Court File No. ____

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

CITY OF OTTAWA

(Applicant)
(Respondent)

-and-

CLUBLINK CORPORATION ULC

(Respondent)
(Appellant)

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**MEMORANDUM OF ARGUMENT OF THE APPLICANT,**
**CITY OF OTTAWA**
(Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. This case calls for clarification of one of the common law's most fundamental distinctions – that between interests in land and contracts that simply involve land. Unlike contractual interests, proprietary interests in land bind successors in title; take priority over competing claims; survive insolvency proceedings; engage statutes that apply only to real property; and are subject to the rule against perpetuities. Yet jurisprudential uncertainty, fueled by contradictory decisions of this Court, blurs the distinction between interests in land and contractual interests. As a result, interest holders and affected third parties lack the guidance necessary to confidently plan their transactions and affairs.

2. In *Vaughan*, this Court held that a contractual right to demand a conveyance of land creates an immediate interest in the land – even if the right is contingent on events that are beyond the transferee's control.[1] Without citing *Vaughan*, this Court reached exactly the opposite conclusion in *Canadian Long Island*.[2] The Court held that the question is whether a conditional conveyance right depends on contingencies beyond the transferee's control. If so, the right is merely contractual until those contingencies have been resolved.[3] While it first appeared that the more recent decision should be followed, appellate developments have since shown that the contradiction in this Court's jurisprudence needs to be resolved.

3. This case is a prime example. ClubLink purchased land to use as a golf course and assumed a greenspace protection agreement related to the golf course. ClubLink gave Ottawa a first right of refusal to purchase the golf course. ClubLink also agreed to transfer the golf course to Ottawa at no cost, but only in the event that ClubLink wanted to stop running the golf course and could not find a purchaser. According to *Canadian Long Island*, Ottawa's conditional right to acquire the golf course is not an interest in land, because ClubLink

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[1] *City of Halifax v Vaughan Construction Company Ltd*, [1961] SCR 715 [*Vaughan*].
[2] *Canadian Long Island Petroleums Ltd v Irving Industries Ltd* (1974), [1975] 2 SCR 715 [*Canadian Long Island*].
[3] *Canadian Long Island* at 736; *McFarland v Hauser* (1978), [1979] 1 SCR 337 at 357 [*McFarland*].

controls whether a conveyance ever occurs. Ottawa cannot compel a conveyance through specific performance, and ClubLink cannot lose its land without consent.[4]

4. The Court of Appeal, however, relied on *Vaughan* to conclude otherwise. According to the Court of Appeal, the parties intended to fetter the use of the land, and Ottawa therefore held a proprietary interest.[5] This meant that the rule against perpetuities applied. As a result, ClubLink is no longer held to the terms of a bargain that permitted extensive residential development in exchange for preservation of greenspace – an agreement ClubLink expressly agreed to assume when it purchased the golf course.

5. The Court of Appeal's decision, and the line of jurisprudence leading to it, show that the status of conditional conveyance rights is now a significant source of uncertainty. In particular, the decision serves to highlight three developments that indicate the issue requires reconsideration by this Court:

   a. First, it is no longer clear that *Canadian Long Island* replaces *Vaughan.*

   b. Second, the Court of Appeal created a novel solution in an attempt to reconcile this Court's jurisprudence, which has effectively created a new species of interest in land. This complex development is inconsistent with common law methodology.

   c. Third, common law principles relevant to the treatment of conditional conveyance rights have changed significantly since this issue was last considered in 1974.

6. This issue cuts across many areas of the law. It has attracted significant attention in other major common law jurisdictions, as well as from Canadian academics. Clarifying the nature of conditional conveyance rights is therefore a matter of public importance that warrants an appeal to this Court. Leave to appeal should be granted to resolve the following issue:

> **When does a conditional right to demand a conveyance create a proprietary interest in land?**

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[4] *Canadian Long Island* at 732.
[5] *Ottawa (City) v ClubLink Corporation ULC*, 2021 ONCA 847 at para 64 ("**Appeal Decision**").

## B. Statement of Facts

### (i) Development in Kanata Required Approval

7. In the early 1980s, Campeau Corporation ("**Campeau**") held 1400 acres of farmland and open space in the former City of Kanata ("**Kanata**"), including a 9-hole golf course.[6] Campeau wanted to develop the land but could not proceed unless Kanata and the Regional Municipality of Ottawa-Carleton (the "**RMOC**") approved the development and amended their respective Official Plans.[7]

8. Campeau offered to preserve 40% of its land as open space, in exchange for the required amendments to the Official Plans of Kanata and the RMOC.[8] This was a selling point for both the local and regional municipalities.[9]

### (ii) Campeau Agreed to Preserve Greenspace for Development Rights

9. In 1981, Kanata and Campeau agreed to terms that would preserve 40% of Campeau's land as open space (the "**1981 Agreement**").[10] The 1981 Agreement provided that a proposed 18-hole golf course would be among the areas included in the lands left as open space.[11]

10. Under the 1981 Agreement, Campeau agreed to use the golf course lands to operate a golf course indefinitely.[12] It could sell the land to any other purchaser, so long as the subsequent purchaser agreed to accept the same limitation.[13] Before selling the land, however, Campeau had to give Kanata the first opportunity to purchase the land on the same terms.[14] Campeau also had to offer the land for transfer to Kanata at no cost if Campeau wanted to stop operating the golf course but could not find a purchaser (the "**Conditional Kanata**

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[6] *Ottawa (City) v ClubLink Corporation ULC*, 2021 ONSC 1298 at para 10 ("**Application Decision**").
[7] Application Decision at paras 10-11.
[8] Application Decision at paras 12-13.
[9] Application Decision at paras 11, 14.
[10] Application Decision at para 14.
[11] Application Decision at paras 16-17.
[12] 1981 Agreement, s 3(a), reproduced in Appeal Decision at para 16.
[13] 1981 Agreement, s 5(2), reproduced in Appeal Decision at para 17.
[14] 1981 Agreement, s 5(3), reproduced in Appeal Decision at para 17.

