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

RESPONDING FACTUM OF THE APPLICANT, CITY OF OTTAWA
(Responding Party re Remittal of Severance Issue)

Date: June 9, 2022

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PART I – OVERVIEW

1. Parties can enter into agreements that provide for perpetual obligations. The 1981 Agreement was such an agreement. On Application, those obligations were found to be valid and enforceable contractual rights. On appeal, the Court of Appeal had a narrow point of disagreement with the Application Judge. Without disturbing any of the other findings of the Application Judge, it found that two sections of the 1981 Agreement created contingent interests in land (rather than contractual rights) that did not vest during the required period and are therefore void for remoteness by operation of the *Perpetuities Act*, R.S.O. 1990, c. P. 9 (the "***Act***").

2. ClubLink Corporation ULC ("**ClubLink**") argues that as a result of this narrow finding, the entire 1981 Agreement and a chain of successive agreements (many of which no declaratory relief was even sought by the City of Ottawa (the "**City**") on the original Application) should be void insofar as the so-called Golf Course Lands are concerned. The foundational principle asserted by ClubLink that "where Courts find parts of a contract unenforceable, the general rule is that the entire contract fails and is unenforceable"[1] is unsupported by case law and incorrect. No further judicial relief is required or warranted. The only effect of the Court of Appeal's decision is that the City has lost the ability to enforce one of the rights it bargained for by virtue of the passage of time. This has no impact on ClubLink's other binding contractual obligations.

3. ClubLink cites the doctrine of severance in an attempt to have the Court unwind a whole chain of enforceable agreements. This is a straw man. No party asked the Court for relief by way of severance, and the doctrine has no application here. The remedy ClubLink requests has been identified by the Supreme Court as applicable only in "the most egregious and abusive cases" of

[1] Factum of ClubLink Corporation ULC dated May 2, 2022 ("**ClubLink Factum**"), para. 30.

contractual illegality,[2] which this is not. The expiry of the 21-year "wait and see" period without a contingent interest vesting is an outcome expressly contemplated by the *Act*,[3] such that the 1981 Agreement is not an "illegal" contract.

PART II – BACKGROUND

A. The 1981 Agreement

4. 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**").[4]

5. By 1979, Campeau had assembled the Campeau Lands, with a view to creating a residential development to be called the Marchwood-Lakeside Community. An existing 9-hole golf course was located within the Campeau Lands.[5]

6. Campeau's development could not proceed unless both the Regional Municipality of Ottawa Carleton (the "**Region**") and Kanata amended their respective Official Plans to allow for residential development.[6] In order to secure the municipalities' support for its proposal, Campeau offered to designate 40% of the Campeau Lands as open and recreational space.[7]

7. The Region was originally opposed to granting the requisite approvals. The Region's Planning Committee meeting record in April 1981 reflects: "It was noted that a major selling point of the development concept was the understanding that the golf course and certain high profile environmental lands were to be retained, in perpetuity, for public use." The Region's Planning

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[2] *Transport North American Express Inc. v. New Solutions Financial Corp.* ("***Transport***"), 2004 SCC 7, para. 40, City of Ottawa's Book of Authorities ("**BOA**"), Tab 3.
[3] *Perpetuities Act*, R.S.O. 1990, c. P. 9, s. 4, Schedule "B".
[4] The factual background that led to the execution of the 1981 Agreement is set out in *City of Ottawa v. ClubLink Corporation ULC*, 2021 ONSC 1298 ("**Application Decision**"), paras. 2, 5 and 9-15, BOA, Tab 1.
[5] Application Decision, para. 10, BOA, Tab 1.
[6] Application Decision, para. 11, BOA, Tab 1.
[7] Application Decision, paras. 12-13, BOA, Tab 1.

Committee ultimately recommended granting approval on the condition precedent that Campeau and Kanata come to an agreement that provided for approximately 40% open space in the area of the Marchwood-Lakeside Community.[8]

8. Approximately two weeks later, on May 26, 1981, Campeau and Kanata entered into such an agreement (the "**1981 Agreement**").[9]

9. The terms of the 1981 Agreement are reviewed in paragraphs 16-23 of the Application Decision. Those included, most notably for the present purposes:

(a) The requirement as set out in section 3, that approximately 40% of the total development area "shall" be left as open space for recreation and natural environment purposes, including a proposed 18-hole golf course; and

(b) The agreed-upon "methods of protection" set out in section 5, including that the golf course would be operated by Campeau "in perpetuity".[10]

B. The Intent of the 1981 Agreement Was To Preserve Open Space

10. In its analysis of the 1981 Agreement, this Court repeatedly found that the parties' true intention was "to ensure that 40% remains as open space,"[11] as expressly stated in section 10 of the agreement:

> I begin the analysis by highlighting the intent of the parties as expressed in s. 10 of the 1981 Agreement: *to establish as proposed by Campeau to provide 40% of the Campeau Lands as open space*. Campeau, while abiding by the 40% principle, incorporated a golf course to be operated in perpetuity; in doing so, Campeau made productive use of a significant portion of the open space lands.[12]

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[8] Application Decision, para. 14, BOA, Tab 1.
[9] Application Decision, para 14, BOA, Tab 1. Please see Schedule "C" for a table of concordance identifying how the contacts have been previously identified by the parties and the Courts.
[10] Application Decision, paras. 16, 18, BOA, Tab 1.
[11] Application Decision, para. 127. See also paras. 5, 75, 84, 85, 104, BOA, Tab 1.
[12] Application Decision, para. 75. See also paras. 2, 5, BOA, Tab 1.

11. Section 5 and the subsequent sections were identified as providing "mechanisms to maintain the 40% principle and protect the open space lands"; being "safeguards which preserve the true intent of maintaining the 40% principle."[13]

12. This Court characterized the 1981 Agreement as also having a "principal objective of operating of a golf course in perpetuity"[14], noting that: "The continued operation of the Golf Course is essential to maintaining the 40% open space principle."[15] This Court repeatedly concluded that the parties intended for the golf course to operate in perpetuity.[16] Importantly: "Campeau wanted to operate a golf course. Kanata did not impose the golf course use but clearly wanted to ensure that the 40% principle was maintained."[17]

13. As set out below, those findings of fact were not challenged on appeal, nor was the conclusion that the parties' overall intention was to ensure 40% open space was preserved.

