Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CITY OF OTTAWA

Applicant

– and –

CLUBLINK CORPORATION ULC

Respondent

– and –

KANATA GREENSPACE PROTECTION COALITION

Intervener

FACTUM OF THE APPLICANT, CITY OF OTTAWA

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PART I - OVERVIEW

1. This case is about the enforcement of a contract. In 1981, Campeau Corporation ("Campeau") and The Corporation of the City of Kanata ("Kanata") struck a bargain to permit the development of approximately 1400 acres of greenspace and farm land for residential subdivisions ("Campeau Lands"). In order to secure Kanata's support for its proposal, Campeau offered to designate 40% of the Campeau Lands as open and recreational space. The Regional Municipality of Ottawa Carleton (the "Region") and Kanata insisted that Campeau's commitment be formalized in a written contract. It was.

2. The contract (referred to as the 40% Agreement), provided that 40% of the Campeau Lands, being 560 acres, would be designated for open, natural and recreational purposes. Of that land, 175 acres would be used for a golf course.

3. Campeau agreed that in the event it "desires to discontinue" the golf course on the Golf Course Lands and can find no other person to acquire or operate it, then it "shall convey the golf course (including lands and buildings) to Kanata at no cost…".

4. Over the years, the Campeau Lands have been subdivided, developed and sold, always subject to the 40% Agreement. The 40% Agreement has been incorporated in subdivision agreements registered on the Campeau Lands and has been incorporated onto official plans and other planning instruments directing the use of land in the City.

5. Campeau's contractual obligations have also been assigned to and assumed by all successive purchasers without exception, including ClubLink when it purchased the Golf Course Lands.

6. Kanata's rights and obligations became the City of Ottawa's upon amalgamation. [1]

7. Time has passed. ClubLink no longer desires to continue operating a golf course. It plans to develop the Golf Course Lands as a residential subdivision. In October of 2019, it filed applications for subdivision approval and zoning amendments under the *Planning Act* in support of these plans.

8. ClubLink has not complied with its contractual obligation to offer to convey the Golf Course Lands to the City. It is ignoring its obligations in pursuit of a financial windfall from its planned development. The court should hold ClubLink to its bargain.

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[1] Affidavit of Derrick Moodie sworn October 24, 2019 ("Moodie October Affidavit"), para. 13, Application Record, Vol. 5, Tab 4, p. 1276-1277; *City of Ottawa Act*, 1999, SO 1999, c 14, Sched E.

PART II - SUMMARY OF FACTS

A) A Contract is Born: The Surrounding Circumstances

9. ClubLink Corporation ULC ("ClubLink") owns and operates the Kanata Golf and Country Club, which includes an 18-hole golf course on 175 acres of land ("Golf Course Lands").[2] The contractual obligations at issue flow from 1981, when Campeau owned the lands.

10. In the 1970s, there was very little residential development in what was then Kanata. Kanata's population was around 18,000. Purchasers were induced to buy homes in remote and rural Kanata with "pioneer bonuses" (cash incentives) and the lure of a 9-hole golf course surrounded by farmers' fields.[3]

11. By 1979, Campeau had assembled 1400 acres of farm land and greenspace in Kanata, including the 9-hole golf course (the "Campeau Lands") with a view to creating a residential development called the Marchwood-Lakeside Community.[4]

12. The proposal could not proceed unless the Region and Kanata agreed to significant amendments to the Regional Official Plan, the local official plan, secondary plans and a zoning by-law and without the approval of draft plans of subdivision.[5] For their parts, the Region and Kanata wanted to ensure that a golf course and other open space and natural areas would be preserved.

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2 Affidavit of Brent Deighan sworn December 13, 2019 ("Deighan Affidavit"), para. 1, Application Record, Vol. 6, Tab 9, p. 1699; Affidavit of Eileen Adams-Wright sworn October 24, 2019 ("Adams-Wright October Affidavit"), para. 4, Application Record, Vol. 1, Tab 2, p. 18; Moodie October Affidavit, paras. 5, 7-8, Application Record, Vol. 5, Tab 4, p. 1275; Map of Kanata, Exhibit A to the Moodie October Affidavit, Application Record, Vol. 5, Tab 4A, p. 1289; The Golf Course Lands are described on 4 parcel registers Ref: Adams-Wright October Affidavit, paras. 2-3, Application Record, Vol. 1, Tab 2, p. 17.

3 Affidavit of Donald Kennedy sworn October 25, 2019 ("Kennedy Affidavit"), paras. 1-2, Application Record, Vol. 6, Tab 6, pp. 1570-1571.

4 Kennedy Affidavit, para. 9, Application Record, Vol. 6, Tab 6, p. 1572.

5 Kennedy Affidavit, para. 10, Application Record, Vol. 6, Tab 6, p. 1572.

13. Campeau made an offer: in exchange for the Region and Kanata satisfying certain conditions, it would designate 40% of the Campeau Lands as recreation and open space.[6] Andrew Haydon, then-regional Chair of Ottawa Carleton, required Campeau to put its 40% commitment into a contact. The Minutes from the Planning Committee meeting of April 28, 1981 record:

> The Regional Chairman, A.S. Haydon expressed his concern on what connotation might be ascribed to the expression 'to set aside lands for open space' as used by Mr. Kennedy. It was noted that **a major selling point of the development concept was the understanding that the golf course and certain high profile environmental land areas were to be retained, in perpetuity, for public use**. However, for more than 8 months, there had been no agreement or methods to be used to achieve this objective. Accordingly, the Regional Chairman indicated his reluctance to make a commitment for a Regional Official Plan Amendment until there was some resolution or quid pro quo arrangement which would ensure that the community interests were protected.[7] [Emphasis added]

14. Campeau agreed to enter into a contract. Within two weeks, the Minutes for the May 12, 1981 Planning Committee meeting record that a "rough draft" agreement was tabled. The Region, Kanata and Campeau were "fundamentally in agreement" that the golf course, "...would be operated, in perpetuity, by Campeau or by others as a golf course; otherwise it would be conveyed to Kanata at a nominal cost."[8]

15. Two weeks later, Campeau and Kanata entered into an agreement dated May 26, 1981 ("1981 40% Agreement") formalizing the 40% Offer.[9]

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6 Kennedy Affidavit, paras. 10, 12 & 18, Application Record, Vol. 6, Tab 6, pp. 1572-1574.

