began.

[71] I agree with the motion judge's assessment of the state of the record and his conclusion. On the agreed facts, it is clear that the Browns did not directly accept the City's repudiation of the Agreement. And there is virtually a complete paucity of evidence and agreed facts regarding what, if anything, transpired

between the Browns and the City concerning the Agreement from the date of the 2004 repudiation until August 2010. The agreed facts merely stipulate that, after the City's December 2004 letter, "further discussions went nowhere" and litigation followed.

[72] Given this significant evidentiary gap, I agree with the motion judge that the City failed to discharge its onus to prove facts regarding conduct by the Browns from which it could reasonably be inferred that they elected to disaffirm the Agreement in the face of the City's repudiatory breach.

(2) The Browns' Standing to Sue

[73] The common law doctrine of privity of contract, an established principle of contract law, stands for the proposition that "no one but the parties to a contract can be bound by it or entitled under it": *Greenwood Shopping Plaza Ltd. v. Neil J. Buchanan Ltd.*, [1980] 2 S.C.R. 228, at para. 9. See also *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, at p. 416; *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co.*, [1915] A.C. 847 (H.L.), at p. 853. In this case, it is common ground that the Browns have no privity of contract with the City in respect of the Agreement. They are not signatories to the Agreement and no explicit assignment or transfer of the Agreement was made in their favour.

[74] Relying on this lack of privity, the City argues that the Browns have no standing to enforce the Agreement because none of the recognized exceptions to the privity of contract doctrine applies on the facts of this case. The City submits that: (1) its covenants under the Agreement are positive covenants which, by operation of law, cannot run with the land; (2) because the Agreement was not assigned or transferred to the Browns, there is no equitable basis on which the Browns are entitled to enforce it; and (3) in the alternative, even if an equitable basis exists for recognition of an assignment or transfer of the Agreement to the Browns, it is defeated by the application of the doctrine of laches.

[75] In response, the Browns rely on what they describe as three exceptions or qualifications to the privity of contract doctrine, any one of which, they maintain, affords them standing to enforce the Agreement. In his factum, counsel for the Browns identified these three "exceptions" or qualifications in this fashion: (1) the enurement clause of the Agreement, under which the benefit of the Agreement flowed to the Browns; (2) the benefit of the City's covenants in the Agreement runs with the lands to the benefit the Browns, as Mr. Sills's successors in title; and (3) the 'principled exception' to the privity rule established by the Supreme Court in *London Drugs*.

[76] The motion judge ruled that the first two suggested exceptions or qualifications apply on the facts of this case. He held that the Browns are

successors of Mr. Sills and that the benefit of the Agreement flowed to them under the express terms of the Agreement. He also held that the benefit of the City's covenants under the Agreement run with the land and are enforceable against the City, as the original covenantor under the Agreement. Given these holdings, the motion judge found it unnecessary to address the Browns' argument that the principled exception to the privity doctrine also applies.

[77] In the result, the motion judge granted declarations that the Browns are "successors of the Agreement" and, thus, they are entitled to enforce it without an express assignment (Question No. 3 on the Special Case); the City does not have a valid defence to the Browns' claims on the basis that they are trying to enforce "a positive covenant in regard to their land" (Question No. 8 on the Special Case); and, the Browns' claim for damages for breach of the Agreement is not defeated by the doctrine of laches (Question No. 14 on the Special Case).

[78] For reasons that differ in some respects from those of the motion judge, I am of the view that he was correct in concluding, in effect, that the Browns have standing to enforce the Agreement.

[79] It is important to note at the outset that the doctrine of privity of contract is of considerably diminished force in Canada as a continuing principle of contract law. It has been subject to a wealth of repeated academic and judicial criticism, leading to frequent calls for law reform in Canada and elsewhere. See for

example, *London Drugs*, at pp. 418-26; *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108, at para. 26; McCamus, at pp. 296-301. Indeed, several Commonwealth jurisdictions have abrogated the privity doctrine entirely, or in specific contexts, by statute. In other instances, the reach of the doctrine has been "significantly undermined by a growing list of exceptions to the rule": McCamus, at p. 299. See also Angela Swan and Jakub Adamski, *Canadian Contract Law*, 3rd ed. (Markham: LexisNexus Canada Inc., 2012) at p. 229. Several of the leading cases cited by the parties on this appeal afford abundant evidence of the relaxation of the ambit of the doctrine in particular cases. Thus, while the doctrine survives in Canada, it persists only in weakened form.