C. The Related Agreements

14. The 1981 Agreement contemplated that additional agreements would be required to set out in detail the future development of the Campeau Lands and the precise location of the open space lands for, amongst other things, the golf course.[18]

15. By subsequent agreements dated June 10, 1985 and December 29, 1998 between Campeau and Kanata, they confirmed the location of the golf course (the "**Golf Course Lands**") within the Campeau Lands (collectively the "**Golf Course Agreement**").[19]

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[13] Application Decision, para. 84, BOA, Tab 1. See also para. 88, in reference to s. 5(4) and 9: "these sections give effect to the true intended purpose: maintaining the 40% open space principle."
[14] Application Decision, para. 77, BOA, Tab 1.
[15] Application Decision, para. 86, BOA, Tab 1.
[16] Application Decision, paras. 82, 83, BOA, Tab 1.
[17] Application Decision, para. 127 (underlining added), BOA, Tab 1.
[18] Application Decision, para. 24, BOA, Tab 1.
[19] Application Decision, para. 25, BOA, Tab 1.

16. On December 20, 1988, Campeau and the City entered into an agreement by which they identified the land that was to be set aside to meet the commitment to 40% open space (collectively with the 1981 Agreement, the "**40% Agreement**").[20]

17. By 1985, portions of the Campeau Lands were developed as residential subdivisions. As a condition of subdivision approval, subdivision agreements had to implement the requirements of the 1981 Agreement and, thereafter, the 40% Agreement.[21]

18. In 1989, Campeau sold certain of the Campeau Lands, including the Golf Course Lands, to another real estate company, Genstar Development Company Eastern Ltd. ("**Genstar**"). Genstar, Campeau and Kanata entered into an agreement dated March 30, 1989 whereby Genstar assumed Campeau's obligations under the 40% Agreement. Genstar later amalgamated with Imasco Enterprises Inc. ("**Imasco**").[22]

19. In 1997, ClubLink purchased the Golf Course Lands from Imasco. ClubLink, Imasco and Kanata entered into an agreement dated November 1, 1996 whereby ClubLink agreed to assume Imasco's obligations in respect of the 40% Agreement and the Golf Course Agreement (the "**ClubLink Assumption Agreement**").[23] The ClubLink Assumption Agreement was explicit:

> 11. Open Space Lands: The parties to this Agreement acknowledge and agree that nothing in this Agreement alters the manner in which approximately 40% of the total development area of the "Marchwood Lakeside Community" is to be left open as space for recreation and natural environmental purposes (the "Open Space Lands") as referred to in Section 3 of the 1981 Agreement, so that the calculation of the Open Space Lands will continue to include the area of the Golf Course Lands including, without limitation, any area occupied by any building or other facility ancillary to the golf course and country club located now or in the future on the Golf Course Lands. [...] [24]

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[20] Application Decision, para. 26, BOA, Tab 1.
[21] Application Decision, para. 28, BOA, Tab 1.
[22] Application Decision, para. 30, BOA, Tab 1.
[23] Application Decision, para. 31, BOA, Tab 1.
[24] ClubLink Assumption Agreement, s. 11 (underlining added), Exhibit "S" to the Affidavit of Eileen Adams-Wright sworn October 24, 2019 (the "**Adams-Wright Affidavit**"), Application Record of the Applicant, City of Ottawa dated February 11, 2022 ("**City's AR**"), Vol. III, Tab 2S, p. 792-793.

20. In 2001, Kanata's rights and obligations became the City's upon amalgamation.[25]

D. The City's Application to the Superior Court of Justice

21. This proceeding was commenced by the City in October 2019. It was prompted by ClubLink's announcement in 2018 that it was pursuing options for alternative use of the lands,[26] and its submission of planning applications to the City in October 2019 for development approvals required to redevelop the Golf Course Lands for residential purposes.[27]

22. The City's application to this Court sought a declaration that ClubLink's obligations in the ClubLink Assumption Agreement and the underlying 40% Agreement remain valid and enforceable, and an order directing ClubLink to withdraw its planning applications.[28]

23. The issues as characterized by this Court included, among others:

(a) The validity of the 1981 Agreement, including whether it creates interests in land that are void for perpetuities; and

(b) If s. 5(4) and/or 9 of the 1981 Agreement are void for perpetuities, can they be severed from the agreement so that the rest remains valid and binding.[29]

24. As set out above, this Court determined that the parties' true intended purpose in the 1981 Agreement was maintaining the 40% open space principle.[30]

25. This Court separately concluded that ss. 5(4) and 9 and the potential conveyance they contemplated "are consequential events but do not form part of the true intent of maintaining the 40% open space principle", and are not interests in land.[31] On that basis, those provisions and the

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[25] Application Decision, para. 34, BOA, Tab 1.
[26] Application Decision, para. 39, BOA, Tab 1.
[27] Application Decision, para. 41, BOA, Tab 1.
[28] Notice of Application issued October 25, 2019, para. 1(a) and (b), City's AR, Vol. I, Tab 1, p. 3.
[29] Application Decision, para. 57, BOA, Tab 1.
[30] Application Decision, para. 88, BOA, Tab 1.
[31] Application Decision, paras. 76, 79, 85, 89, 104, BOA, Tab 1.