7 Regional Planning Committee Minutes of Meeting dated April 28, 1981, Exhibit A to the Affidavit of Paul Henry sworn November 27, 2019 ("Henry Affidavit"), Application Record, Vol. 6, Tab 7A, pp. 1636-1639.

8 Regional Planning Committee Minutes dated May 12, 1981, Exhibit B to the Henry Affidavit, Application Record, Vol. 6, Tab 7B, p. 1643.

9 Kennedy Affidavit, para. 20, Application Record, Vol. 6, Tab 6, p. 1575; The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, pp. 48-62.

B) Key Terms of the Contract

16. S. 3 of the 1981 40% Agreement outlines the benefit that Kanata received:

> Campeau hereby confirms the principle stated in its proposal that approximately forty (40%) percent of the total development area of the 'Marchwood Lakeside Community' shall be left as open space for recreation and natural environmental purposes which areas consist of the following:
>
> (a) the proposed 18 hole golf course
>
> (b) the storm water management area
>
> (c) the natural environmental areas
>
> (d) lands to be dedicated for park purposes.[10]

17. S. 5 of the 1981 40% Agreement sets out agreed-upon "Methods of Protection" for ensuring that the Golf Course Lands would remain open space as a golf course "in perpetuity."[11]

18. S. 5(1) provides that the Golf Course Lands "shall be operated by Campeau as a golf course in perpetuity provided that Campeau shall at all times be permitted to assign the management of the golf course without prior approval of Kanata."[12]

19. S. 5(2) provides that:

> ...Campeau may sell the golf course (including lands and buildings) provided the new owners enter into an agreement with Kanata **providing for the operation of the golf course in perpetuity**, upon the same terms and conditions as contained herein.[13] [Emphasis added]

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[10] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, p. 50.

[11] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, p. 51.

[12] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, p. 51.

[13] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, p. 51.

20. S. 5(3) entitles Kanata to a right of first refusal.[14]

21. The critical provision for this Application is S. 5(4). It provides that:

> **In the event that Campeau desires to discontinue the operation of the golf course** and it can find no other persons to acquire or operate it, then **it shall convey the golf course (including lands and buildings) to Kanata at no cost** and if Kanata accepts the conveyance, Kanata shall operate or cause to be operated the land as a golf course subject to the provisions of para 9.[15] [Emphasis added]

22. The 1981 40% Agreement also contemplates a scenario where Campeau be permitted to apply for development approvals under the *Planning Act* in respect of the Golf Course Lands. This would only be permitted **if** Kanata were to refuse to accept a conveyance of the Golf Course Lands. S. 5(5) provides that, "…**in the event Kanata will not accept the conveyance…then Campeau shall have the right to apply for development of the golf course lands** in accordance with the Planning Act.".[16]

23. S. 9 of the 1981 40% Agreement sets out what the parties agreed would occur if Kanata does not use any of the 40% lands in its possession, including the Golf Course Lands to the extent they are conveyed pursuant to Section 5(4), for recreation and natural environmental purposes:

> In the event that any of the land set aside for open space for recreation and natural environmental purposes ceases to be used for recreation and natural environmental purposes by Kanata then the owner of the land, if it is Kanata, shall reconvey it to Campeau at no

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[14] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, p. 51.

[15] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, p. 51.

[16] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, p. 51.

> cost unless the land was conveyed to Kanata in accordance with Section 33(5)(a) or 35b of The Planning Act.[17]

24. The 40% Agreement was and remains the cornerstone of the development scheme for the Campeau Lands.[18]

C) The Parties Enter into Related Agreements

25. The 1981 40% Agreement cemented Campeau's commitment to designating 40% of the Campeau Lands as recreation and open space. It did not identify in detail all of the parcels to be so designated. The agreement contemplated further study to determine where within the Campeau Lands the open space lands would be situated.[19]

26. As development of the Campeau Lands progressed and plans of subdivision began receiving draft plan approval and being registered, on December 20, 1988 Kanata and Campeau entered into another agreement by which they identified the land that was to be set aside to meet the 40% commitment ("1988 40% Agreement").[20] Together the 1981 40% Agreement and the 1988 40% Agreement are referred to as the "40% Agreement".

27. Campeau and Kanata were also parties to two agreements specifically addressing where the Golf Course Lands would be situated. The earlier agreement dated June 10, 1985 ("1985 Golf Club Agreement") was the initial attempt to identify the precise lands to be used.[21] The latter

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17 The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, p. 52.

18 Kennedy Affidavit, para. 19, Application Record, Vol. 6, Tab 6, p. 1575; Official Minutes of the Regional Planning Committee Meeting, April 28, 1981, Exhibit A to the Henry Affidavit, Application Record, Vol. 6, Tab 7A, pp. 1636-1639; Official Minutes of the Regional Planning Committee Meeting, May 12, 1981, Exhibit B to the Henry Affidavit, Application Record, Vol. 6, Tab 7B, pp. 1640-1646.

