Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant

and

CLUBLINK CORPORATION ULC

Respondent

and

KANATA GREENSPACE PROTECTION COALITION

Intervener

REPLY FACTUM OF CLUBLINK CORPORATION ULC
DOCTRINE OF SEVERANCE

July 19, 2022

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PART I - OVERVIEW

1. The City's and Coalition's responding submissions ask that the doctrine of severance be applied. They say that the conveyance obligations in ss. 5(4) and 9 can be excised from the 1981 40% Agreement without significantly affecting ClubLink's golf course obligations. Respectfully, their submissions are not consistent with the facts and the law. Their requested approach would yield a result that is not consistent with fundamental principles of contract law. Among other things:

(a) they attempt to confine the application of the severance doctrine only to cases of statutory illegality, contrary to a robust body of jurisprudence in which it is applied in various instances of common law unenforceability;

(b) they seek to transform the 40% Agreement into a perpetual contract, which would require ClubLink to continue operating the golf course with none of the "off ramps" that envisage future changes in land use. This is not consistent with the express terms of the bargain; and

(c) the Coalition now seeks to advance an entirely new legal theory to this proceeding—estoppel by convention—that was neither pleaded nor argued by any party at any stage of the proceedings. This submission is improper and unsupported on the record in any event.

PART II - REPLY TO THE CITY'S SUBMISSIONS

A. SEVERANCE WOULD TRANSFORM 1981 40% AGREEMENT INTO A PERPETUAL CONTRACT

2. The 1981 40% Agreement is not a perpetual contract. Nor did this Court find that it imposes an obligation on ClubLink to operate the golf course forever.[1] To the contrary, this agreement sets out important off-ramps to ClubLink's obligations in s. 5(1). Read holistically and in accordance with the principles of contractual interpretation, the provisions governing the golf course "provide a mechanism for the land to evolve beyond the open space purpose".[2]

3. The City's perpetual contract jurisprudence does not apply. In *Conseil Scolaire*, the agreement in question required a municipality to provide snow-clearing and garbage removal to a school board, with no end date or right of termination.[3] The decision in *Thunder Bay* concerned a contractual promise by a railway operator to give a municipality "the perpetual right to cross the said bridge for street railway, vehicle and foot traffic".[4] In both cases, the Court of Appeal held that the contracts impose perpetual obligations that could not be terminated upon reasonable notice. Neither contained "off ramps" that allow one party to stop carrying on an activity or providing a right to the other.

4. In both cases, the Court's analysis was based on a careful and thorough interpretation of the agreement, in order to determine the parties' intentions and reasonable expectations at the time of contracting. In *Thunder Bay*, Laskin J.A. explained "the overriding principle . . . that the

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[1] See, *e.g.*, Application Decision para. 5 ("Within that space would be a golf course, to be operated in perpetuity, subject to certain alternative scenarios", emphasis added); and para. 83 ("The potential for Kanata to become the owner of the Golf Course is nothing more than an 'off ramp' in the event that the operation of the golf course is not continued in accordance with the initial objective to operate the golf course in perpetuity.")
[2] Application Decision, para. 78.
[3] *Conseil Scolaire Catholique Franco-Nord v. Nipissing Ouest (Municipalité)*, 2021 ONCA 544.
[4] *Thunder Bay (City) v. Canadian National Railway Company*, 2018 ONCA 517.

meaning of an agreement and the intent of the parties entering into it must be derived from the words the parties used and the context in which they used those words."[5]

5. The 1981 40% Agreement is fundamentally different from the contracts in *Conseil Scolaire* and *Thunder Bay*. In the immediate case, neither party intended nor reasonably expected that the golf course would necessarily continue to be operated as such ***forever***. While section 5(1) uses the term "in perpetuity", the structure of the agreement provides for an evolution in land use upon certain events. That is what this Court held. Specifically, if Campeau or its successors "desire to discontinue" operating the golf course, and the City chooses either to refuse a conveyance of the land (ss. 5(4) and 5(5)), or accepts a conveyance but it later "ceases to be used for recreational and natural environmental purposes" (s. 9), the land reverts back to Campeau or its successor free and clear, and with no impediments on its ability to pursue an alternative land use. Section 5(5) of the 1981 40% Agreement specifically contemplates Campeau's "right to apply for development of the golf course lands in accordance with the *Planning Act*" (emphasis added).

6. The City's approach eliminates any possibility of this evolving land use. Instead, it freezes these lands as a golf course for as long as the 40% Agreement remains in force—even if neither ClubLink nor the City wish to operate them as such. This is manifestly not the bargain reached between Campeau and Kanata in 1981. The term "in perpetuity" in s. 5(1) cannot overwhelm the interpretive analysis. The version of the contract that the City and Coalition urge upon this Court undermines the clear intentions of the contracting parties.

[5] *Thunder Bay*, para. 30.