**Conveyance**").[15] If Kanata rejected the transfer, Campeau would have the right to develop the land as it saw fit.[16]

11. If Kanata acquired the golf course lands through the Conditional Kanata Conveyance, Kanata was obligated to use the lands for recreation and natural environment purposes. Otherwise, Kanata was required to transfer the land back to Campeau at no cost (together with the Conditional Kanata Conveyance, the "**Conditional Conveyances**").[17]

12. Kanata and Campeau entered into several related agreements in 1985 and 1988.[18] Among other things, those agreements precisely defined the golf course area,[19] and indicated that the 1981 Agreement would run with and bind the golf course lands "for the benefit of the Marchwood Lakeside Community."[20]

### (iii) Ottawa's Enforcement of ClubLink's Obligation to Preserve Greenspace

13. By amalgamation, Ottawa stands in Kanata's place under the 1981 Agreement. ClubLink Corporation ULC ("**ClubLink**") is the current owner of the golf course[21] and, through a series of transactions, acquired all of Campeau's obligations under the 1981 Agreement.[22]

14. In December 2018, ClubLink announced that it was pursuing development of the golf course lands because of declining interest in golf.[23] In October 2019, ClubLink applied to subdivide the land and develop it for residential and open space purposes.[24]

15. Ottawa applied for a declaration that its rights under the 1981 Agreement are binding against ClubLink. ClubLink argued that the Conditional Conveyances create interests in land. Based on that characterization, ClubLink argued that the Conditional Conveyances are subject to the rule against perpetuities and therefore invalid.

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[15] 1981 Agreement, s 5(4), reproduced in Appeal Decision at para 17.
[16] Application Decision at para 18; Appeal Decision at para 17.
[17] 1981 Agreement, s 9, reproduced in Appeal Decision at para 18.
[18] Application Decision at paras 24-28; Appeal Decision at paras 21-23.
[19] Application Decision at para 24.
[20] Appeal Decision at para 23.
[21] Application Decision at para 6.
[22] Application Decision at paras 31-32.
[23] Application Decision at para 39.
[24] Application Decision at para 41.

### C. Procedural History

#### (i) Superior Court of Justice

16. The application judge held that the 1981 Agreement is a valid and binding contract, fully enforceable against ClubLink. In his view, the Conditional Conveyances were contractual interests that were not subject to the rule against perpetuities.

17. The application judge recognized that the rule against perpetuities applies only to proprietary interests and not to mere contractual rights.[25] He therefore focused his analysis on whether the Conditional Conveyances create proprietary interests in land.[26]

18. The application judge referred to this Court's decision in *Canadian Long Island*. He recognized that *Canadian Long Island* distinguished "options", which give the interest holder an immediate right to call for a conveyance and thereby create an interest in land, from "rights of first refusal" that are not controlled by the interest holder and are therefore merely contractual.[27] He also applied the more recent *Israel Estate* decision, where the Ontario Court of Appeal concluded that certain interests cannot be categorized as either options or rights of first refusal.[28] Following *Israel Estate*, the application judge concluded that the relevant inquiry is whether the parties intended to create interests in land.[29]

19. For the application judge, one relevant consideration was that the parties did not expect Kanata's right to acquire the golf course to ever materialize. He recognized that the parties intended the golf course to exist in perpetuity.[30] The application judge therefore contrasted this case with *Israel Estate*, where the landowner had to act in good faith to fulfil the condition that would allow the interest holder to demand a conveyance. In *Israel Estate*, he concluded, the conveyance was inevitable.[31]

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[25] Application Decision at paras 62, 65-66.
[26] Application Decision at para 76.
[27] Application Decision at para 65.
[28] *2123201 Ontario Inc v Israel Estate*, 2016 ONCA 409 [*Israel Estate*].
[29] Application Decision at paras 66, 75.
[30] Application Decision at paras 77-83.
[31] Application Decision at paras 80-81.

20. The application judge also recognized that, in this case, Campeau controlled whether the Conditional Kanata Conveyance would materialize, which supported the view that the right was merely contractual.[32] While he considered the specific language of the contractual provisions, and the fact that the relevant agreements were registered against title, he did not find those factors determinative.[33]

21. Ultimately, the application judge concluded that the Conditional Conveyances are not enforceable by specific performance and are merely contractual rights that may never materialize.[34] In substance, the application judge therefore applied this Court's decision in *Canadian Long Island*.

**(ii) Court of Appeal**

22. The Court of Appeal instead concluded that the Conditional Conveyances are void based on the rule against perpetuities.[35] In stark contrast to the application judge's analysis, the Court of Appeal rejected the relevant considerations from *Canadian Long Island* and instead favoured other factors.

23. The Court of Appeal criticized the application judge for considering whether the contracting parties intended the Conditional Kanata Conveyance to materialize.[36] The Court held that, in this case, Kanata's lack of control over the right to demand a transfer was not relevant to the question of whether the right was contractual or proprietary.[37] Rather than looking at control, or at the nature of the condition giving rise to Kanata's right to demand a transfer, the Court of Appeal asked whether the Conditional Conveyances offended the rule against perpetuities by attempting to fetter real property.[38]

24. For the Court of Appeal, the Conditional Conveyances fettered real property in the same manner as the conveyance considered by this Court in *Vaughan* and were therefore

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[32] Application Decision at para 97-98.
[33] Application Decision at paras 94, 103.
[34] Application Decision at paras 93, 104.
[35] Appeal Decision at paras 64-65.
[36] Appeal Decision at para 33.
[37] Appeal Decision at para 33.
[38] Appeal Decision at paras 45, 61.

indistinguishable.[39] In a footnote, the Court of Appeal recognized that *Vaughan* and *Canadian Long Island* are inconsistent but noted that it had previously resolved those issues by holding that *Vaughan* remains good law notwithstanding *Canadian Long Island*.[40]

25. Finally, the Court relied heavily on the fact that one of the Agreements purported to bind the land.[41] According to the court, there is a "well-established distinction" between contractual agreements that purport to attach rights to the land, and those that do not.[42]

## PART II – STATEMENT OF ISSUES

26. The proposed appeal raises the following issue of national importance: When does a conditional right to demand a conveyance create a proprietary interest in land?

## PART III – STATEMENT OF ARGUMENT

27. Providing a clear answer on whether conditional rights to demand a conveyance[43] create interests in land is a matter of public importance, as the distinction between contractual and proprietary interests arises in many different contexts. Contracting parties cannot confidently arrange their affairs without certainty about the nature of their rights and obligations. It is now apparent that this Court's conflicting decisions in *Vaughan* and *Canadian Long Island* have generated significant uncertainty.[44] And while the Ontario Court of Appeal purports to have resolved this uncertainty, the Court of Appeal has effectively created a novel form of interest in land without regard for underlying common law principles. This development is inconsistent with the common law method and will only serve to compound commercial uncertainty about the many different issues that turn on the existence of an interest in land.

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[39] Appeal Decision at para 58.
[40] Appeal Decision at fn 1.
[41] Appeal Decision at para 62.
[42] Appeal Decision at para 43.
[43] These rights are referred to as "conditional conveyance rights" below.
[44] Paul M Perell, "Options, Rights of Repurchase and Rights of First Refusal as Contracts and as Interests in Land" (1991) 70:1 Can B Rev 1 at 23-24; *Israel Estate* at paras 33-37; *Jain v Nepean (City)*, 1992 CanLII 7629 at 13 (ONCA) [*Jain*]; *Sandhu v Chan*, 2017 BCSC 1279 at para 49 [*Sandhu*].