19 Kennedy Affidavit, para. 21, Application Record, Vol. 6, Tab 6, p. 1575.

20 The 1988 40% Agreement, Exhibit J to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2J, pp. 302-345; Moodie October Affidavit, para. 10, Application Record, Vol. 5, Tab 4, p. 1276.

21 The 1985 Golf Club Agreement, Exhibit G to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2G, pp. 63-80.

agreement dated December 29, 1988 ("1988 Golf Club Agreement") set out the precise description of the Golf Course Lands given the availability of legal descriptions and finalized plans.[22] Collectively, these agreements are referred to as the "Golf Club Agreement".[23]

28. The 1981 Agreement is registered on title to all of the Campeau Lands.[24] It was intended to govern the development scheme for the entire area. The Golf Club Agreement is registered on title to the Golf Course Lands.

29. Starting in 1985, portions of the Campeau Lands were developed as residential subdivisions through the registration of plans of subdivision. As a condition of subdivision approval granted under the *Planning Act*, subdivision agreements implementing first the 1981 40% Agreement, and later the 40% Agreement as a whole and incorporating by reference the 40% Agreement and the Golf Club Agreement were also registered.

30. The Golf Course Lands are included in plans of subdivision registered in 1985, 1988 and 1990 and are subject to subdivision agreements incorporating the 40% Agreement. For example, Schedule "P" to three of the Subdivision Agreements registered on title to the Golf Course Lands provides:

> In conjunction with the Concept Plan approval, the **City of Kanata and the Owner shall agree as to the amount of land included in the plan which shall be dedicated to the City** as the parkland dedication **in accordance with** Section 50(5) of The Planning Act, and **the 40% Agreement entered into by the Owner and the City of Kanata**.[25] [Emphasis added]

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[22] The 1988 Golf Club Agreement, Exhibit I to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2I, pp. 288-301.

[23] Adams-Wright October Affidavit, para. 5(d), Application Record, Vol. 1, Tab 2, pp. 18-19.

[24] Adams-Wright October Affidavit, para. 5(a), Application Record, Vol. 1, Tab 2, p. 18.

[25] The 1987 Subdivision Agreement, Exhibit H to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2H, p. 258; The 1989 Subdivision Agreement, Exhibit M to the Adams-Wright October Affidavit, Application

31. Schedule "P" to the remaining subdivision agreement provides:

> **The Owner agrees that parkland be dedicated to the City in accordance with the Agreement dated May 26, 1981 between Campeau Corporation and the City of Kanata and registered as NS140350** in the Lands Title Division Office of Ottawa Carleton No. 4 and that the 5% lands as per The Planning Act shall be dedicated in another area of the Kanata Lakes project. This shall be to the satisfaction of the City of Kanata.[26] [Emphasis added]

32. Schedule "P" to all four of these subdivision agreements that apply to the Golf Course Lands also provides that the owner of the lands will agree that:

> Cross country skiing and any necessary grooming of cross country ski trails shall be permitted on the golf course during the winter months to the satisfaction of the Director of Parks and Recreation.[27]

33. Three subdivision agreements registered on title to portions of the Campeau Lands being developed by KNL Developments Inc. identify compliance with the 40% Agreement as a condition that must be fulfilled prior to the enactment of a part-lot control by-law for the lands in question.[28]

34. Many homes back onto the Golf Course Lands.[29] In addition to members who golf, the general public enjoys the Golf Course Lands for walking and cross-country skiing.[30] These public entitlements are enshrined in registered subdivision agreements. The Golf Course Lands are not

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Record, Vol. 2, Tab 2M, p. 545; The 1992 Subdivision Agreement, Exhibit N to the Adams-Weight October Affidavit, Application Record, Vol. 2, Tab 2N, p. 648.

[26] The 1985 Subdivision Agreement, Exhibit A to the Affidavit of Eileen Adams-Wright sworn November 27, 2019 ("Adams-Wright November Affidavit"), Application Record, Vol. 4, Tab 3A, p. 1195.

[27] The 1987 Subdivision Agreement, Exhibit H to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2H, p. 254; The 1989 Subdivision Agreement, Exhibit M to the Adams-Wright October Affidavit, Application Record, Vol. 2, Tab 2M, p. 547; The 1992 Subdivision Agreement, Exhibit N to the Adams-Weight October Affidavit, Application Record, Vol. 2, Tab 2N, p. 649; The 1985 Subdivision Agreement, Exhibit A to the Adams-Wright November Affidavit, Application Record, Vol. 4, Tab 3A, p. 1196.

[28] Moodie October Affidavit, paras. 16-17, Application Record, Vol. 5, Tab 4, pp. 1277-1278.

[29] Kennedy Affidavit, para 23, Application Record, Vol. 6, Tab 6, p. 1576.

[30] Kennedy Affidavit, para 23, Application Record, Vol. 6, Tab 6, p. 1576.

only a significant physical element of the present-day Campeau Lands, but are also knitted into the fabric of the community.