7. Contrary to the submission at paragraph 35 of the City's factum, ClubLink does not seek to "change the content" of the 40% Agreement or require that it be renegotiated. To the contrary, ClubLink asks the Court to find, based on the Court of Appeal's holding, that the unenforceability of certain provisions in this contract cannot be read out of the parties' agreements without fundamentally altering the terms of the agreement.

B. SEVERANCE APPLIES TO AGREEMENTS THAT ARE UNENFORCEABLE FOR PERPETUITIES

8. At paragraph 53 of its responding factum, the City argues that severance "has no application where a contractual term has become void for remoteness" because this doctrine applies only "to make an otherwise illegal contract legal". It says that severance is limited to the context of statutory illegality—which the City says is not the case here, because ss. 5(4) and 9 do not contravene the *Perpetuities Act* on its "wait and see" approach.

9. The result of the City's submission is that these provisions are removed (*i.e.* 'blue-penciled') from the agreement—but that ClubLink remains bound by everything else in the 40% Agreement, as if those provisions did not exist. For the reasons below, the City's approach to severance is incorrect as a matter of law and finds no basis in principle or public policy.

10. **First, the severance doctrine is not confined to statutory illegality; it also applies in the context of common law unenforceability.** This is consistently confirmed in the case law:

(a) in *Cora*, the Ontario Court of Appeal made clear that severance is available "where part of a contract is unenforceable because enforcement would be contrary to statute or common law";[6]

[6] *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152, para. 35, emphasis added.

(b) in *Shafron*, the Supreme Court of Canada found a ***narrow scope*** for blue-pencil severance to cure an overly broad or ambiguous restrictive covenant, which is contrary to public policy and therefore unenforceable at common law. Nowhere did the Supreme Court say that severance was unavailable because the restrictive covenant did not violate a statutory rule;[7] and

(c) in *Ratnanather*, this Court confirmed that severance applies beyond cases of statutory illegality, including in the context of contracts that are void for uncertainty:

> The doctrine of severance has been applied to "illegal" contracts to separate legal from objectionable parts of a contract: G.H.L. Fridman, *The Law of Contracts in Canada*, 3rd ed.
>
> Why should not the same reasoning be applied to separate unenforceably vague sections from the contract? In each case one severs that part of the agreement which the court will not enforce. If the court will enforce the remainder of a contract when the severed part was unenforceable because it violated substantive law, surely it offends no policy to enforce a remainder when the severed part was unenforceable only because of the parties' failure to define their bargain with enough precision.[8](Emphasis added.)

11. In each of these cases, the Court applied the doctrine to sever unenforceable terms that could be removed without affecting the substance of the bargain. The City's submission identifies no principle or policy reason why this doctrine should be confined only to cases of statutory prohibition, and not those involving a prohibition at common law as well. None of the cases cited above draw such a distinction either.

12. **Second, the rule against perpetuities is a common law rule of public policy, not a statutory prohibition.** The City argues that the provisions of ss. 5(4) and 9 are not "illegal"—

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[7] *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, para. 36.
[8] *Ratnanather v. Kosalka* (1995), 24 O.R. (3d) 326; 1995 CanLII 7075 (S.C.), p. 10.

and therefore not subject to the severance doctrine—because they technically do not offend the *Perpetuities Act* on its "wait and see" approach. But this ignores the fact that the underlying rule against perpetuities is a common law rule of public policy "created because judges were concerned about uncertainty regarding the ownership of assets."[9] The effect of the *Perpetuities Act* is simply that this rule "continues to apply in Ontario, save as specifically modified or changed" by the statute.[10] But the rule against perpetuities ***remains*** a common law rule—just like the unreasonable restrictive covenant in *Shafron* and the uncertain contractual term in *Ratnanather*.

13. What this means is that a contingent interest that vests outside the perpetuity period is void and unenforceable at common law, subject to modifications in the *Perpetuities Act*. The effect of the "wait and see" approach in s. 3 of the *Act* is that ss. 5(4) and 9 were initially valid, but became void and unenforceable upon the expiry of the perpetuity period.

14. The City's submission that "the 1981 Agreement was at no time contrary to statute" (para. 42) therefore ignores the common law basis of the rule against perpetuities, and does not assist in its narrow "statutory illegality" argument. The principles of severance apply to the offending provisions in this case in the same way as they apply to common law unenforceability generally.