(a) The Enurement Clause

[80] The analysis of the City's standing challenge must begin with consideration of the intentions of the parties at the time the Agreement was entered into, as reflected in the provisions of the Agreement. The Browns rely, especially, on the enurement clause in the Agreement, which they characterize as an "exception" or qualification to the privity of contract doctrine. While I view the use of the term "exception" in this context as misconceived – the enurement clause does not fall within or constitute, by itself, a recognized exception to the privity rule, such as trust or agency – I do accept that the language of the provision is critical in this

case. For convenience, I again set out the terms of the enurement clause, as agreed between Thurlow and Mr. Sills:

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

[81] The motion judge held, at para. 30, that the words of the enurement clause "clearly demonstrate that it was in the contemplation of the parties that there would be subsequent owners of Mr. Sills' [*sic*] property". He found, as a fact, that the Browns are successors of Mr. Sills, as contemplated under the enurement clause. I agree. Moreover, I did not understand the City to challenge these findings on appeal. To the contrary, counsel for the City candidly conceded during oral argument that the Browns are successors in interest to Mr. Sills. This was a proper concession.

[82] The motion judge did not comment further on the effect of these findings in relation to the privity rule, saying merely, at para. 31: "Therefore, I find that the [Browns] fit within this exception to the privity of contract rule as successors."

[83] The question therefore arises as to what legal consequences flow from the language employed by the parties in the enurement clause. As I have already said, I do not think this type of contractual provision can properly be termed an "exception" to the doctrine of privity of contract on the current state of the law.

[84] That said, 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 landowners 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 enforce the Agreement as against the City as if they were the original covenantee(s) to the Agreement: see Angela Swan and Jakub Adamski, *Canadian Contract Law*, at p. 169 and, generally, at pp. 163-226.

[85] In these circumstances, 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.

[86] This conclusion is fortified by the agreed answers to Questions Nos. 1 and 2 on the Special Case, quoted earlier in these reasons. As I have said, by those answers, the City agreed that the Agreement imposes: "a *perpetual* obligation"

on it to maintain the drainage system "*at all times*" and to make good damage caused "*to the property owner whoever that may be from time to time*" as a result of lack of repair or acts done "*at any time*" by the City "in maintaining and repairing the system" (emphasis added). As the motion judge aptly observed, at para. 23, the wording of these answers "appears clearly to favour a determination of [the privity of contract] issue in favour of the [Browns]".

[87] I agree. On the language of the enurement clause and the agreed proper interpretation of the Agreement as a whole, the City and Mr. Sills clearly understood that the continuing access sought by the City to the affected lands could only be provided by the property owner "whoever that may be from time to time". In consideration for such continuing access, the City undertook to maintain and repair the drainage system, indefinitely, for the benefit of the property owner.

[88] It is also important to emphasize that the City itself is not a stranger to the Agreement, against whom it is sought to enforce contractual covenants. The City acknowledged on the Special Case that, as a result of the 1998 amalgamation of Thurlow and the City of Belleville, the City stands in Thurlow's shoes and is bound by Thurlow's contractual obligations created under the Agreement. Thus, as a matter of law, the City, in effect, is the original covenantor under the Agreement.

[89] The City relies strongly on the decision of the Supreme Court in *Greenwood* in support of its privity-based attack on the enforceability of the Agreement. I agree that *Greenwood* is the principal obstacle to the Browns' standing claim. However, for several reasons, I do not think that *Greenwood* and its progeny bar the Browns' action against the City.