D) Chain of Ownership of the Golf Course Lands

35. In 1989, Campeau sold the Campeau Lands, including the Golf Course Lands, to another real estate development company, Genstar Development Company Eastern Ltd. ("Genstar") (Genstar later amalgamated with Imasco).[31] Genstar, Campeau and Kanata entered into an agreement dated March 30, 1989 ("Genstar Assumption Agreement").[32] Pursuant to s. 2 of the Genstar Assumption Agreement, Genstar assumed Campeau's obligations under "the Forty Percent Agreement".[33]

36. ClubLink purchased the Golf Course Lands in 1997 from Imasco Enterprises Inc. ("Imasco").[34] As part of its purchase of the Golf Course Lands, ClubLink entered into an agreement with Imasco and Kanata dated November 1, 1997 ("ClubLink Assumption Agreement"), which was registered on title at the time of the transfer on January 8, 1997.[35]

37. Pursuant to s. 3 of the ClubLink Assumption Agreement, Clublink agreed to the following:

> Assumption: [ClubLink] hereby assumes, as of the date hereof, all of Imasco's liabilities and obligations under and in respect of the Forty Percent Agreement and the Golf Club Agreement.
>
> (a) to make payment or otherwise perform such liabilities and obligations in accordance with the provisions of the Forty Percent Agreement and the Golf Club Agreement; and

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[31] Adams-Wright October Affidavit, para. 5(k), Application Record, Vol. 1, Tab 2, pp. 20-21.
[32] Adams-Wright October Affidavit, paras. 5(f), 5(g), Application Record, Vol. 1, Tab 2, p. 19-20.
[33] The referenced "Forty Percent Agreement" comprises the 1981 40% Agreement" and the 1988 40% Agreement", Ref: The Genstar Assumption Agreement, Exhibit L to the Adams-Wright October Affidavit, Application Record, Vol. 2, Tab 2L, p. 395.
[34] Adams-Wright October Affidavit, para. 5(l), Application Record, Vol. 1, Tab 2, p. 21.
[35] Adams-Wright October Affidavit, paras. 5(l), 5(n), Application Record, Vol. 1, Tab 2, p. 21.

> (b) that from and after the date hereof, every covenant, proviso, condition and stipulation contained in the Forty Percent Agreement and the Golf Club Agreement shall apply to and bind the [ClubLink] in the same manner and to the same effect as if the [ClubLink] had executed the same in the place and stead of Campeau or Imasco.[36]

38. By agreeing to s. 3 of the ClubLink Assumption Agreement, ClubLink bound itself to the original terms of the 1981 40% Agreement.

39. S. 10 of the ClubLink Assumption Agreement specifically echoes s. 9 of the 1981 40% Agreement. It provides:

> Open Space Lands: If the City is required under Section 9 of the 1981 Agreement to reconvey any land (because, as provided for more particularly in such Section 9, such land ceased to be used for recreational and natural environmental purposes by the City), then the City shall notify the Purchaser of such conveyance prior to delivering it to Imasco or as Imasco may direct.[37]

40. ClubLink's role with respect to the Golf Course Lands has always been limited to owning and operating a golf course. In the event that the City were to accept the conveyance of the Golf Course Lands, and then cease to use the Golf Course Lands for recreational and natural environmental purposes, the City would be obliged to deliver the land to Imasco (and not ClubLink).

41. The parcel registers for the Golf Course Lands disclose a Charge/Mortgage (with a principal amount of $80 Million) and an Assignment of Rents from ClubLink in favour of Maxium Financial Services Inc. The Charge/Mortgage is security for a $80M promissory note and also lists

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[36] ClubLink Assumption Agreement, Exhibit S to the Adams-Wright October Affidavit, Application Record, Vol. 3, Tab 2S, p. 791.

[37] ClubLink Assumption Agreement, Exhibit S to the Adams-Wright October Affidavit, Application Record, Vol. 3, Tab 2S, p. 792.

a host of lands that it secures, including Diamondback Golf Club, Caledon Woods Golf Club and Eagle Ridge Golf Club.[38]

E) ClubLink Desires to Discontinue Operating the Golf Course

42. On December 14, 2018, ClubLink publically announced it was pursuing options for alternative use of the lands, and that it had entered into a partnership with developers Minto Communities Canada and Richcraft Homes, "to assist with ... redevelopment plans for the property".[39]

43. In 2019, ClubLink conducted soil sampling.[40] In March of 2019, it requested a pre-consultation meeting with the City's Planning Department, which is required by the City before it will receive applications for significant development approvals under the *Planning Act*.

44. ClubLink has never offered to convey the Golf Course Lands to the City.[41] Despite this, in a clear breach of its obligations under s. 5(4) and s. 5(5) of the 1981 40% Agreement, on October 8, 2019, ClubLink filed applications for a zoning by-law amendment and for approval of a proposed plan of subdivision, both pursuant to the *Planning Act*.[42]

45. The applications would permit the development of Golf Course Lands as a residential subdivision including 545 detached dwellings, 586 townhouse dwellings, and 371 apartment dwellings.[43]

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[38] Charge/Mortgage, Exhibit B to the Adams-Wright November Affidavit, Application Record, Vol. 4, Tab 3B, p. 1202-1239.
[39] Moodie October Affidavit, para. 18, Application Record, Vol. 5, Tab 4, p. 1278.
[40] Moodie October Affidavit, para. 21, Application Record, Vol. 5, Tab 4, p. 1279.
[41] Moodie October Affidavit, para. 39, Application Record, Vol. 5, Tab 4, p. 1282.
[42] Moodie October Affidavit, paras. 29-32, Application Record, Vol. 5, Tab 4, p. 1280-1281.
[43] Moodie October Affidavit, para. 32, Application Record, Vol. 5, Tab 4, p. 1281.

46. Although obtaining planning approval does not require an applicant to proceed with a development, the resources required to put forward a proposed plan of subdivision of the magnitude being advance by ClubLink for the Golf Course Lands[44] show that ClubLink "desires to discontinue" operating the golf course.