1981 Agreement were found to be valid and enforceable,[32] such that there was no need to consider the severance issue raised by ClubLink in its response to the application.[33]

E. The Court of Appeal Did Not Consider the So-Called "Severance Issue"

26. By way of judgment dated November 26, 2021, the Court of Appeal allowed ClubLink's appeal. The Court of Appeal's analysis focused only on the interpretation of ss. 5(4) and 9 of the 1981 Agreement,[34] and concluded:

> [11] […] in the context of all the Agreements, the plain language of ss. 5(4) and 9 creates a contingent interest in land. Sections 5(4) and 9 are therefore void and unenforceable as being contrary to the rule against perpetuities because the City's right to call upon a conveyance of the golf course lands did not vest during the perpetuity period. […][35]

27. While the Court did not undertake a detailed analysis of the other contractual terms, it did consider the "overall purpose and nature of the Agreements" and held:

> [56] The Agreements formed part of a development contract that allowed Campeau to develop its own land but subject to certain limits to further the City's public policies, most notably, the 40% principle.
>
> [57] There is no question that the 40% principle was an important contractual feature that allowed Campeau to advance the development of property and further the City's public policies. The City wanted to ensure that 40% of the property to be developed would remain as open space to be used in certain ways. One of the ways was the operation in perpetuity of a golf course. That said, the 40% principle, by itself, does not determine the issue of whether the parties intended to give Kanata (and its successors and assigns) an interest in land or a contractual right to protect the 40% principle.[36]

28. The Court of Appeal did not set aside or alter the Application Judge's interpretation of the parties' overall intentions[37] – rather, it's point of narrow disagreement with the Application Judge

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[32] Application Decision, para. 104, BOA, Tab 1.
[33] Application Decision, para. 146, BOA, Tab 1.
[34] *Ottawa (City) v. ClubLink Corporation ULC*, 2021 ONCA 847 ("**Appeal Decision**"), paras. 3, 8, 11, 31, 46-50, 58, 60-65, 70-71, BOA, Tab 2.
[35] Appeal Decision, para. 11, BOA, Tab 2.
[36] Appeal Decision, paras. 56-57 (underlining added), BOA, Tab 2.
[37] Appeal Decision, paras. 32-33, BOA, Tab 2.

was whether two sections of the agreement constituted an intent to create an interest in land as opposed to a contractual right.[38]

29. The Court of Appeal declined to consider ClubLink's argument that ss. 5(4) and 9 could not be severed, such that the entire 1981 Agreement failed. As set out by the Court of Appeal:

> [68] In my view, this court is not in a position to consider ClubLink's argument.
>
> [69] First, ClubLink did not identify which provisions of the 1981 Agreement that are so interrelated to ss. 5(4) and 9 and the void contingent interests in land that they must necessarily be inoperative. Further, there is no basis to void myriad other provisions in the 1981 Agreement that are unrelated to the golf course and that have already been performed.
>
> [70] Moreover, the focus of the submissions before this court was on the validity and enforceability of ss. 5(4) and 9 of the 1981 Agreement. We do not have the benefit of the application judge's findings on the larger question raised by ClubLink. And, in my opinion, the determination that ss. 5(4) and 9 of the 1981 Agreement are void and unenforceable may affect provisions of not simply the 1981 Agreement but also the 1985 and 1988 Agreements, as well as the Assumption Agreement. In my view, if the parties cannot agree, this larger question should be remitted to the application judge for determination.[39]

30. In short, without making any determination on the point given the absence of evidence before it on that point, the Court of Appeal invited the parties to address this issue to the Application Judge if they so wished. ClubLink then requested this further attendance.

PART III – ISSUE

31. The issue on this attendance is whether the 40% Agreement, the Golf Course Agreement and the ClubLink Assumption Agreement remain valid and enforceable, in light of the Court of Appeal's determination that ss. 5(4) and 9 are void for remoteness as contemplated by the *Act*.

32. The City's position is that the agreements remain valid and enforceable perpetual contracts, which continue to have effect as if ss. 5(4) and 9 are omitted from the 1981 Agreement.[40]

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[38] Appeal Decision, paras. 31, 33, 39, 46-47, BOA, Tab 2.
[39] Appeal Decision, paras. 68-70 (underlining added), BOA, Tab 2.
[40] Anger & Honsberger, *Law of Real Property*, 3rd ed., § 10:19, BOA, Tab 4.

PART IV – LAW AND ARGUMENT

A. The Agreements are Perpetual Contracts

33. The Court of Appeal, as recently as 2021, confirmed that parties may enter into contracts that create perpetual obligations.[41] Those obligations can bind successors in title, and cannot be terminated unilaterally.[42] Perpetual obligations do not expire, but continue "permanently or forever."[43] The 1981 Agreement is such a contract, as repeatedly found by this Court.[44]

34. In this further attendance, ClubLink is asking the Court to relieve it of its perpetual contractual obligations, because it now considers it more advantageous to re-develop the Golf Course Lands with a residential subdivision than continue to operate a golf course. The Court of Appeal affirmed that such a perceived change in circumstance should have no impact on parties' obligations under a perpetual agreement:

> An after-the-fact analysis as to whether the arrangement turns out to be economically advantageous to one party or the other ought not to have factored into the interpretation of the agreement that was reached. The fact that an agreement reached between two parties is not, after many years of operation, economically "fair" to one party or the other should not operate so as to justify ending the relationship. It is not the court's role to "save a contracting party from a bargain that proves improvident with hindsight".[45]

35. Furthermore: a court cannot change the content of a contract, nor can it require parties to renegotiate certain terms of the contract.[46] The fact that market conditions may change, even significantly, since the parties entered a contract "does not on its own justify disregarding the terms of the Contract and its nature."[47]

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[41] *Conseil Scolaire Catholique Franco-Nord v. Nipissing Ouest (Municipalité)* ("***Conseil Scolaire***"), 2021 ONCA 544, paras. 46, 77, BOA, Tab 5.
[42] *Thunder Bay (City) v. Canadian National Railway Company* ("***Thunder Bay***"), 2018 ONCA 517, paras. 1, 4, 7, 32, 40, 46, 49, 60, 77, 80, BOA, Tab 6.
[43] *Thunder Bay*, 2018 ONCA 517, para. 50, BOA, Tab 6.
[44] For example, see Application Decision, paras. 2, 5, 18, 75, 77, 82, 83, 127, BOA, Tab 1.
[45] *Conseil Scolaire*, 2021 ONCA 544, para. 70 (underlining added, citations omitted), BOA, Tab 5.
[46] *Churchill Falls (Labrador) Corp. v. Hydro-Quebec ("**Churchill Falls**")*, 2018 SCC 46, paras. 6, 110, 121, 124, 127-128, 132, 138, BOA, Tab 7.
[47] *Churchill Falls*, 2018 SCC 46, para. 137, BOA, Tab 7. See also para. 70.