[90] In *Greenwood*, the employees of a corporate tenant of a shopping centre, while acting in the course of their employment, negligently caused a fire that destroyed part of the centre. The question arose whether the provisions of the lease that required the landlord to insure the premises protected the tenant's employees from liability. The Supreme Court held that the employees, who were strangers to the lease and, hence, had no privity of contract with the landlord, could not claim the benefit and protection of the insurance provisions. As this court said in *Tony and Jim's Holdings Ltd. v. Silva* (1999), 43 O.R. (3d) 633, at para. 15, in so holding, the Supreme Court in *Greenwood* essentially refused to relax the application of the privity rule beyond the then-recognized exceptions of trust or agency. On the limited evidence before it, the Supreme Court concluded that neither exception was made out.

[91] In my opinion, although not explicitly overruled, *Greenwood* has been overtaken by the subsequent decisions of the Supreme Court in *London Drugs* and *Fraser River*, which established the principled exception to the doctrine of privity of contract.

[92] I will return to the facts and significance to this case of *London Drugs* and *Fraser River* later in these reasons. At this point, however, I note that *London Drugs* involved the question whether third-party beneficiaries to a contract could invoke the protection of a limited liability clause agreed upon by the original contracting parties. In addressing this question, Iacobucci J., writing for a majority of the Supreme Court, considered and distinguished *Greenwood* on several grounds. As relevant here, he noted, at p. 431, that unlike the facts in *London Drugs*, (1) *Greenwood* involved a lease rather than a contract for services; (2) there was little, if any, evidence to support a finding that the parties to the contract at issue in *Greenwood* intended to confer a benefit on the parties who sought the protection of the limited liability clause; and (3) in *Greenwood*, the parties seeking to obtain benefits under the contract were viewed as complete strangers and not third-party beneficiaries. In light of these distinguishing features, Iacobucci J. concluded, at p. 431, that *Greenwood* is of limited use in a determination of third-party beneficiary rights. This conclusion, and the distinguishing aspects of *Greenwood* identified by Iacobucci J. in *London Drugs*, apply equally to this case.

[93] Indeed, in my view, this case is even more distinct from *Greenwood* than the factors identified in *London Drugs* suggest. *Greenwood* did not involve the consideration of an enurement clause or the rights of persons who stood in the shoes of the original contracting parties. In contrast, this case involves the right

of successors to an original covenantee – who were expressly intended by the original contracting parties to share in the benefit of their bargain – to rely on and enforce the benefit of perpetual contractual covenants given by the original covenantor. As I have said, by reason of the enurement clause in the Agreement, Mr. Sills's successors effectively assume the position of first parties to the Agreement by stepping into his shoes, as the original covenantee. In this capacity, the Browns simply seek to require the City to make good on the promises it saw fit to make under the Agreement.

[94] On these particular facts, the strict application of the doctrine of privity would ignore the nature, stated purpose and express terms of the Agreement and allow the City, as the original covenantor, to escape the covenants to which, as a matter of law, it must be seen to have expressly consented. In these circumstances, I conclude that the strict application of the doctrine of privity should not stand in the way of justice: *London Drugs*, at p. 446.

(b) The Principled Exception to the Privity Rule

[95] Given my conclusion that the Browns have standing to enforce the Agreement by operation of the enurement clause, it is not technically necessary to consider the other arguments advanced by the City in support of its privity of contract objection to the enforceability of the Agreement. Were it necessary to do so, however, I would also rest the rejection of this objection on the principled

exception to the privity rule established in *London Drugs*, as amplified and applied in *Fraser River*. The principled exception may be explained by brief reference to *London Drugs* and *Fraser River*.

[96] In *London Drugs*, the Supreme Court was concerned with whether a contractual limitation of liability clause in favour of a warehouseman applied to protect the warehouseman's employees from liability in a lawsuit brought against them and their employer by a customer whose goods were damaged through the employees' negligence while the goods were in storage at the employer's warehouse. A majority of the Supreme Court held, at pp. 414 and 452, that the concept of "warehouseman" under the contract between the employer and the customer must be taken to implicitly cover the warehouseman's employees. As the employees were thus third-party beneficiaries to the limitation of liability clause set out in the relevant storage contract between their employer and the customer, and as they were performing the precise services contracted for by the customer, the employees could benefit from the clause notwithstanding that they were not signatories to the contract.