47. The submission of planning applications triggers statutory timelines for a decision from the approval authority—in this case, the City. Under the *Planning Act* timelines, since the City has not made a decision in respect of either application, ClubLink now has the right to appeal directly to the Local Planning Appeal Tribunal ("LPAT") in respect of its applications.[45]

48. If LPAT approves the planning applications, then subject to its satisfaction of any conditions, ClubLink could begin selling lots.[46]

PART III - ISSUES

49. There are three issues:

i. Is ClubLink in breach of s. 5(4) of the 1981 40% Agreement and s. 3 of the ClubLink Assumption Agreement?

ii. If there is a breach, is specific performance the appropriate remedy?

iii. If the Golf Course Lands are conveyed to the City, what are the City's obligations pursuant to s. 9 of the 1981 40% Agreement?

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[44] Moodie October Affidavit, paras. 28, 33-34, Application Record, Vol. 5, Tab 4, pp. 1280-1281; ClubLink's Handout from pre-consultation meeting, Exhibit M to the Moodie October Affidavit, Application Record, Vol. 5, Tab 4M, pp. 1455-1466; Planning Rationale dated September 2019, Exhibit P to the Moodie October Affidavit, Application Record, Vol. 5, Tab 4P, pp. 1494-1561.

[45] Moodie October Affidavit, para. 38, Application Record, Vol. 5, Tab 4, p. 1282; Affidavit of Derrick Moodie sworn November 27, 2019 ("Moodie November Affidavit"), para. 3, Application Record, Vol. 5, Tab 5, p. 1567.

[46] Moodie October Affidavit, para. 61, Application Record, Vol. 5, Tab 4, p. 1287.

PART IV - LAW & AUTHORITIES

ISSUE 1: BREACH OF CONTRACT

A) The Rights and Obligations in Issue are Contractual

50. The rights and obligations in issue in this Application flow between ClubLink and the City by virtue of the ClubLink Assumption Agreement. They are personal rights.

B) Principles of Contractual Interpretation

51. In determining what a party's contractual obligations are, the role for the reviewing court is to identify the shared intention of the parties at the time of contracting.[47]

52. The framework for contract interpretation was confirmed by the Supreme Court in *Sattva Capital Corp. v. Creston Moly Corp.* In *Sattva*, the Supreme Court held, "… the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction".[48]

53. The approach was recently summarized by the Ontario Court of Appeal in *Weyerhaeuser Company Limited v. Ontario (Attorney General)*.[49] The reader is to:

(i) determine the intention of the parties in accordance with the language they have used in the written document, based upon the "cardinal presumption" that they have intended what they have said;

(ii) read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning;

(iii) read the contract in the context of the surrounding circumstances known to the parties at the time of the formation of the contract; and

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47 *Sattva Capital Corp. v. Creston Moly Corp*, 2014 SCC 53, [2014] 2 SCR 633, at para. 47 ("*Sattva*").
48 *Sattva*, at paras. 47-48, 57-58.
49 2017 ONCA 1007, 77 BLR (5th) 175 ("*Weyerhaeuser*").

(iv) read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed.[50]

54. While the context of the surrounding circumstances informs contract interpretation, this factual matrix "must never be allowed to overwhelm the words" of the contract. The objective of considering the factual matrix is to "deepen a decision-maker's understanding of the mutual and objective intentions of the parties **as expressed in the words of the contract**" (emphasis added).[51] The interpretative force of the factual matrix is limited to how the pertinent circumstances would have reasonably shaped the parties' understanding of the words chosen.[52]

55. The court may consider evidence of the parties' post-contractual conduct as "it may be helpful in showing what meaning the parties attached to the document after its execution, and this in turn may suggest that they took the same view at an earlier date." However, the Court of Appeal has recently cautioned that subsequent conduct is an unreliable guide and evidence should only be admitted "if the contract remains ambiguous after considering its text and its factual matrix".[53]

C) ClubLink's Contractual Obligations are Clear

56. ClubLink's contractual obligations are clear and unambiguous. Under s. 3 of the ClubLink Assumption Agreement, ClubLink agreed that it would assume "as of the date hereof, all of Imasco's liabilities and obligations under and in respect of the Forty Percent Agreement".[54] Imasco

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[50] *Weyerhaeuser*, at para. 65.
[51] *Sattva*, at para. 57.
[52] *Sattva*, at para. 58.
[53] *Thunder Bay (City) v. Canadian National Railway Company*, 2018 ONCA 517, at para. 63, 424 DLR (4th) 588 ("*Thunder Bay*").
[54] ClubLink Assumption Agreement, Exhibit S to the Adams-Wright October Affidavit, Application Record, Vol. 3, Tab 2S, p. 791.

had assumed all of Campeau's obligations under the 1981 40% Agreement by virtue of the Genstar Assumption Agreement and Imasco's subsequent amalgamation with Genstar.

57. Therefore, the parties to the ClubLink Assumption Agreement intended ClubLink to assume all of the obligations on Campeau set out in the 1981 40% Agreement. What then were the obligations under the 1981 40% Agreement?

58. The 1981 40% Agreement sets out a straightforward roadmap for the use and ownership of the Golf Course Lands. The starting point is that ClubLink must operate the golf course "in perpetuity" (s. 5(1)) subject to certain "off-ramps". The "off-ramps" include: a sale of the lands (s. 5(2)); an offer for the lands is received (s. 5(3)), and; a situation where ClubLink "desires to discontinue" the operation of the golf course but does not have a buyer or operator lined up (s. 5(4)). In that event it "shall convey" the land to the City "at no cost".

(i) The meaning of "in perpetuity" in s. 5(1)

59. S. 5(1) provides that the lands "shall be operated by Campeau as a golf course **in perpetuity**..." [emphasis added]. As confirmed recently by the Ontario Court of Appeal, it would be erroneous to interpret the intentions of the contracting parties without acknowledging those parties' choice to use the phrase "in perpetuity."[55]

60. Reading the 1981 40% Agreement as a whole, it is clear that the intention of the parties was that the Golf Course Lands would always be operated as a golf course while in private hands, unless or until: 1) the City refused a conveyance of the land, or 2) after accepting a conveyance the City stopped using the land for recreation and natural environmental purposes.