36. ClubLink's submissions on this further attendance, that "the parties neither bargained for nor reasonably expected that Campeau would be bound to operate a golf course on the lands *forever*"[48] and that the parties "cannot have intended that Campeau and its successors to be bound to operate the golf course 'in perpetuity'"[49] is inconsistent with:

(a) the express terms of the 1981 Agreement, which prescribes that the Golf Course Lands "shall be operated by Campeau as a golf course in perpetuity";[50]

(b) the repetition of that obligation in the Golf Course Agreement, that any sale of the golf course would be subject to "the purchaser entering into an agreement with the City providing for the operation of the golf course in perpetuity…";[51] and

(c) this Court's finding that Campeau, "while abiding by the 40% principle, incorporated a golf course to be operated in perpetuity", which enabled Campeau to make productive use of a significant portion of the open space lands.[52]

37. ClubLink should not be permitted to circumvent its contractual commitments, as found in the 40% Agreement, the Golf Course Agreement and the ClubLink Assumption Agreement.

B. The 1981 Agreement is Consistent with the *Perpetuities Act*

38. The *Act* contemplates the execution of an agreement that establishes contingent interest in land which may not vest within 21 years. The Court of Appeal found that ss. 5(4) and 9 of the 1981 Agreement created contingent interests in land[53] and therefore the *Act* is engaged.

39. Section 3 of the *Act* confirms the initial validity of ss. 5(4) and 9 of the 1981 Agreement:

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[48] ClubLink Factum, para. 37.
[49] ClubLink Factum, para. 40.
[50] 1981 Agreement, s. 5(1), Exhibit "F" to Adams-Wright Affidavit, City's AR, Vol. I, Tab, 2F, p. 51.
[51] (1988) Golf Course Agreement, s. 4, Exhibit "I" to Adams-Wright Affidavit, City's AR, Vol. I, Tab, 2I, p. 291.
[52] Application Decision, para. 75, BOA, Tab 1.
[53] Appeal Decision, para. 11, BOA, Tab 2.

> **Possibility of vesting beyond period**
>
> 3. No limitation creating a contingent interest in property shall be treated as or declared to be invalid as violating the rule against perpetuities by reason only of the fact that there is a possibility of such interest vesting beyond the perpetuity period.

40. Section 4 of the *Act* enshrines in statute the "wait and see" principle, confirming that ss. 5(4) and 9 were presumptively valid for the duration of the perpetuity period:

> **Presumption of validity and "Wait and See"**
>
> **4** (1) Every contingent interest in property that is capable of vesting within or beyond the perpetuity period is presumptively valid until actual events establish,
>
> a) that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of section 8 or 9, shall be treated as void or declared to be void; […]

41. Where, as the Court of Appeal found in this case, the contingent interest in land does not vest within the perpetuity period, section 4(3) of the *Act* specifies the applicable remedy: it "shall be declared or treated as void for remoteness only if, and so far as, the right is not fully exercised within the perpetuity period."[54]

42. Thus, the 1981 Agreement was at no time contrary to statute – in ss. 5(4) and 9 it created a presumptively valid contingent interest in land, which then became void for remoteness once the perpetuity period expired. The Court of Appeal's ruling that ss. 5(4) and 9 are void for remoteness because the City's right to call upon a conveyance of the Golf Course Lands did not vest during the perpetuities period[55] was a straightforward application of the applicable statutory remedy.[56] This narrow ruling has no impact on other sections of the 1981 Agreement which are not interests in land, but rather are straightforward contractual obligations.

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[54] *Perpetuities Act*, R.S.O. 1990, c. P. 9, s. 3 and 4, Schedule "B".
[55] Appeal Decision, para. 11, BOA, Tab 2.
[56] See *Perpetuities Act*, R.S.O. 1990, c. P. 9, s. 5, Schedule "B". This provision sets out the process to apply to the Court for a declaration as to the validity or invalidity of an interest.

C. The Balance of the 1981 Agreement is Enforceable

43. ClubLink's foundational argument is incorrect: it is not the case that "where Courts find parts of a contract unenforceable, the general rule is that the entire contract fails and is unenforceable".[57] Chaos would result if that overarching statement were true. ClubLink cites no cases in support of this sweeping proposition, and none of the cases cited in it's submissions deal with contractual terms found to be void for remoteness due to the rule against perpetuities.

44. Anger & Honsberger's *Law of Real Property*, in its chapter on the rule against perpetuities, sets out: "The general rule is that an instrument containing any void limitation takes effect as if the void limitation and all limitations dependent on it were omitted from the instrument."[58]

45. This is evident in a multitude of contexts where the rule against perpetuities is engaged:

(a) Where an option to purchase in a lease is void as contrary to the rule against perpetuities, "the effect of this is that the lease takes effect as if the void limitation created by the option were omitted".[59] The balance of the lease remains intact.

(b) Where a condition subsequent to and limiting an estate in fee simple is found to be void as contrary to the rule against perpetuities, that term cannot be enforced and the vendor is left with fee simple absolute.[60] The underlying conveyance of property is not unwound.

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[57] ClubLink Factum, para. 30.
[58] Anger & Honsberger, *Law of Real Property*, 3rd ed., § 10:19, BOA, Tab 4. Note that the continued correctness of the statement as it pertains to "limitations dependent" in Ontario is questionable, due to *Perpetuities Act*, R.S.O. 1990, c. P. 9, s. 10, which directs: "A limitation that, if it stood alone, would be valid under the rule against perpetuities is not invalidated by reason only that it is preceded by one or more limitations that are invalid under the rule against perpetuities, whether or not such limitation expressly or by implication takes effect after, or is subject to, or is ulterior to and dependent upon, any such invalid limitation." This provision has not yet been considered in the jurisprudence.
[59] *Harris v. Minister of National Revenue*, [1966] S.C.R. 489, 1966 CanLII 58 (S.C.C.), p. 497, BOA, Tab 8.
[60] *North Gower (Township) Public School Board v. Todd*, [1968] 1 O.R. 63-67, 1967 CanLII 279 (Ont. C.A.), paras. 5, **7**, 10, BOA, Tab 9; *Missionary Church, Canada East v. Nottawasaga (Township)* (1980), 32 O.R. (2d) 88, 1980 CanLII 1851 (Ont. H.C.), paras. 2, 3, 12, BOA, Tab 10. See also Anger & Honsberger, *Law of Real Property*, 3rd ed., § 8:4 and § 8:13, BOA, Tab 4.