[97] As this court stated in *Madison Developments Ltd. v. Plan Electric Co.* (1997), 36 O.R. (3d) 80, at para. 30, leave to appeal to S.C.C. refused, [1997] S.C.C.A. No. 659, the Supreme Court in *London Drugs* not only distinguished and declined to follow *Greenwood*, it also applied new reasoning to create an

incremental change in the law of privity and set forth a test for the application of this change.

[98] More specifically, the majority of the Supreme Court held in *London Drugs*, at p. 448, that while none of the traditionally-recognized exceptions to the privity of contract doctrine applied to assist the employees, the privity rule should be relaxed where the following requirements were satisfied:

> 1. the limitation of liability clause must, either expressly or impliedly, extend its benefits to the employees (or employee) seeking to rely on it; and
>
> 2. the employees (or employee) seeking the benefit of the limitation of liability clause must have been acting in the course of their employment and must have been performing the very services provided for in the contract between their employer and the plaintiff (customer) when the loss occurred.

[99] The principled exception to the privity rule introduced in *London Drugs* was again considered and applied, this time unanimously, by the Supreme Court in *Fraser River*. In that case, at paras. 28-29 and 32, the court clarified that satisfaction of the first branch of the *London Drugs* test is a threshold requirement: to invoke the exception, there must be a showing that the contracting parties intended to extend the benefit in question to the third party seeking to rely on the contractual provision. Further, under the second branch of the test, the intention to extend the benefit of the contractual provision to the actions of a third-party beneficiary is irrelevant unless the actions of the third

party come within the scope of the contract in general, or the provision in particular, between the initial contracting parties.

[100] The Supreme Court emphasized in *Fraser River*, at para. 32, as did the majority of the court in *London Drugs*, at p. 449, that the extension of the principled approach to create a new exception to the doctrine of privity of contract, "first and foremost must be dependent upon the intention of the contracting parties". Finally, the application of the principled approach is not confined to situations involving only employer-employee relationships or limited liability: see *Fraser River*, at para. 31; *Madison*, at para. 30.

[101] I am satisfied that the first branch of the test for the application of the principled exception to the privity rule is met in this case. There can be no question that under the terms of the Agreement, the original contracting parties intended to extend the benefit of the City's covenants under the Agreement to an ascertainable group or class of persons that includes the Browns. Thus, there is a compelling argument in favour of relaxing the doctrine of privity in this case, given the inclusion of an enurement clause that expressly refers to "successors" of Mr. Sills, like the Browns. On this aspect of the facts, this case is closer to *Fraser River* than to *London Drugs*.

[102] Not without some hesitation, I am also persuaded that the second branch of the principled exception test is satisfied. The Agreement required that Mr. Sills

provide access to his lands for the purpose of the maintenance and repair of the drainage system that Thurlow had installed. This was the activity of the convenantee for which the parties bargained. There is no evidence nor any agreed facts in the Special Case indicating that Mr. Sills, or the Browns as his successors in interest, failed to perform or stand ready to perform this obligation under the Agreement by denying or impeding the City's access to their lands for the purposes envisaged by the Agreement.

[103] I appreciate that the last repair work on the drainage system appears to have been carried out in 1959, more than 50 years ago. But nothing on the Special Case indicates that any of Mr. Sills, the Pleiziers or the Browns ever denied access to their property or would have done so if such access had been sought by the municipality.

[104] The City submits that it was incumbent on the Browns and their predecessors in title to call on the City for the maintenance or repair of the drainage system and that their failure to do so further signals that they elected to disaffirm the contract.

[105] I disagree. This assertion is wholly unsupported by the language of the Agreement. Moreover, on the evidence, both the Pleiziers and the Browns did draw the City's attention to its obligations under the Agreement to maintain and repair the drainage system. The City (and Thurlow) responded to the requests

that it honour its obligations with unilateral repudiations of the Agreement. In these circumstances, I do not think that it is open to the City to now assert that the landowners were obliged, yet failed, to seek to hold the City to its obligations.