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[55] *Thunder Bay*, at para. 46.

61. This interpretation is reinforced by and consistent with the factual matrix within which the two sophisticated parties (a developer and a planning authority) were operating in at the time they entered into the contract.

62. A key element of the factual matrix is the statutory land use planning context that informed (and continues to inform) the subdivision of the Campeau Lands for residential development.[56] The "in perpetuity" language of the 1981 40% Agreement reflects the applicable statutory scheme at the time the agreement was struck. S. 29(25) of the *Planning Act*, RSO 1980, c 379 provided that agreements tied to subdivision approval would be enforceable against "any and all subsequent owners of the land".[57]

63. The terms of the 1981 40% Agreement and ClubLink Assumption Agreement are clear and unambiguous. The plain text reading of s. 5(4) is bolstered when one considers the broader scheme and purpose of the agreement, as well as the factual matrix. Therefore, it is not necessary for this Honourable Court to consider evidence of post-contract conduct.

64. In the event the court considers post-contract conduct, then the City has consistently abided by the principles and terms of the 1981 40% Agreement. The terms of the 1981 40%

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[56] Kennedy Affidavit, paras. 10, 20, Application Record, Vol. 6, Tab 6, pp. 1572, 1575; Regional Planning Committee Minutes dated May 12, 1981, Exhibit B to the Henry Affidavit, Application Record, Vol. 6, Tab 7B, p. 1640-1646; The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, pp. 48-62; Moodie October Affidavit, para. 10, Application Record, Vol. 5, Tab 4, p. 1276.

[57] *Planning Act*, RSO 1980, c 379, s. 29(25): "Every municipality and the Minister may enter Agreements into agreements imposed as a condition to the giving of a consent and any such agreement may be registered against the land to which it applies and the municipality or the Minister, as the case may be, shall be entitled to enforce the provisions thereof against the owner and, subject to the provisions of the *Registry Act* and the *Land Titles Act*, any and all subsequent owners of the land".

Agreement have been and continue to be incorporated into applicable subdivision agreements registered under the *Planning Act*.[58]

65. If the Court does not enforce ClubLink's contractual obligations, there could be an unravelling effect impacting parts of the Campeau Lands owned by other developers, who have been abiding by the principles of the 40% Agreement.[59]

66. In sum, the incorporation of the phrase "in perpetuity" within s. 5 of the 1981 40% Agreement was intentional, and was consistent with the land use planning objectives that informed the 1981 40% Agreement and the governing statutory provisions. S. 5(4) is one of the tools laid out in the original agreement that secures those long-term objectives by ensuring that private owners are precluded from developing the Golf Course Lands for purposes other than as recreational open space unless and until the municipality refuses to accept the conveyance of the Golf Course Lands for open space and recreational purposes.

(ii) The meaning of "desires to discontinue" in s. 5(4)

67. S. 5(4) provides that "in the event that Campeau **desires to discontinue** the operation of the golf course and it can find no other persons to acquire or operate it, then it shall convey the golf course…". [emphasis added]

68. The agreement does not specify all of the circumstances that would constitute a "desire to discontinue". However, two things are clear. First, this is something different from actually

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[58] Moodie November Affidavit, para. 6, Application Record, Vol. 5, Tab 5, p. 1568; Moodie October Affidavit, paras. 16-17, Application Record, Vol. 5, Tab 4, pp. 1277-1278; The 1987 Subdivision Agreement, Exhibit H to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2H, p. 258; The 1989 Subdivision Agreement, Exhibit M to the Adams-Wright October Affidavit, Application Record, Vol. 2, Tab 2M, p. 545; The 1992 Subdivision Agreement, Exhibit N to the Adams-Weight October Affidavit, Application Record, Vol. 2, Tab 2N, p. 648; The 1985 Subdivision Agreement, Exhibit A to the Adams-Wright November Affidavit, Application Record, Vol. 4, Tab 3A, p. 1195.

[59] Moodie October Affidavit, paras. 14-17, Application Record, Vol. 5, Tab 4, pp. 1277-1278.

discontinuing operation of the golf course (or the section would have simply said, "In the event Campeau discontinues the operation of the golf course").

69. Second, making an application under the *Planning Act* is a "desire to discontinue". When s. 5(4) is read together with s. 5(5), it is clear that ClubLink does not have the right to make an application under the *Planning Act* unless it has offered to convey the Golf Course Lands to the City at no cost, and the City has not accepted the conveyance.

(iii) The meaning of "at no cost" in s. 5(4)

70. S. 5(4) provides that Campeau shall convey the land "at no cost". This should be interpreted to mean that the land shall be conveyed free and clear of any mortgages, charges or encumbrances.

71. The Golf Course Lands are treated in the same way that the "natural environmental areas" and the "and for park purposes" are treated in ss. 7 and 9 of the 1981 40% Agreement – they are to be conveyed "at no cost" to Kanata.

72. The conveyance of the Golf Course Lands to the City without the discharge/release of the Charge/Mortgage in favour of Maxium Financial Services Inc. would defeat the intended purpose of a "no cost" conveyance. ClubLink could simply burden the Golf Course Lands to such a degree that the City would not accept a conveyance.

73. In any event, since the City is only permitted to keep the land if it is used for recreational and natural environmental purposes, it would be a commercial absurdity if the City were obliged

to assume financial responsibility for ClubLink's business by providing security for a promissory note issued to ClubLink.[60]

74. Accordingly, "at no cost" means that ClubLink is required to offer to convey the Golf Course Lands to the City free and clear of the Charge/Mortgage and the Assignment of Rents in favour of Maximum Financial Services Inc.