### A. Conditional Conveyance Rights Are Used For Many Different Purposes

28. Many different contracts involve potential conveyances of land that are subject to conditions. Two common forms are options to purchase, contingent on the option holder exercising the option, and rights of first refusal, contingent on the landowner wanting to sell. However, conditional conveyance rights come in many different forms.[45] Conveyance rights may be contingent on construction timelines,[46] subdivision approval,[47] payment by a specific date,[48] employment changes,[49] or, as in this case, changes relating to land use.[50] Each raises the same question: before the contingency is fulfilled, does the holder of the conditional conveyance right have an interest in the land? This question demands a clear answer, because it has a significant consequential impact in several different contexts.[51]

### B. Numerous Contexts Require Identifying Interests in Land with Certainty

29. Distinguishing interests in land from mere contractual rights has a fundamental impact on contracting parties' rights and obligations.[52] Commercial certainty therefore demands clear and predictable boundaries that define the scope of interests in land. Clarifying those boundaries in the context of conditional conveyance rights is a matter of public importance.

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[45] Perell, "Options, Rights of Repurchase and Rights of First Refusal" at pp 7-8; Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade, The Law of Real Property*, 8th ed (2012) at 620-23; Anne La Forest, *Anger & Honsberger Law of Real Property*, 3rd ed (looseleaf, online) at §4.20.
[46] See e.g. *Vaughan* at 719-720; *Jain* at 4.
[47] See e.g. *Dynamic Transport Ltd v OK Detailing Ltd*, [1978] 2 SCR 1072 at 1086-87.
[48] *La France v La France*, 1982 CanLII 1211 at paras 8-9 (ABQB) [*La France*].
[49] See e.g. *Laurin v. Iron Ore Co of Canada*, 1977 CanLII 1774 at paras 63-65 (NL SC) [*Laurin*]; *British Columbia Forest Products Ltd v Gay*, 1976 CanLII 226 at para 10 (BCSC), aff'd 1978 CanLII 376 at paras 14-15 (BCCA) [*British Columbia Forest Products*]
[50] See also *Loyalist (Township) v The Fairfield-Gutzeit Society*, 2019 ONSC 2203 at para 20 [*Loyalist Township*]; *Pelham (Town) v Fonthill Gardens Inc*, 2019 ONSC 567, at para 43.
[51] Charles Harpum, "Rights of Pre-Emption: Ugly Ducklings Into Swans" (1978) 37:2 Cambridge LJ 213 at 215-16.
[52] *Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp*, 2020 SCC 29 at para 19 [*Crystal Square*].

30. One of the most central characteristics of an interest in land is that it binds successors in title without privity of contract, unlike contractual covenants.[53] The interest is enforceable *in rem*, against the land itself, rather than against a specific person. Those purchasing land therefore need to understand the types of rights that are capable of encumbering their purchase. Interest holders similarly need to predict whether their interest will be enforceable against third parties or, instead, provide only a claim for damages against the original covenantor.

31. During insolvency proceedings, the proprietary nature of interests in land affects both the interest holder and other creditors. In many instances, insolvent debtors can disclaim their contractual agreements, leaving the contracting counterparty with an unsecured claim for damages that may not yield any recovery.[54] Courts may also grant vesting orders that transfer property free and clear of any contractual interests, thereby increasing the property's marketability and value for creditors.[55] Interests in land, however, cannot be disclaimed, and courts are reluctant to remove such interests from title. The holder of an interest in land therefore has a right that generally survives insolvency and remains enforceable.[56]

32. Legislative enactments also commonly turn on distinctions between interests in land and contractual interests. Many enactments use terms like "interest in land" as the basis for granting rights or imposing obligations.[57] *Vaughan*, for example, turned on whether the

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[53] *Anger & Honsberger Law of Real Property* at § 16:1, 16.2; *Heritage Capital Corp v Equitable Trust Co*, 2016 SCC 19 at para 25 [*Heritage Capital*]; *Crystal Square* at para 19.

[54] Virginie Gauthier, David Sieradzki and Hugo Margoc, "Rights of First Refusal and Options to Purchase in Insolvency Proceedings – Not Quite Insurmountable" (2019) 9 J Insolvency Institute Can 103 at 119-25; *New Skeena Forest Products Inc, Re v Don Hull & Sons Contracting Ltd*, 2005 BCCA 154 at paras 22-31; *CIM Bayview Creek Inc, Re*, 2021 ONSC 220 at para 38 [*CIM Bayview*]

[55] Gauthier, Sieradzki & Margoc at 113-18; *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc*, 2019 ONCA 508 at paras 25-28 [*Dianor*].

[56] *CIM Bayview* at paras 42-44, 50-51; *Dianor* at para 105; see also Gauthier, Sieradzki & Margoc at 126-27.

[57] A CanLII search suggests that 633 statutes and regulations in force as of January 18, 2022 use the term "interest in land", which does not include those that reference similar terms relating to real property or ownership of land (see e.g. this Court's decision in *Montreal LH & P Cons v*

holder of a conditional conveyance right was an "owner of land" under Nova Scotia's *Expropriation Act*.[58] Those with an interest in land are also permitted by legislation to register their interest[59] and to file a certificate of pending litigation.[60]

33. Other enactments raise the specific question of whether a conditional conveyance right creates an immediate interest in land, because that in turn determines whether the agreement results in a transfer of the land. In *Frobisher*, for example, this Court considered whether an option to purchase grants an interest in land to determine whether the option caused a transfer prohibited by Saskatchewan's *Quartz Mining Regulations*.[61] In *McFarland*, this Court similarly considered whether a right of first refusal results in a disposition under Alberta's *Dower Act*.[62] And in *Kostiuk v. Minister of National Revenue*, the Federal Court considered whether a settlement agreement contemplating a conditional conveyance created an immediate interest in the land and therefore resulted in a transfer of the land under the *Income Tax Act*.[63] The *Income Tax Act* also requires applying common law principles to determine whether a landowner has entered into an "option to acquire or dispose" of the land.[64]

34. Finally, because interests in land have the permanence associated with being enforceable against subsequent purchasers, courts developed the rule against perpetuities to curb potential abuse.[65] The rule has no application to contractual interests (which bind only the original covenantor)[66] but does apply to invalidate certain proprietary interests that indirectly

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*City of Westmount*, [1926] SCR 515 at 523-24, which applied common law concepts to a Quebec taxation statute that referred to "real property" and "real estate" without defining those terms).