[106] For the same reasons, I would reject the City's claim that the Browns' entitlement to enforce the Agreement is defeated by laches. This equitable defence is of limited application in the case of a claim for enforcement of the benefit of a contract. These claims, as here, relate to the alleged contractual entitlement to specific performance or damages. They are, therefore, founded in law rather than equity.

[107] In this case, we are concerned with the City's continuing breach of its obligations under the Agreement following its unilateral repudiations of the Agreement. I see no dispositive effect of delay by the Browns on the liability of the City in these circumstances.

[108] Further, and importantly, there is no evidence that the Pleiziers' or the Browns' conduct resulted in prejudice to the City. The City's bald claim of prejudice is based solely on the historical nature of the Agreement – no particulars of actual prejudice to the City were proven or agreed upon by the parties.

[109] In sum, no agreed facts or other evidence on this record suggests that any of Mr. Sills, the Pleiziers or the Browns resiled from or failed to perform the

Agreement. To paraphrase the language of *Fraser River*, at para. 39, the provision by them of access to their property was the "very activity" contemplated by and required of them under the Agreement containing the provision upon which they seek to rely.

[110] 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.

[111] 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.

(3) The Agreement is not Void on Public Policy Grounds

[112] The City raises two public policy-based arguments as further impediments to the enforcement of the Agreement by the Browns. It argues that the Agreement is unenforceable as against it because a perpetual contract that admits of no right of termination offends public policy and is unconscionable. Further, the City says, the enforcement of perpetual obligations of the kind created under the Agreement offends public policy because it fetters the City's discretion regarding the future use of public roads and road allowances. In my opinion, these arguments cannot succeed on this record.

[113] With respect to the first argument, Question No. 4 on the Special Case reads: "Whether or not the Agreement, if properly interpreted as imposing a perpetual obligation, is invalid as contrary to public policy because it does impose a perpetual obligation". In respect of this question, the motion judge ruled: "[T]he Agreement, which imposes a perpetual obligation upon the City, is not invalid as contrary to public policy because it does impose a perpetual obligation."

[114] Although the City raised Question No. 4 in its Notice of Appeal, it did not challenge the motion judge's ruling on this issue or otherwise mention the matter in its factum. Instead, the City sought to advance this claim during oral argument. The procedural unfairness to the Browns arising from this tactic is

manifest. In the circumstances, in my view, the City is precluded from attempting to raise this issue on appeal. To conclude otherwise would offend basic fairness.

[115] The City's second public-policy based argument fails for lack of evidentiary support. As the Browns submit, there is simply no evidence or agreed facts to support the City's assertion that its discretion regarding the future use of public roads and road allowances will be fettered or impeded if it is held to its obligations under the Agreement.

[116] I would reject this ground of appeal.

IV. Concluding Comments

[117] I conclude with these comments. The disposition of this appeal on the basis that I propose does not deprive the City of any recourse. As acknowledged by the Browns during oral argument, it is open to the City to pursue those defences to enforcement of the Agreement pleaded by it in its statement of defence that were not dealt with on the Special Case, *e.g.* the City's claim that the Agreement was frustrated. Further, on a properly amended pleading, there is nothing to prevent the City from pursuing, if so advised, its claim that Mr. Sills's successors in title abandoned the Agreement. These matters were not dealt with on the Special Case and formed no permissible part of the issues raised before this court. Of course, the adjudication of the Browns' entitlement to the specific remedies sought by them also remains for another day.

V. Disposition

[118] For the reasons given, I would dismiss the appeal. If the parties are unable to agree on the costs of this appeal, the Browns may submit their brief written costs submission to the Registrar of this court, within 15 days from the date of the release of these reasons. The City shall submit its brief responding submissions on costs to the Registrar, within 15 days thereafter.

Released: “EAC” March 12, 2013

“E.A. Cronk J.A.”
“I agree Robert P. Armstrong J.A.”
“I agree Gloria Epstein J.A.”