D) The *Planning Act* Endows the 40% Agreement with Special Status

75. The particular contractual rights and obligations in question have a special status by operation of the *Planning Act*.

76. The Ontario *Planning Act* provides that agreements entered into as conditions of subdivision approval are enforceable against "any and all subsequent owners of the land". [61]

77. The 40% Agreement is the cornerstone of the development scheme established for the Campeau Lands. The implementation of the 40% Agreement as well as the maintenance of the Golf Course Lands as a recreational area for the public and as a golf course is enshrined in subdivision agreements which are registered on title to the Golf Course Lands as well as the portions of the Campeau Lands developed for residential purposes over time. [62]

78. This creates certainty for future owners of lands in the subdivision that the development scheme put in place for the subdivision will carry on into the future as lots are sold and property

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[60] Charge/Mortage, Exhibit B to the Adams-Wright November Affidavit, paras. 5, 6(b) and 9, Application Record, Vol. 4, Tab 3, pp. 1206-1208, 1210.

[61] Section 29(25) of the *Planning Act*, RSO 1980, c 379; Section 51 (26) of the *Planning Act*, 1990, c. P. 13.

[62] The 1987 Subdivision Agreement, Exhibit H to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2H, pp. 81-287; The 1989 Subdivision Agreement, Exhibit M to the Adams-Wright October Affidavit, Application Record, Vol. 2, Tab 2M, pp. 399-555; The 1992 Subdivision Agreement, Exhibit N to the Adams-Wright October Affidavit, Application Record, Vol. 2, Tab 2N, pp. 556-652; The 1985 Subdivision Agreement, Exhibit A to the Adams-Wright November Affidavit, Application Record, Vol. 4, Tab 3A, pp. 1054-1201.

changes hands. These provisions create a statutory exception to the common law rule that positive covenants or contractual obligations do not bind freehold successors in title. As stated by the Ontario Court of Appeal in *Amberwood*, "the burden of positive covenants made in favour of public bodies can run with the land under the provisions of the *Planning Act*.[63]

79. The fact that Kanata required both the execution of assumption agreements upon the conveyance of the Golf Course Lands and incorporated the 40% Agreement by reference into agreements entered into as conditions of subdivision approval for the Campeau lands demonstrates the municipality's commitment to ensuring that the obligation to maintain these lands as recreational open space was preserved in perpetuity, or until the municipality ceases to use them for this purpose.

E) ClubLink is in Breach: It Should be Held to the Terms of the Bargain It Struck

80. The provisions that govern ClubLink's obligations—s. 3 of the ClubLink Assumption Agreement and s. 5(4) of the 1981 40% Agreement—are clear and unambiguous. ClubLink has breached its obligations. It cannot file an application under the *Planning Act* unless and until it has offered to convey the Golf Course Lands to the City at no cost, and the City has refused the conveyance.

81. The Supreme Court has emphasized the importance of holding parties to their contracts. In *Pacific National Investments Ltd. v Victoria (City),*[64] the unanimous court held:

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[63] *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123*, 211 DLR (4th) 1, 2002 CarswellOnt 850, at para. 51 (ONCA) ("*Amberwood*"). While *Amberwood* concerns positive covenants, the permissive language of section 51(26) is not limited to positive covenants.

[64] 2004 SCC 75, [2004] 3 SCR 575 ("*Pacific National*").

> The general rule, of course, is that it is not the function of the court to rewrite a contract for the parties. Nor is it their role to relieve one of the parties against the consequences of an improvident contract.[65]

82. Parties can agree to be bound by long-term or even perpetual obligations. In *Thunder Bay (City) v. Canadian National Railway Company*, the Ontario Court of Appeal expressly upheld the application judge's finding that an agreement that imposes a perpetual obligation will be enforced and cannot be terminated unilaterally.[66]

83. Parties should be held to their bargains even where there are changes to the market that render a bargain unprofitable. The Supreme Court univocally held in the 2018 *Churchill Falls (Labrador) Corporation Limited v. Hydro-Quebec*[67] case that the court will not disregard the terms of the contract by intervening to reshape the contract and reallocate benefits.[68]

84. If ClubLink is dissatisfied with the deal it made because its business model has changed, its remedy is to ask the City and Imasco if they are willing to renegotiate. It is not this Court's role to ignore the plain words of a contract and to craft a new agreement. Contracts would be meaningless if they were unenforceable.

ISSUE 2: SPECIFIC PERFORMANCE

A) The City is entitled to specific performance of ClubLink's obligation under s. 5(4)

85. Specific performance is a discretionary equitable remedy. In deciding whether to grant specific performance, the court will consider three factors: (1) the nature of the property involved;

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[65] *Pacific National,* at para. 31.
[66] *Thunder Bay,* at para. 49.
[67] 2018 SCC 46, [2018] 3 SCR 101 ("*Churchill Falls*").
[68] *Churchill Falls*, at paras. 136-138.

(2) the inadequacy of damages as a remedy and (3) the behaviour of the parties, having regard to the equitable nature of the remedy.[69]

B) Nature of the property—there is no meaningful substitute

86. The Supreme Court has confirmed that an entitlement in a contract without a readily available substitute can be enforced through specific performance.[70]

87. No substitute is available in this case. The entitlement captured in s. 5(4) of the 1981 40% Agreement, and carried through subsequent assumption agreements, was in furtherance of the contract's purpose to ensure that the Golf Course Lands would be kept as open space. The City's entitlement to have the Golf Course Lands offered for conveyance so that they remain open space cannot be cured by any substitute.