[58] *Vaughan* at 719; see also *Halifax (City) v Vaughan Construction Co*, 1960 CarswellNS 10 at paras 41-43 (SC).
[59] See e.g. *Kadyschuk v Sawchuk*, 2006 MBCA 18 at paras 11-12, 20-22 [*Kadyschuk*].
[60] See e.g. *1244034 Alberta Ltd v Walton International Group Inc*, 2007 ABCA 372 at paras 16-17 [*Walton*]; *Todd Family Trust v Barefoot Science Technologies*, 2013 ONSC 523 at para 13.
[61] *Frobisher Ltd v Canadian Pipelines & Petroleums Ltd*, [1960] SCR 126 at 167, per Judson J [*Frobisher*].
[62] *McFarland* at 351.
[63] *Kostiuk v Minister of National Revenue*, 1992 CarswellNat 449 at para 14 (FC TD).
[64] See Martin Lamoureaux, "The Option in a Bijural Context"; see e.g. *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 49.
[65] *Canadian Long Island* at 726-27; *Megarry & Wade* at 369-70.
[66] *Canadian Long Island* at 735-36; *Megarry & Wade* at 370.

restrain alienation.[67] For interests where the rule potentially applies, the interest's validity hinges on clearly distinguishing between interests in land and mere contractual rights.

35. Given the far-reaching consequences of recognizing an interest in land, providing clear and predictable guidance on whether conditional conveyance rights grant interests in land is a matter of public importance.

### C. This Court's Contradictory Jurisprudence is a Source of Uncertainty

#### (i) *Vaughan* and *Canadian Long Island* are Contradictory

36. Despite the need for clarity and predictability, Canadian law on the status of conditional conveyances is currently uncertain, the root of which is the express contradiction between this Court's decisions in *Vaughan* and *Canadian Long Island*. Until this Court clarifies whether *Canadian Long Island* overruled *Vaughan*, or provides an explanation to reconcile these decisions, uncertainty will prevail.

37. In *Vaughan*, the City of Halifax sold land to a developer. Halifax retained the right to repurchase the land if the developer did not begin construction within a reasonable time. Instead of following the agreement, the developer negotiated with the Province of Nova Scotia to sell the land at a higher price. The Province ultimately expropriated the land, raising the question of whether Halifax was entitled to compensation.[68]

38. This Court concluded in *Vaughan* that the municipality's right to repurchase the land was indistinguishable from a right of pre-emption, or a right of first refusal. The Court held that such agreements create interests in land from the moment the agreement is formed. The Court also held that whether the interest holder has the power to compel a conveyance is irrelevant to the analysis:

> An owner of land contracts that if he decides to sell he will give X the first right to buy at a stated price or at a price to be determined according to a bona fide offer made by another. The owner may decide never to sell and X cannot compel him to sell. Nevertheless, X has an equitable interest in the land.[69]

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[67] *Canadian Long Island* at 732-33.
[68] *Vaughan* at 717-18.
[69] *Vaughan* at 720 [emphasis added].

39. In *Canadian Long Island*, decided 13 years after *Vaughan*, this Court reached the opposite conclusion. The Court held that conditional conveyance rights grant immediate interests in land only if the interest holder can demand a conveyance from the outset, which is the hallmark of an option to purchase.[70] Other conditional conveyance rights, like rights of first refusal, depend on a contingency within the landowner's control and therefore do not grant an interest in land until the contingency is resolved. The Court stated:

> [The contract] did not give to the respondents any present right to require in the future a conveyance of [the land]. It was not specifically enforceable at the time the agreement was executed. The respondents were not given any right to take away Sadim's interest without its consent. Their right under that clause was a contractual right… The contingency in this clause is resolved solely upon the decision of [the landowner] to sell.[71]

40. While the reasoning in *Canadian Long Island*, and its failure to address *Vaughan*, attracted criticism,[72] many concluded that *Canadian Long Island* represented the current state of the law.[73] More recently, however, Canadian courts have courts reopened the debate about how to properly determine the nature of conditional conveyance rights.

### (ii) Recent Decisions Make Conditional Conveyance Rights Highly Uncertain

41. Lingering uncertainty caused by the unresolved conflict between *Vaughan* and *Canadian Long Island* has been compounded by the treatment of this Court's related decision in *Weinblatt*.[74] *Weinblatt* was decided shortly after *Vaughan* and involved almost identical facts. The Ontario Court of Appeal applied *Vaughan* and concluded that a conditional conveyance right grants an immediate interest in land.[75] On appeal, however, this Court took a different approach. This Court held in *Weinblatt* that a conditional conveyance right grants

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[70] *Canadian Long Island* at 732.
[71] *Canadian Long Island* at 732 [emphasis added].
[72] Perell, "Options, Rights of Repurchase and Rights of First Refusal" at 23-28.
[73] Perell, "Options, Rights of Repurchase and Rights of First Refusal" at 27; Keith T Smith & Shawn H T. Denstedt, "Preemptive Rights and the Sale of Resource Properties: Practical Problems and Solutions" (1992) 30:1 Alta L Rev 57 at 58-59; see e.g. *Sutherland Estate v. Dyer*, 1991 CanLII 7120 at p 14 (ONSC) [*Sutherland Estate*]; *Laurin* at paras 63-65; *British Columbia Forest Products* at para 15; *Kadyschuk* at paras 20-22.
[74] *Weinblatt v Kitchener (City)* (1968), [1969] SCR 157 [*Weinblatt*].
[75] *Weinblatt v Kitchener (City)*, 1966 CanLII 25 (ONCA).

an interest "to arise at a future date", which can be enforced against a subsequent purchaser who has "full notice" of the right.[76]

42. While the notice principle from *Weinblatt* is consistent with *Canadian Long Island*,[77] Courts of Appeal fostered uncertainty by equating *Weinblatt* and *Vaughan*. Despite *Canadian Long Island*, both the Alberta Court of Appeal and the Ontario Court of Appeal have relied on the Court of Appeal's reasons in *Weinblatt* to suggest that conditional conveyance rights grant immediate interests in land.[78] In *Jain*, for example, the Ontario Court of Appeal considered both *Vaughan* and *Weinblatt* inconsistent with *Canadian Long Island* on that basis.[79]

43. Though the discussion in *Jain* reintroduced doubt about the nature of conditional conveyance rights, the Court of Appeal's holding reflected a narrow application of *Weinblatt*'s notice principle. The Court ultimately held that whether the earlier cases were wrongly decided or overturned by *Canadian Long Island* should be decided in a future case:

> Whether or not the Supreme Court proceeded on an erroneous assumption in *Vaughan* as to whether an interest in land arises through a right of first refusal, this is at most obiter in the reasons, and the law remains as it was indicated in the ratio decidendi [of *Vaughan* and *Weinblatt*]. A person who acquires property with notice of a third party's right of purchase in the event of failure to construct a building takes subject to that option. Control of the exercise of the option is not a factor.[80]