(c) Where an estate or interest devolves by reason of a void limitation in a will, it devolves subject to such directions as were validly imposed by the testor.[61] The entire will is not unwound.

46. In this case, the 1981 Agreement continues in effect as if ss. 5(4) and 9 are omitted. There is no basis to vitiate the other contractual terms, many of which have already been performed, and all of which are capable of continued performance. Nor is there any basis to unwind the further commitments made in the 40% Agreement, the Golf Course Agreement and the ClubLink Assumption Agreement.

47. ClubLink's obligation to operate the golf course in perpetuity is not limited by the City's contingent right to the reconveyance of the Golf Course Lands in s. 5(4). Rather, the omission of that limitation simply deprives the City of one remedy that it had to ensure the continued operation of the golf course if ClubLink "desire[d] to discontinue the operation of the golf course and it [could] find no other persons to acquire or operate it."[62]

48. As another example: s. 5(3) of the 1981 Agreement grants the City a right of first refusal should ClubLink receive an offer for the sale of the golf course.[63] A right of first refusal is a personal right that does not create an immediate interest in land, which is not subject to the rule against perpetuities.[64] There is no principled basis upon which the City's contractual right of first refusal would be impacted by the Court of Appeal's finding that a separate term in the 1981 Agreement is void for remoteness.

49. The general rule identified by Anger & Honsberger in the context of perpetuities also finds application in other types of contracts, as demonstrated by several of the cases ClubLink relies

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[61] Anger & Honsberger, *Law of Real Property*, 3rd ed., § 10:19, BOA, Tab 4.
[62] 1981 Agreement, s. 5(4), Exhibit "F" to Adams-Wright Affidavit, City's AR, Vol. I, Tab, 2F, p. 51.
[63] Application Decision, para. 18, BOA, Tab 1.
[64] *2123201 Ontario Inc. v. Israel Estate* ("***Israel Estate***"), 2016 ONCA 409, paras. 22-24, BOA, Tab 11.

upon where the Court found a term of a contract to be unenforceable, without a subsequent finding that the entire contract was thereby rendered unenforceable.

50. In *Shafron v. KRG Insurance Brokers (Western) Inc.* ("***Shafron***"), the restrictive covenant in an employment contract was found unenforceable due to its ambiguity, but the employment contract was not set aside.[65] Similarly, in *Mason v. Chem-Trend Ltd. Partnership*, the Ontario Court of Appeal applied *Shafron* and found that a non-competition covenant was unreasonable and unenforceable, while commenting in its analysis that the company would continue to benefit from the ongoing obligations imposed by the confidentiality term in the employment contract[66] – implicitly recognizing the ongoing enforceability of the balance of the contract.

51. In addition, in *2176693 Ontario Ltd. v. Cora Franchise Group Inc.* ("***Cora***"), a term in a franchise agreement was found to be unenforceable, but there was no corresponding finding that the entire agreement was unenforceable, thereby rendering the two operators of franchised restaurants without a contractual framework for their ongoing businesses.[67]

52. ClubLink's overarching thesis that the entire 1981 Agreement and the subsequent agreements should now be declared unenforceable is demonstrably incorrect, and appears to be based upon a misunderstanding of the applicability of the doctrine of severance, as set out below.

D. The Doctrine of Severance Has No Applicability in this Circumstance

53. ClubLink's focus on the doctrine of severance is incorrect. The doctrine has no application where a contractual term has become void for remoteness. Rather, severance is a mechanism that was developed by the Courts to make an otherwise illegal contract legal.[68]

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[65] *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, paras. 1-2, 5, 36-42, 44-46, 48-50, 58-59, Tab 12.
[66] *Mason v. Chem-Trend Ltd. Partnership*, 2011 ONCA 344, at paras. 13-16, 22-24, 31, 34, BOA, Tab 13.
[67] *2176693 Ontario Ltd. v. Cora Franchise Group Inc.* ("***Cora***"), 2015 ONCA 152, para. 28-31, 64, 71, BOA, Tab 14.
[68] *Transport*, 2004 SCC 7, para. 27, BOA, Tab 3.

54. The 1981 Agreement is not an illegal contract and therefore severance has no applicability.

1) *Void Terms are Distinct from Unenforceable or "Illegal" Terms*

55. There are important conceptual differences between contractual terms that are void, and terms that are unenforceable as contrary to statute (so-called, statutory illegality).[69] The distinction between a term that is void and a term that is unenforceable is "more than merely technical", as stated by the Court of Appeal.[70] This is because the analysis and potential consequences differ depending upon whether a term is found to be void, as opposed to unenforceable or "illegal".

56. The word "void" has a well established legal meaning: "it imports a lack of validity or legal force".[71] A term that is void is "of no legal force or effect", is "empty, spent and of no effect", and cannot be saved by a curative provision.[72]

57. This is conceptually distinct from a contract that is unenforceable because it would be contrary to statute. Statutory illegality requires the Court to make a finding that a term is expressly or impliedly prohibited by statute and, if not specified by the statute, the consequences of that prohibition.[73]

58. ClubLink's starting point, that one unenforceable term necessarily renders an entire contract unenforceable,[74] is an incorrect recitation of the historically inflexible approach, that a contract that was contrary to statute was necessarily void *ab initio*.[75]