88. There is no other land that ClubLink could offer to convey that would fulfill the purpose of s. 5(4): to guarantee that the Golf Course Lands in this particular residential setting would remain open space. A collection of smaller and separate open spaces is also not a responsive substitute, given that the original bargain concerns the mass of contiguous lands comprising the Golf Course Lands together. There is no available substitute for those lands within the borders of the Campeau Lands and additional development will only reduce the quantity of open space.

C) Damages are inadequate

89. If ClubLink is able to halt operation of the golf course and redevelop the Golf Course Lands without offering to convey them to the City, the City's damages cannot be quantified, or

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[69] *Matthew Brady Self Storage Corp v InStorage Limited Partnership,* 2014 ONCA 858, at paras. 29 & 32 ("*InStorage*").

[70] *Semelhago v Paramadevan*, [1996] 2 SCR 415 at para 22, 136 DLR (4th) 1.

compensated by money. The City would loose the ability to preserve the lands to be used for recreational and natural environmental purposes. The cost will also be borne by non-parties to the contract – the residents of the community surrounding the Golf Course Lands and those who use the lands for recreational purposes. No amount of money will afford the City an adequate or complete remedy for the loss of this unique tract of open recreational space in the City.

D) The City is entitled to an equitable remedy in this case

90. As an equitable remedy, specific performance is only available where the equities in the specific case favour that outcome.[71] The City makes its request with clean hands.

91. If a breach of s. 5(4) does not necessitate specific performance, ClubLink will be able to proceed in a manner that is fundamentally at odds with the words and objectives of the 1981 40% Agreement. The 1981 40% Agreement was not meant as a tool for creating a windfall for the landowner. It was explicitly meant to guarantee the protection of the Golf Course Lands as open space. Specific performance is the only remedy that will actually honour the bargain struck. Other remedies will eviscerate the protective purpose of the 1981 40% Agreement.

ISSUE #3: INTERPRETATION OF S. 9

A) The City May Keep the Golf Course Lands for Recreational and Natural Environmental Purposes

92. The City seeks a Declaration that if it accepts a conveyance of the Golf Course Lands, it is not thereafter obliged to reconvey the Golf Course Lands so long as it continues to use the land for recreational and natural environmental purposes, irrespective of whether it continues operation of the golf course. If the City were to accept a conveyance of the land, then its obligations are set out

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[71] *InStorage*, at para. 40.

in s. 9 of the 1981 40% Agreement and s. 10 of the ClubLink Assumption Agreement. There is no obligation that the Golf Course Lands must be operated as a golf course by the City.

PART IV - ORDER REQUESTED

93. The City seeks the relief set out in s. 1 (a), (b) and (c) of the Notice of Application, together with its costs of this Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of February, 2020.

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SCHEDULE "A"

LIST OF AUTHORITIES

1.	*Amberwood Investments Ltd. v Durham Condominium Corp. No. 123*, 211 DLR (4th) 1
2.	*Churchill Falls (Labrador) Corp. v Hydro-Quebec*, 2018 SCC 46
3.	*Matthew Brady Self Storage Corporation v InStorage Limited Partnership*, 2014 ONCA 858
4.	*Pacific National Investments Ltd. v Victoria (City)*, 2004 SCC 75
5.	*Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53
6.	*Semelhago v Paramadevan*, [1996] 2 SCR 415
7.	*Thunder Bay (City) v Canadian National Railway Company*, 2018 ONCA 517
8.	*Weyerhaeuser Company Limited v Ontario (Attorney General)*, 2017 ONCA 1007

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

***Planning Act*, RSO 1980, c 379**

29(25) Every municipality and the Minister may enter Agreements into agreements imposed as a condition to the giving of a consent and any such agreement may be registered against the land to which it applies and the municipality or the Minister, as the case may be, shall be entitled to enforce the provisions thereof against the owner and, subject to the provisions of the Registry Act and the Land Titles Act, any and all subsequent owners of the land

***Planning Act*, RSO 1990, c P 13**

51(26) A municipality or approval authority, or both, may enter into agreements imposed as a condition to the approval of a plan of subdivision and the agreements may be registered against the land to which it applies and the municipality or the approval authority, as the case may be, is entitled to enforce the provisions of it against the owner and, subject to the Registry Act and the Land Titles Act, any and all subsequent owners of the land.

***City of Ottawa Act*, 1999, SO 1999, c 14, Sched E**

5(1) The following municipalities are dissolved on January 1, 2001:

1. The Regional Municipality of Ottawa-Carleton.
2. The City of Cumberland.
3. The City of Gloucester.
4. The Township of Goulbourn.
5. The City of Kanata.
6. The City of Nepean.
7. The Township of Osgoode.
8. The City of Ottawa.
9. The Township of Rideau.
10. The Village of Rockcliffe Park.
11. The City of Vanier.
12. The Township of West Carleton. 1999, c. 14, Sched. E, s. 5 (1).

5(2) The city stands in the place of the old municipalities for all purposes. 1999, c. 14, Sched. E, s. 5 (2).

5(3) Without limiting the generality of subsection (2),

(a) the city has every power and duty of an old municipality under any general or special Act, in respect of the part of the municipal area to which the power or duty applied on December 31, 2000; and

(b) all the assets and liabilities of the old municipalities on December 31, 2000, including all rights, interests, approvals, status, registrations, entitlements and contractual benefits and obligations, become assets and liabilities of the city on January 1, 2001, without compensation. 1999, c. 14, Sched. E, s. 5 (3).

CITY OF OTTAWA	and **CLUBLINK CORPORATION ULC**	and **KANATA GREENSPACE PROTECTION COALITION**
Applicant	Respondent	Intervener

Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Ottawa

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