44. In *Israel Estate*, however, the Ontario Court of Appeal transformed *Jain*'s narrow holding into a much broader principle that applies irrespective of notice. Based on *Jain* – and its reliance on *Vaughan* and *Weinblatt* – the Court held that control over a conditional conveyance right does not determine whether the right grants an interest in land at the time of its creation.[81] While the comments in *Jain* were *obiter*, *Israel Estate* directly undermined this Court's leading decision in *Canadian Long Island*. The Court effectively concluded that *Canadian Long Island* should not be followed and, as a result, that Canadian law should no

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[76] *Weinblatt* at 161.
[77] See *Canadian Long Island* at 737.
[78] *Jain* at p 13; *Carruthers v Tioga Holdings Ltd*, 1999 ABCA 73 at para 10.
[79] *Jain* at pp 9-10.
[80] *Jain* at p 13
[81] *Israel Estate* at para 37.

longer match the common law of England,[82] Australia,[83] and New Zealand.[84] According to *Israel Estate*, this issue instead turns on whether the contracting parties intended to grant an immediate interest in land.[85]

45. The approach taken in *Israel Estate* is novel. Not only did the Court of Appeal depart from *Canadian Long Island*, it also did not restore the reasoning from *Vaughan*. Prior to *Israel Estate*, those were the only two approaches commonly recognized as determining whether a conditional conveyance right creates an immediate interest in land.[86] The idea that conditional conveyance rights hold the privileged status of an interest in land whenever contracting parties intend such a result does not appear in any jurisprudence pre-dating *Israel Estate*, nor is it suggested in the commentary. Despite this issue having been addressed in common law jurisdictions around the world, no other court has adopted the same analysis.

46. *Israel Estate* also creates significant uncertainty. *Vaughan* and *Canadian Long Island* each provided a bright line that clearly identified whether conditional conveyance rights create interests in land. Contracting parties governed by either rule could predictably determine whether their interests would have the persistence and priority that flows from a proprietary interest. This accords with the principle that property rights should be clear and stable.[87] By contrast, *Israel Estate* suggests that conditional conveyance rights will be evaluated on a case-by-case basis long after they are created. Unlike the bright line rules that came before it, the Court of Appeal's solution invites an *ad hoc* assessment with unpredictable

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[82] *Megarry & Wade* at 666; *Bircham & Co Nominees (No 2) Ltd v Worrell Holdings Ltd*, [2001] EWCA Civ 775 at paras 27-37.
[83] *Chipper v Octra Nominees Pty Ltd*, [2006] FCA 1633 at paras 102-25; see also Peter J Allen & Richard I Cottee, "The Effect of the Rule Against Perpetuities on Pre-Emptive Rights in Joint Ventures" (1982) 4:1 Aust Mining and Petroleum LJ 190 at 192-94.
[84] *Auckland Council v Pallister* [2013] NZHC 2717 at paras 16-20; *Wiltshire Developments Ltd v Blake*, [2013] NZHC 761 at paras 14-15.
[85] *Israel Estate* at paras 31, 38, 40, 43.
[86] See Perell, "Options, Rights of Repurchase and Rights of First Refusal" at 17-27; Christine J. Davis, "Floating Rights" (2002) 61:2 Cambridge LJ 423 at 437-41; *Megarry & Wade* at 664-67; Harpum, "Rights of Pre-Emption" at 214-19; Keith Evans, "The Law of Options" (2002) 25:1 Dalhousie LJ 47 at 75-79.
[87] Bruce Ziff, "Yet Another Function For the Numerus Clausus Principle of Property Rights, and a Useful One at That" (29 March 2021) at 2, 4, online: http://ssrn.com/abstract=2026088.

outcomes.[88] Given the importance of distinguishing contractual rights from interests in land, the approach taken for conditional conveyance rights should instead provide clear and predictable guidance. This is a domain in which legal certainty is of primary importance.

47. The line of authority spawned by *Israel Estate*, which culminates in the decision below, directly conflicts with *Canadian Long Island*, appellate jurisprudence applying *Canadian Long Island*,[89] and the commentary on this issue.[90] It is no longer clear whether conditional conveyance rights carry the privileges and consequences associated with interests in land. Given that the uncertainty originates from this Court's conflicting decisions, a decision from this Court is needed to restore predictability.

### D. The Decision Below Extends *Israel Estate* and Implements a Fundamental Reform of Common Law Principles.

48. The Court of Appeal's decision below amplifies the public importance of the issue at stake in this appeal. Extending *Israel Estate*, the decision below effectively creates a novel form of proprietary interest without considering the widespread impact and uncertain ramifications associated with such a development. The Court of Appeal's decision is not an appropriate application of common law methodology.

49. Unlike *Israel Estate*, this case more directly raised the conflict between *Vaughan* and *Canadian Long Island*. The conditional conveyance right in *Israel Estate* depended on the landowner fully removing gravel from the land. While the landowner had discretion to determine when the gravel had been removed, they did not fully control the conveyance because they were obligated to fulfil the condition in good faith.[91] This distinguished *Israel Estate* from *Canadian Long Island*. By contrast, ClubLink's discretion to operate the golf

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[88] *Bhasin v Hrynew*, 2014 SCC 71 at para 70 [*Bhasin*]; *Uber Technologies Inc v Heller*, 2020 SCC 16 at para 153, per Brown J (concurring); see also David Cohen, "The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry" (1982) 32:1 U Toronto LJ 31 at fn 8.

[89] See e.g. *British Columbia Forest Products* at para 15; *Benzie v Kunin*, 2012 ONCA 766 at paras 66-67;

[90] See e.g. Perell, "Options, Rights of Repurchase and Rights of First Refusal" at 17-27; Davis at 437-41; *Megarry & Wade* at 664-67; Harpum, "Rights of Pre-Emption" at 214-19; Evans at 75-79.

[91] *Israel Estate* at paras 27-29, 39.

course is completely unfettered and the condition in this case is therefore directly analogous to the condition addressed in *Canadian Long Island*. Moreover, Ottawa's conditional conveyance right benefits a municipality and relates to land use, which resembles the rights addressed in *Vaughan* and *Weinblatt*.

50. The Court of Appeal therefore attempted to extract a general principle from *Vaughan* and *Weinblatt*, notwithstanding that *Canadian Long Island* directly contradicted the reasoning in *Vaughan*, and that *Weinblatt* was decided on the basis of notice. Without a decision of this Court clearly addressing those issues, the Court of Appeal concluded that rights purporting to bind the land and control its use or development, thereby fettering real property, are interests in land.[92]

51. This principle marks a significant expansion of *Israel Estate*. While *Israel Estate* focused on the contracting parties' intentions, the Court nevertheless maintained the view that options to purchase are the only type of conditional conveyance right that create an interest in land.[93] The Court in *Israel Estate* simply considered the parties' intentions to determine whether an option to purchase – i.e., the right to demand a conveyance – had been created.[94] Here, while purporting to apply *Israel Estate*, the Court of Appeal abandoned this "rigid classification scheme" altogether.[95] The Court effectively concluded that rights falling short of an option to purchase may nevertheless create interests in land on the basis of the Court's newly developed "fettering" principle.