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[69] *Still v. Minister of National Revenue* ("***Still***"), 1997 CarswellNat 2193 (Fed. C.A.), paras. 13, 17-19, 21-22, BOA, Tab 15.
[70] *Cora*, 2015 ONCA 152, paras. 68-69, BOA, Tab 14.
[71] *Price v. Turnbull's Grove Inc.*, 2007 ONCA 408, para. 34, BOA, Tab 16.
[72] *Price v. Turnbull's Grove Inc.*, 2007 ONCA 408, paras. 23, 34-37, BOA, Tab 16.
[73] See *Cora*, 2015 ONCA 152, paras. 35-36, for a discussion of a contract that is unenforceable because enforcement would be contrary to statute, and paras. 64-70, for a discussion of the difference between a provision being void, as opposed to unenforceable as contrary to statute, BOA, Tab 14. See also *Still*, 1997 CarswellNat 2193 (Fed. C.A.), para. 43, BOA, Tab 15.
[74] ClubLink Factum, para. 30.
[75] *Cope v. Rowlands* (1836), 2 M. & W. 149, 150 E.R. 707 (Eng. Exch.), p. 710, as cited in *Still*, 1997 CarswellNat 2193 (Fed. C.A.), paras. 9, 17, BOA, Tab 15. Of note, the Federal Court of Appeal's summary of the doctrine of illegality was endorsed by the Supreme Court in *Transport*, 2004 SCC 7 , para. 20, BOA, Tab 3.

59. As the strict application of the historical approach at times led to harsh or inequitable results,[76] Canadian courts developed a more flexible approach to statutory illegality in contract, "in which courts resorted to various judicial techniques to avoid innocent parties suffering the consequences of a finding of illegality under that legislation".[77] Now, only at the far end of the spectrum, for contracts that are "so objectionable that their illegality will taint the entire contract", will Courts declare the entire contract to be void *ab initio*. Examples include exploitative loan-sharking arrangements or contracts with a criminal object.[78]

60. The extremity of this remedy is demonstrated by the fact that none of the cases cited by ClubLink that contemplate severance in fact resulted in a finding that the entire contract was unenforceable.[79]

61. The modern approach rejects the notion that simply because a contract is on its face prohibited by statute it is illegal; rather, "a finding of illegality is dependent, not only on the purpose underlying the statutory prohibition, but also on the remedy being sought and the consequences which flow from a finding that a contract is unenforceable."[80] Thus, the enforceability of a term that appears to be contrary to a statute, or is "illegal", is now the subject of judicial discretion. This is conceptually distinct from a void term, which is so without any need for a Court order to set it aside.

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[76] *Still*, 1997 CarswellNat 2193 (Fed. C.A.), paras. 7, 9 , 12, 15, 17, BOA, Tab 15.
[77] *Still*, 1997 CarswellNat 2193 (Fed. C.A.), paras. 20, 24, 37, BOA, Tab 15.
[78] *Transport*, 2004 SCC 7 , para. 6, BOA, Tab 3.
[79] In *Canadian American Financial Corp.*, the impugned covenant in restraint of competition was severed from the contract, though there was no finding that the contract was otherwise unenforceable (per p. 5); in *Transport*, notional severance was applied to read down the clause to make it legal (per paras. 48-49); in *Shafron*, while the Supreme Court determined neither notional nor blue-pencil applied to save the impugned restricted covenant in the employment contract, there was no finding that the whole contract was invalid (per paras. 10, 42, 50, 59); and in *Cora*, while the Court found the clause was unenforceable (not void), there was no corresponding finding that the entire franchise agreement was unenforceable (per para. 71).
[80] *Still*, 1997 CarswellNat 2193 (Fed. C.A.), paras. 37, 43, 48 (underlining added), BOA, Tab 15.

2) *The Remedy of Severance is Inapplicable Where a Term is Void*

62. The doctrine of severance was developed for circumstances where the Courts are grappling with the consequence of a potential finding that a term is contrary to statute and thereby unenforceable, including whether the impugned term is so fundamental to the contract that the entire agreement would necessarily be illegal if the term was allowed to remain.[81] Severance is only one on a spectrum of available remedies available to the Court in that context.[82]

63. Where a term is void by virtue of a statutory provision, there is no further analysis – "the legislature has spoken."[83] In contrast, where a term may be unenforceable by virtue of a statute:

> […] the enforceability and severance analysis requires an extra step. The appellant is seeking to enforce a contractual obligation, an obligation that by its terms is too broad and incapable of being enforced without violating [a statute]. The appellant needs the assistance of the court to permit it to call for something less, something that will be in accordance with the statute.[84]

64. The *Act* already sets out the consequence of the determination that ss. 5(4) and 9 created a contingent interest in land – while it was presumptive valid, if the interest did not vest in the perpetuity period, the interest is void.[85] There is no need, nor would it be appropriate, for judicial discretion to be employed to apply an alternative remedy than that prescribed by the legislature.

65. This facts of this case can be considered in contrast with the dilemma faced by the Supreme Court in the *Transport North American Express Inc. v. New Solutions Financial Corp.* ("***Transport***"). That case dealt with the application of s. 347 of the *Criminal Code*, which states that an effective annual rate of interest that exceeds sixty per cent is "criminal", but does not specify what the effect or consequence (contractually) was to be where an agreement breached that

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[81] *Transport*, 2004 SCC 7 , paras. 27-28, 32, BOA, Tab 3.
[82] *Transport*, 2004 SCC 7 , paras. 4-6, 31, 40, BOA, Tab 3.
[83] *Cora.*, 2015 ONCA 152, para. 70, BOA, Tab 14.
[84] *Cora*, 2015 ONCA 152, paras. 67-70, BOA, Tab 14.
[85] *Perpetuities Act*, R.S.O. 1990, c. P. 9, ss. 3 and 4, Schedule "B". See for example *Israel Estate*, 2016 ONCA 409, para. 21, fn. 1, BOA, Tab 11.

provision. The Supreme Court considered the "spectrum of remedies available to judges in dealing with contracts that violate s. 347 of the *Code*"[86], and ultimately selected notional severance as the tool that "most appropriately cure[d] the illegality while remaining otherwise as close as possible to the intentions of the parties expressed in the agreement."[87] Based on the particular circumstances of that case, the Supreme Court opted to read down the infringing term so that the effective interest rate did not exceed the criminal rate, thereby making it consistent with the *Code*.[88]

66. There is no analogous analysis to be undertaken in this case, where the legislature has already prescribed the outcome. The doctrine of severance has no applicability to a contractual term that is void for remoteness.