52. The Court of Appeal's conclusion creates a new species of interest in land. Options to purchase grant an interest in land because equity treats the purchaser of land under a completed contract for purchase and sale as the owner of the land, even before legal title passes on the closing date.[96] The proprietary interest is the right to demand a conveyance and it is premised on the landowner's irrevocable commitment to sell.[97] The decision below

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[92] Appeal Decision at paras 40, 43, 45, 58-60, 64.
[93] *Israel Estate* at para 24.
[94] *Israel Estate* at paras 38, 43.
[95] Appeal Decision at para 51.
[96] Bruce Ziff, "Death to Semelhago!" (2016) 39:1 Dal LJ 1 at 4; *Megarry & Wade* at 657.
[97] *Mitsui & Co (Canada) Ltd v Royal Bank of Canada*, [1995] 2 SCR 187 at paras 26-27 [*Mitsui*].

protects something different: though the landowner can avoid the conveyance, and the interest holder has no right to demand a conveyance, an interest in land may nevertheless be created simply through an intention to fetter the use of real property.

53. Mere intention to fetter or encumber real property has never been sufficient to ground an interest in land. Indeed, contractual covenants generally do not bind subsequent purchasers.[98] As this Court very recently reiterated, this is especially true of positive covenants, like ClubLink's obligation to maintain the golf course, which are incapable of running with land.[99] While certain negative covenants may create interests in land, that only occurs when specific requirements are satisfied.[100] And those requirements apply "even if an agreement contains an express intention to the contrary."[101]

54. The decision below is therefore a remarkable development that amounts to a fundamental reform of real property law. As this Court recently recognized, the modes of holding real property (*i.e.*, the categories of interests in land) are fixed.[102] Despite having wide latitude to create unique contractual terms, contracting parties are not permitted to create new forms of proprietary interests that bind third parties.[103] Yet the principle articulated by the Court of Appeal allows contracting parties to create real property interests and enforce those interests against third parties simply by asserting their intention to do so.

55. The loosely defined interest created by the Court of Appeal provides a new basis for allowing contractual covenants to run with the land. This threatens to subsume the stringent requirements that apply to more specific interests, such as easements and restrictive

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[98] *Heritage Capital* at para 25; *Crystal Square* at para 19. see also Paul M Perell, "Covenants as Contracts and as Interests in Land" (2005) 29 Adv Q 476.
[99] *Crystal Square* at paras 17-18, 20.
[100] *Durham Condominium Corporation No 123 v Amberwood Investments Limited*, 2002 CanLII 44913 at paras 17-33 (ONCA) [*Amberwood*].
[101] *Heritage Capital* at para 25.
[102] *Crystal Square* at para 21; see also Bruce Ziff, *Principles of Property Law*, 7th ed (2018) at 66-67; Ziff, "Yet Another Function for Numerus Clausus" at 2-4; *Fairhill Developments Ltd v Aberdeen Properties Ltd*, 1969 CanLII 403 at 6-7 (Ont HCJ).
[103] Ziff, "Yet Another Function for Numerus Clausus" at 3-4, citing *Keppell v Bailey* (1834), 2 My & K 517 at 535 (Ch); Ziff, *Principles of Property Law* at 66.

covenants.[104] As this case demonstrates, the interest created by the Court of Appeal also gives proprietary status to positive covenants, which would allow them to be enforced against subsequent purchasers. This is the very same change that courts have previously considered too complex and uncertain to implement as a common law development.[105]

56. Rather than considering all of the potential ramifications of creating a new interest in land, the Court of Appeal narrowly focused on the rule against perpetuities.[106] Because the rule applied to invalidate Ottawa's interest in this case, the Court concluded that its decision promoted free-alienation and marketability of land.[107] However, this newly recognized interest will apply in many contexts where the rule against perpetuities is not at issue.[108] In those contexts, an interest in land premised on the intention to fetter real property simply serves to fragment land ownership.[109] It will raise questions about the priority of competing interests,[110] the consequences of insolvency,[111] and whether ownership of the underlying land has been transferred to the holder of the "fettering" interest.[112]

57. Moreover, if other jurisdictions continue to adopt the *Israel Estate* line of authority,[113] this new interest in land will exist in jurisdictions that have abolished the rule against perpetuities altogether.[114] In those jurisdictions, proprietary interests fettering the use of real property will effectively run with land permanently. This directly contradicts the rationale that prompted the Court of Appeal to recognize such an interest as proprietary in the first place.

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[104] Ziff, "Yet Another Function for Numerus Clausus" at 4; see also Ziff, *Principles of Property Law* at 420-25; *Amberwood* at paras 17-33.
[105] *Amberwood* at paras 43-50.
[106] Appeal Decision at para 44.
[107] Appeal Decision at paras 45, 64.
[108] See the cases cited at paras 29-34, above.
[109] Ziff, "Yet Another Function for Numerus Clausus" at 8-10.
[110] See e.g. *Jain*.
[111] See e.g. *CIM Bayview*.
[112] See e.g. *McFarland*; *Frobisher*.
[113] See e.g. *Sandhu* at paras 44-51.
[114] The rule has been abolished in Saskatchewan, Manitoba, and Nova Scotia: *The Trustee Act, 2009*, SS 2009, c T-23.01, s 58; *The Perpetuities and Accumulations Act*, CCSM c P33; *Perpetuities Act*, SNS 2011, c 42.

58. The Court of Appeal's analysis results in a complex change with significant potential ramifications. It invites uncertainty and unfairness for those parties who have structured their commercial relationships around existing real property rules, and it is therefore not an appropriate application of common law methodology.[115]

59. This case is a prime example: the 1981 Agreement was created shortly after *Canadian Long Island*. The rule in *Canadian Long Island* was repeatedly affirmed to be the law, both in Canada and abroad, prior to ClubLink assuming the Agreement and throughout the Agreement's existence. Now, the conditional conveyance rights in the Agreement have been invalidated by a novel proprietary interest recognized 40 years later. Common law development should not yield this result, and clarification from this Court is therefore required. The need for clarification indicates that this issue is one of public importance.

### E. The Common Law has Advanced Significantly Since *Canadian Long Island*

60. Legal developments since *Canadian Long Island* also indicate that it is an opportune time for this Court to reconsider the nature of conditional conveyance rights.

61. *Canadian Long Island* was based on the principle that the holder of an option to purchase has a right to demand specific performance from the moment the interest is created.[116] By describing the interest in terms of the availability of specific performance, *Canadian Long Island* relied on the premise that contracts for the sale of land are specifically enforceable as a matter of course.[117] While this was generally understood to be the law when *Canadian Long Island* was decided, this Court's more recent decision in *Semelhago* altered the principle and limited the availability of specific performance.[118] *Semelhago* raises the question of whether *Canadian Long Island* accurately describes the types of conditional conveyance rights that create an interest in land.

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[115] *Friedmann Equity Developments Inc v Final Note Ltd*, 2000 SCC 34 at para 51.
[116] *Canadian Long Island* at 731; *Megarry & Wade* at 657-58.
[117] See Bruce Ziff, "Death to Semelhago!" (2016) 39:1 Dal LJ 1 at 4-5; Perell, "Options, Rights of Repurchase and Rights of First Refusal" at 18-20, 28.
[118] *Semelhago v Paramadevan*, [1996] 2 SCR 415 at par 21; see Ziff, "Death to Semelhago!" at 3; *Walton* at paras 16-17.

62. Moreover, *Canadian Long Island* referenced "control" over a conveyance at a time when contractual conditions and discretionary powers were not as well understood. This Court has since clarified that contracting parties may have an obligation to perform conditions that do not *appear* to be in their control, and to fulfil those obligations in good faith.[119] Courts have grappled with these developments by examining the nature of contingencies that lead to a conveyance.[120] The decision below takes a different approach, by concluding that the nature of the contingency involved in a conditional conveyance right is irrelevant.[121] A decision from this Court would serve to clarify whether recent developments relating to contract performance are relevant to the nature of conditional conveyance rights.

63. Accordingly, not only has the conflict between *Vaughan* and *Canadian Long Island* led to a persistent state of uncertainty, the common law foundation that yielded the reasoning in *Canadian Long Island* has changed. This issue of public importance is therefore ripe for reconsideration by this Court.

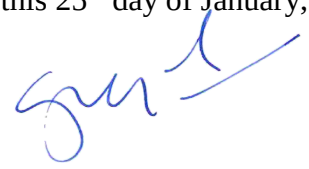
## PART IV – SUBMISSIONS ON COSTS

64. Ottawa asks that costs follow the cause of the appeal.

## PART V – ORDER SOUGHT

65. Ottawa seeks an order granting leave to appeal, with costs following the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of January, 2022.

Per: 

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Emma Blanchard
Counsel for the Applicant,
City of Ottawa

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[119] *Mitsui* at para 34; *Dynamic Transport* at 1086-87; *Bhasin* at paras 50-51.
[120] *Loyalist Township* at para 35; *Israel Estate* at para 27; Application Decision at paras 77-83.
[121] Appeal Decision at para 33.

## PART VI – TABLE OF AUTHORITIES

**Caselaw:**

| No. | Authority | Paragraph Reference |
|---|---|---|
| 1. | *1244034 Alberta Ltd v Walton International Group Inc*, 2007 ABCA 372 | 32, 61 |
| 2. | *2123201 Ontario Inc v Israel Estate*, 2016 ONCA 409 | 18, 19, 27, 44-49, 51 |
| 3. | *Auckland Council v Pallister* [2013] NZHC 2717 | 44 |
| 4. | *Benzie v Kunin*, 2012 ONCA 766 | 47 |
| 5. | *Bhasin v Hrynew*, 2014 SCC 71 | 46, 62 |
| 6. | *Bircham & Co Nominees (No 2) Ltd v Worrell Holdings Ltd*, [2001] EWCA Civ 775 | 44 |
| 7. | *British Columbia Forest Products Ltd v Gay*, 1976 CanLII 226 (BCSC) | 28, 40, 47 |
| 8. | *British Columbia Forest Products Ltd v Gay*, 1978 CanLII 376 (BCCA) | |
| 9. | *Canadian Long Island Petroleums Ltd v Irving Industries Ltd* (1974), [1975] 2 SCR 715 | 2, 3, 5, 34, 36, 39-47, 49, 50, 59-63 |
| 10. | *Carruthers v Tioga Holdings Ltd*, 1999 ABCA 73 | 42 |
| 11. | *Chipper v Octra Nominees Pty Ltd*, [2006] FCA 1633 | 44 |
| 12. | *CIM Bayview Creek Inc, Re*, 2021 ONSC 220 | 31, 56 |
| 13. | *City of Halifax v Vaughan Construction Company Ltd*, [1961] SCR 715 | 2, 4,5, 24, 27, 28, 32, 36-46, 49, 50, 63 |
| 14. | *Durham Condominium Corporation No 123 v Amberwood Investments Limited*, 2002 CanLII 44913 (ONCA) | 53, 55 |

| No. | Authority | Paragraph Reference |
|---|---|---|
| 15. | *Dynamic Transport Ltd v OK Detailing Ltd*, [1978] 2 SCR 1072 | 28, 62 |
| 16. | *Fairhill Developments Ltd v Aberdeen Properties Ltd*, 1969 CanLII 403 (Ont HCJ) | 54 |
| 17. | *Friedmann Equity Developments Inc v Final Note Ltd*, 2000 SCC 34 | 58 |
| 18. | *Frobisher Ltd v Canadian Pipelines & Petroleums Ltd*, [1960] SCR 126 | 33, 56 |
| 19. | *Halifax (City) v Vaughan Construction Co*, 1960 CarswellNS 10 (SC) | 32 |
| 20. | *Heritage Capital Corp v Equitable Trust Co*, 2016 SCC 19 | 30, 53, |
| 21. | *Jain v Nepean (City)*, 1992 CanLII 7629 | 27, 28, 42-44, 56 |
| 22. | *Kadyschuk v Sawchuk*, 2006 MBCA 18 | 32, 40 |
| 23. | *Kostiuk v Minister of National Revenue*, 1992 CarswellNat 449 (FC TD) | 33 |
| 24. | *La France v La France*, 1982 CanLII 1211 (ABQB) | 28 |
| 25. | *Laurin v Iron Ore Co of Canada*, 1977 CanLII 1774 (NL SCTD) | 28, 40 |
| 26. | *Loyalist (Township) v The Fairfield-Gutzeit Society*, 2019 ONSC 2203 | 28, 62 |
| 27. | *McFarland v Hauser* (1978), [1979] 1 SCR 337 | 2, 33, 56 |
| 28. | *Mitsui & Co (Canada) Ltd v Royal Bank of Canada*, [1995] 2 SCR 187 | 52, 62 |
| 29. | *New Skeena Forest Products Inc, Re v Don Hull & Sons Contracting Ltd*, 2005 BCCA 154 | 31 |
| 30. | *Ottawa (City) v ClubLink Corporation ULC*, 2021 ONCA 847 | 4, 10-12, 22, 23-25, 50, 51, 56, 62 |