E. The Court of Appeal Found that the Parties Intended to Create a Contingent Interest in Land

67. ClubLink urges this Court to intervene (though use of an inapplicable doctrine), on the premise that the voiding of ss. 5(4) and 9 of the 1981 Agreement "fundamentally alter[s] the bargain reached between Campeau and Kanata in the 1980s", and "would effectively saddle ClubLink with an obligation to continue operating the golf course with no 'off-ramps' […]".[89]

68. This is incorrect, in two respects.

69. First: the Court of Appeal's finding was that the parties intended to create contingent interests in land.[90] That necessarily means that Campeau and Kanata intended in 1981 that the "off-ramp" created by s. 5(4) would become void if the interest did not vest in the perpetuity period. The "wait and see" principle codified in the current *Act* is substantially the same as the

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[86] *Transport*, 2004 SCC 7, para. 6, 33, BOA, Tab 3.
[87] *Transport*, 2004 SCC 7, paras. 32, 48, BOA, Tab 3.
[88] *Transport*, 2004 SCC 7, para. 48, BOA, Tab 3.
[89] ClubLink Factum, para. 2.
[90] Appeal Decision, para. 63, BOA, Tab 2.

statute that was in force in May 1981.[91] There is thus no basis to suggest that the voiding of this provision "destablize[s] the parties' reasonable expectations by […] saddling Campeau and its successors with a perpetual obligation to operate a golf course (or find a buyer willing to do the same)", as ClubLink represents.[92]

70. Second: ClubLink continues to have "off-ramps" should it wish to stop operating a golf course. It may sell the Golf Course Lands to a new owner, on the same terms that it purchased it, subject to the City's right of first refusal.[93] That is the bargain that Campeau made in 1981, and ClubLink assumed in 1996. Or, as an alternative "off-ramp", ClubLink may re-negotiate the agreement with the City.

71. While ClubLink now wishes to unilaterally change the use of the Golf Course Lands for residential redevelopment, it is seeking judicial intervention to try to obtain rights that neither it nor its predecessors negotiated. The possibility of a change of use of the Golf Course Lands was only contemplated in two scenarios, one explicitly (s. 5(5)[94] and the other implicitly (s. 9[95]). However, in either scenario, that change of use was contingent on Kanata's discretion; to either not accept the conveyance of the Golf Course Lands, or to cease using the Golf Course Lands for recreation and natural environmental purposes. Campeau did not negotiate a free-standing right of re-development – it was always dependent on the municipality's discretion.

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[91] *The Perpetuities Act*, R.S.O. 1970, C. 343 (as amended), s. 4, Schedule "B".
[92] ClubLink Factum, para. 40.
[93] 1981 Agreement, s. 5(2) and (3), Exhibit "F" to Adams-Wright Affidavit, City's AR, Vol. I, Tab, 2F, p. 51.
[94] 1981 Agreement, s. 5(5): "In the event that Kanata will not accept the conveyance of the golf course as provided for in sub-paragraph (4) above then Campeau shall have the right to apply for development of the golf course lands in accordance with The Planning Act, notwithstanding anything to the contrary contained in this agreement."
[95] 1981 Agreement, s. 9: "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 environment purposes by Kanata then the owner of the land, if it is Kanata, shall reconvey it to Campeau at no cost unless the land was conveyed to Kanata in accordance with Section 33(5)(a) or 35b of The Planning Act".

72. In effect, the Court of Appeal's finding that ss. 5(4) and 9 are void for remoteness leaves ClubLink in the exact circumstance it has always been in. Only the City has lost a right, to acquire the Golf Course Lands at no cost, in the circumstances contemplated by s. 5(4).

73. There is no unfairness in holding ClubLink to the perpetual bargain that it knowingly assumed.[96]

PART V – ORDER SOUGHT

74. The Applicant / Responding Party on this further attendance, the City of Ottawa, respectfully requests an Order:

(a) Declaring that the obligations of ClubLink in s. 3 of the ClubLink Assumption Agreement and the underlying 40% Agreement remain valid and enforceable;

(b) Granting the costs of this proceeding, plus all applicable taxes; and

(c) Such further and other relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 9th day of June, 2022.

Kirsten Crain / Emma Blanchard / Laura Robinson
Borden Ladner Gervais LLP
Lawyers for the Applicant

[96] ClubLink Assumption Agreement, s. 3, Exhibit "S" to Adams-Wright Affidavit, City's AR, Vol. III, Tab 2S, p. 791. ClubLink agreed to: "assume 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…" The "Forty Percent Agreement" was defined collectively as the agreements dated May 26, 1981 and December 20, 1988; and the "Golf Club Agreement" was defined collectively as the agreements dated June 10, 1985 and December 20, 1988 (see City's AR, p. 789).

SCHEDULE "A" – AUTHORITIES

1. *City of Ottawa v. ClubLink Corporation ULC*, 2021 ONSC 1298
2. *Ottawa (City) v. ClubLink Corporation ULC*, 2021 ONCA 847
3. *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7
4. Anger & Honsberger, *Law of Real Property*, 3rd ed.
5. *Conseil Scolaire Catholique Franco-Nord v. Nipissing Ouest (Municipalité)*, 2021 ONCA 544
6. *Thunder Bay (City) v. Canadian National Railway Company*, 2018 ONCA 517
7. *Churchill Falls (Labrador) Corp. v. Hydro-Quebec*, 2018 SCC 46
8. *Harris v. Minister of National Revenue*, [1966] S.C.R. 489, 1966 CanLII 58 (S.C.C.)
9. *North Gower (Township) Public School Board v. Todd*, [1968] 1 O.R. 63-67, 1967 CanLII 279 (Ont. C.A.)
10. *Missionary Church, Canada East v. Nottawasaga (Township)* (1980), 32 O.R. (2d) 88, 1980 CanLII 1851 (Ont. H.C.)
11. *2123201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409
12. *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6
13. *Mason v. Chem-Trend Ltd. Partnership*, 2011 ONCA 344
14. *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152
15. *Still v. Minister of National Revenue*, 1997 CarswellNat 2193 (Fed. C.A.)
16. *Price v. Turnbull's Grove Inc.*, 2007 ONCA 408

SCHEDULE "B" – STATUTES, REGULATIONS AND BYLAWS

***Perpetuities Act*, R.S.O. 1990, c. P. 9**

Definitions

1 In this Act,

"court" means the Superior Court of Justice; ("tribunal")

"in being" means living or conceived; ("en existence")

"limitation" includes any provision whereby property or any interest in property, or any right, power or authority over property, is disposed of, created or conferred. ("délimitation") R.S.O. 1990, c. P.9, s. 1; 2006, c. 19, Sched. C, s. 1 (1).