| No. | Authority | Paragraph Reference |
|---|---|---|
| 31. | *Ottawa (City) v ClubLink Corporation ULC*, 2021 ONSC 1298 | 7-10, 12-14, 17-21, 62 |
| 32. | *Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp*, 2020 SCC 29 | 29, 30, 53, 54 |
| 33. | *Pelham (Town) v Fonthill Gardens Inc*, 2019 ONSC 567 | 28 |
| 34. | *Sandhu v Chan*, 2017 BCSC 1279 | 27, 57 |
| 35. | *Semelhago v Paramadevan*, [1996] 2 SCR 415 | 61, |
| 36. | *Sutherland Estate v Dyer*, 1991 CanLII 7120 (ONSC) | 40 |
| 37. | *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc*, 2019 ONCA 508 | 31 |
| 38. | *Todd Family Trust v Barefoot Science Technologies*, 2013 ONSC 523 | 32 |
| 39. | *Uber Technologies Inc v Heller*, 2020 SCC 16 | 46 |
| 40. | *Weinblatt v Kitchener (City)* (1968), [1969] SCR 157 | 41 |
| 41. | *Weinblatt v Kitchener (City)*, 1966 CanLII 25 (ONCA) | 41 |
| 42. | *Wiltshire Developments Ltd v Blake*, [2013] NZHC 761 | 43 |

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| No. | Secondary Source | Paragraph Reference |
|---|---|---|
| 1. | Anne La Forest, *Anger & Honsberger Law of Real Property*, 3rd ed (looseleaf, online) | 28, 30 |
| 2. | Bruce Ziff, "Death to Semelhago!" (2016) 39:1 Dal LJ 1 | 52, 61 |

| No. | Secondary Source | Paragraph Reference |
|---|---|---|
| 3. | Bruce Ziff, "Yet Another Function For the Numerus Clausus Principle of Property Rights, and a Useful One at That" (29 March 2021) | 46, 54-56 |
| 4. | Bruce Ziff, *Principles of Property Law*, 7th ed (2018) | 54, 55 |
| 5. | Charles Harpum, "Rights of Pre-Emption: Ugly Ducklings Into Swans" (1978) 37:2 Cambridge LJ 213 | 28, 45, 47 |
| 6. | Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade, The Law of Real Property*, 8th ed (2012) | 28, 34, 44, 45, 47, 52, 61 |
| 7. | Christine J. Davis, "Floating Rights" (2002) 61:2 Cambridge LJ 423 | 45, 47 |
| 8. | David Cohen, "The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry" (1982) 32:1 U Toronto LJ 31 | 46 |
| 9. | Keith Evans, "The Law of Options" (2002) 25:1 Dalhousie LJ 47 | 45, 47 |
| 10. | Keith T. Smith & Shawn H. T. Denstedt, "Preemptive Rights and the Sale of Resource Properties: Practical Problems and Solutions" (1992) 30:1 Alta L Rev 57 | 40 |
| 11. | Martin Lamoureaux, "The Option in a Bijural Context". | 33 |
| 12. | Paul M Perell, "Options, Rights of Repurchase and Rights of First Refusal as Contracts and as Interests in Land" (1991) 70:1 Can B Rev 1 | 27, 28, 40, 45, 47 |
| 13. | Paul M Perell, "Convenants as Contracts and as Interests in Land" (2005) 29 Adv | 53 |
| 14. | Peter J Allen & Richard I Cottee, "The Effect of the Rule Against Perpetuities on Pre-Emptive Rights in Joint Ventures" (1982) 4:1 Aust Mining and Petroleum LJ 190 | 44 |
| 15. | Virginie Gauthier, David Sieradzki and Hugo Margoc, "Rights of First Refusal and Options to Purchase in Insolvency Proceedings – Not Quite Insurmountable" (2019) 9 J Insolvency Institute Can 103 | 31 |

**Statutes, Regulations, Rules, etc.:**

| No. | Statute, Regulation, Rule, etc. | Section, Rule, Etc. |
|---|---|---|
| 1. | *Income Tax Act*, RSC 1985, c 1 (5th Supp) | s 49 |
| | *Loi de l'impôt sur le revenu*, LRC 1985, c 1 (5e suppl) | art 49 |
| 2. | *The Trustee Act, 2009*, SS 2009, c T-23.01 | s 58 |
| 3. | *The Perpetuities and Accumulations Act*, CCSM, c P33 | Generally |
| | *Loi sur les dispositions à titre perpétuel et la capitalisation, CPLM c P33* | Généralement |
| 4. | *Perpetuities Act*, SNS 2011, c 42 | Generally |

## PART VII – STATUTES, LEGISLATION, RULES, ETC.

**Legislation and section**

| Legislation, etc. in alphabetical order that could not be hyperlinked directly to the provision (in English) | Legislation, etc. in alphabetical order that could not be hyperlinked directly to the provision (in French) |
|---|---|
| ***Income Tax Act*, RSC 1985, c 1 (5th Supp), s. 49**<br>Grant of options<br><br>49 (1) Subject to subsections (3) and (3.1) and for the purposes of this Subdivision, the granting of an option is equivalent to the disposition of property the adjusted cost base of which, for the person giving the option, immediately before the option is granted, is void, except in the case of one of the following options:<br>(a) an option to acquire or dispose of a principal residence;<br>(b) an option given by a company to acquire shares of its capital stock or bonds to be issued by it;<br>(c) an option given by a trust to acquire units to be issued by it. | ***Loi de l'impôt sur le revenu*, LRC 1985, c 1 (5e suppl) art 45**<br>Octroi d'options<br><br>49 (1) Sous réserve des paragraphes (3) et (3.1) et pour l'application de la présente sous-section, l'octroi d'une option équivaut à la disposition d'un bien dont le prix de base rajusté, pour celui qui donne l'option, immédiatement avant l'octroi de l'option, est nul, sauf s'il s'agit d'une des options suivantes :<br>a) une option portant sur l'acquisition ou la disposition d'une résidence principale;<br>b) une option donnée par une société pour l'acquisition d'actions de son capital-actions ou d'obligations qu'elle doit émettre;<br>c) une option donnée par une fiducie pour l'acquisition d'unités qu'elle doit émettre. |

| Legislation, etc. in alphabetical order that could not be hyperlinked directly to the provision (in English) | Legislation, etc. in alphabetical order that could not be hyperlinked directly to the provision (in French) |
|---|---|
| ***The Trustee Act, 2009*, SS 2009, c T-23.01**<br>Rules against perpetuities cease to apply<br>58 The rules against perpetuities are no longer the law of Saskatchewan. | French – N/A |