Possibility of vesting beyond period

3 No limitation creating a contingent interest in property shall be treated as or declared to be invalid as violating the rule against perpetuities by reason only of the fact that there is a possibility of such interest vesting beyond the perpetuity period. R.S.O. 1990, c. P.9, s. 3.

Presumption of validity and "Wait and See"

4 (1) Every contingent interest in property that is capable of vesting within or beyond the perpetuity period is presumptively valid until actual events establish,

(a) that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of section 8 or 9, shall be treated as void or declared to be void; or

(b) that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be valid.

General power of appointment

(2) A limitation conferring a general power of appointment, which but for this section would have been void on the ground that it might become exercisable beyond the perpetuity period, is presumptively valid until such time, if any, as it becomes established by actual events that the power cannot be exercised within the perpetuity period.

Special power of appointment, etc.

(3) A limitation conferring any power, option or other right, other than a general power of appointment, which but for this section would have been void on the ground that it might be exercised beyond the perpetuity period, is presumptively valid, and shall be declared or treated as void for remoteness only if, and so far as, the right is not fully exercised within the perpetuity period. R.S.O. 1990, c. P.9, s. 4.

Applications to determine validity

5 (1) An executor or a trustee of any property or any person interested under, or on the validity or invalidity of, an interest in such property may at any time apply to the court for a declaration as to the validity or invalidity with respect to the rule against perpetuities of an interest in that property, and the court may on such application make an order as to validity or invalidity of an interest based on the facts existing and the events that have occurred at the time of the application and having regard to sections 8 and 9.

Interim income

(2) Pending the treatment or declaration of a presumptively valid interest within the meaning of subsection 4 (1) as valid or invalid, the income arising from such interest and not otherwise disposed of shall be treated as income arising from a valid contingent interest, and any uncertainty whether the limitation will ultimately prove to be void for remoteness shall be disregarded. R.S.O. 1990, c. P.9, s. 5.

Saving

10 (1) A limitation that, if it stood alone, would be valid under the rule against perpetuities is not invalidated by reason only that it is preceded by one or more limitations that are invalid under the rule against perpetuities, whether or not such limitation expressly or by implication takes effect after, or is subject to, or is ulterior to and dependent upon, any such invalid limitation.

Acceleration of expectant interests

(2) Where a limitation is invalid under the rule against perpetuities, any subsequent interest that, if it stood alone, would be valid shall not be prevented from being accelerated by reason only of the invalidity of the prior interest. R.S.O. 1990, c. P.9, s. 10.

***The Perpetuities Act*, R.S.O. 1970, C. 343 (as amended)**

4.—(1) Every contingent interest in real or personal property that is capable of vesting within or beyond the perpetuity period is presumptively valid until actual events establish, Presumption of validity and "Wait and See"

(*a*) that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of section 8 or 9, shall be treated as void or declared to be void; or

(*b*) that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be valid.

(2) A limitation conferring a general power of appointment, which but for this section would have been void on the ground that it might become exercisable beyond the perpetuity period, is presumptively valid until such time, if any, as it becomes established by actual events that the power cannot be exercised within the perpetuity period. General power of appointment

(3) A limitation conferring any power, option or other right, other than a general power of appointment, which but for this section would have been void on the ground that it might be exercised beyond the perpetuity period, is presumptively valid, Special power of appointment, etc.

and shall be declared or treated as void for remoteness only if, and so far as, the right is not fully exercised within the perpetuity period. 1966, c. 113, s. 4, *amended*.

SCHEDULE "C" – TABLE OF CONCORDANCE OF CONTRACTS

Contract	As defined by the Notice of Application issued October 25, 2019	As defined by the Application Decision dated February 19, 2021	As defined by the Court of Appeal's Decision dated November 26, 2021	As referred to in ClubLink's Factum dated May 2, 2022	As referred to in this Factum
Agreement dated May 26, 1981 between Campeau and Kanata	1981 40% Agreement (collectively with 1988 40% Agreement, the "40% Agreement")	1981 Agreement	1981 Agreement	1981 40% Agreement (collectively with 1988 40% Agreement, the "40% Agreement")	1981 Agreement
Agreement dated June 10, 1985 between Campeau and Kanata	Golf Course Agreement (collectively)	1985 Golf Club Agreement	*(not defined)*	1985 Golf Course Agreement (collectively with the 1988 Golf Club Agreement, the "Golf Club Agreement")	Golf Course Agreement (collectively)
Agreement dated December 20, 1988 between Campeau and Kanata	1988 40% Agreement (collectively with 1981 40% Agreement, the "40% Agreement")	1988 Agreement	December 20, 1988 Agreement	1988 40% Agreement (collectively with 1988 40% Agreement, the "40% Agreement")	(collectively with the 1981 Agreement, the "40% Agreement")
Agreement dated December 29, 1988 between Campeau and Kanata	Golf Course Agreement (collectively)	*(not defined)*	*(not defined)*	1988 Golf Club Agreement (collectively with the 1985 Golf Course Agreement, the "Golf Club Agreement")	Golf Course Agreement (collectively)
Agreement dated November 1, 1996 between Imasco, ClubLink and Kanata	ClubLink Assumption Agreement	ClubLink Assumption Agreement	Assumption Agreement	Assumption Agreement	ClubLink Assumption Agreement

City of Ottawa	- and - ClubLink Corporation ULC	- and - Kanata Greenspace Protection Coalition	Court File No.: 19-81809
Applicant	Respondent	Intervener	

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Ottawa

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