15. **Third, there is no merit to the City's illusory distinction between "voidness" and "unenforceability"**. At paragraphs 62 and 63 of its factum, the City argues that severance applies where "a term is contrary to statute and thereby unenforceable"—but not where "a term

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[9] A.H. Oosterhoff *et al*, *Oosterhoff on Trusts*, p. 578 (attached as Tab 1).
[10] *Quercus Algoma Corporation et al. v. Algoma Central Corporation*, 2021 ONSC 2457, para. 20. Section 2 of the *Perpetuities Act* states that "Except as provided by this Act, the rule of law known as the rule against perpetuities continues to have full effect".

is void by virtue of a statutory provision" because in such cases "the legislature has spoken." This is again incorrect as a matter of law for at least two reasons:

(a) The legislature in this case has not prescribed any remedy for the question before this Court. The *Perpetuities Act* says nothing about severance, or the impact that a void property interest may have on the enforceability of other parts of the instrument. Such questions are determined by the severance doctrine; and

(b) The concept of 'unenforceability' does not arise only in the statutory context. In *Israel Estate*, the Court of Appeal confirmed that a purchase option was "void and unenforceable under the rule against perpetuities" because it gave an immediate interest in land that did not vest within the applicable 21-year period.[11] Similarly, the Supreme Court of Canada in *Shafron* held that "[a]n ambiguous restrictive covenant will be *prima facie* unenforceable because the party seeking enforcement will be unable to demonstrate reasonableness in the face of an ambiguity."[12] And even the Court of Appeal in the present case confirmed that ss. 5(4) and 9 of the 1981 40% Agreement are "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."[13] In none of these cases did the Court's finding of unenforceability depend on a breach of statute. Nor do they say that contractual "voidness" and "unenforceability" are mutually exclusive.

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[11] *2123201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409, para. 5.
[12] *Shafron*, para. 27.
[13] Appeal Decision, para. 11.

16. Nothing in the City's submission allows the Court to circumvent the severance analysis, which must be undertaken to fully resolve the question remitted by the Court of Appeal. This Court must determine whether the parties' bargain concerning the golf course can be sensibly enforced without the benefit of ss. 5(4) and 9 of the 1981 40% Agreement. They cannot, for all the reasons in ClubLink's main factum on severance.

C. NO MERIT TO THE CITY'S *IN TERROREM* SUBMISSION

17. At paragraph 43 of its factum, the City suggests that "chaos would result" if this Court accepts the general rule that, where part of a contract is unenforceable at common law, the entire contract fails unless it can be saved by the doctrine of severance. No authority is cited for this *in terrorem* submission. To the contrary, this general rule was confirmed by the Court of Appeal in *Cora*,[14] and cited by the Coalition at para. 7 of its responding factum.[15]

18. Nor would any "chaos" result if the City's approach to severance were found to be inappropriate in this case. ClubLink is not asking to unwind the entire bargain giving rise to the 40% Agreement, reverse the land use designation or seek the return of any land conveyed by Campeau to Kanata or to third parties.

19. Instead, the finding that ClubLink seeks is narrow and limited only to the continued operation of the golf course. It has no effect on the City's official plan or zoning by-laws, or on ownership of the stormwater management ponds or lands dedicated as parks. ClubLink would be free to continue operating the golf course if it chose to do so.

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[14] *Cora*, para. 35: "Where part of a contract is unenforceable because enforcement would be contrary to statute or the common law, rather than setting aside the entire contract, courts may sever the offending provisions while leaving the remainder of the contract intact".

[15] Coalition Factum, para. 7: "Where part of a contract is unenforceable because enforcement would be contrary to statute or common law, it may not be necessary to set aside the entire contract. Rather, courts may sever the offending provisions while leaving the remainder of the contract intact" (citing *Cora*, paras. 35-36).

D. FINDINGS ON SEVERANCE ARE WITHIN THE COURT'S JURISDICTION

20. None of the parties contest this Court's jurisdiction to consider the issue of severance that was remitted by the Court of Appeal. But at the outset of its factum, the City suggests that it did not seek declaratory relief in respect of certain contracts at issue, and that "no party asked the Court for relief by way of severance".[16]

21. There is no jurisdictional impediment to this Court considering the effect of the unenforceable ss. 5(4) and 9 on the balance of the parties' contractual relationship. To the contrary, a determination on this point is necessary to the relief pleaded by the City. Specifically, a declaration that s. 3 of the Assumption Agreement "remain[s] valid and enforceable" requires the Court to consider the validity and enforceability of the underlying 40% and Golf Club Agreements. In other words, it is necessary for the City to prove that *all* contracts are valid and enforceable in order to succeed on its pleaded relief. It bears the burden of proving that ss. 5(4) and 9 can be severed without fundamentally altering ClubLink's golf course obligations.

22. In any event, the severance issue was fully briefed and argued before this Court and the Court of Appeal, without any jurisdictional objection from the City or the Coalition. Nor was there any requirement for ClubLink to bring a cross-application in order to engage the severance issue. Instead, it is the City that bears the burden of proving the enforceability of its contractual relationship with ClubLink. This Court can ***and must*** make findings on the severance doctrine, in order to fully and completely decide the issues in the City's application. This is precisely why this issue was remitted by the Court of Appeal:

> [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

[16] City's Responding Factum, paras. 2-3.

> 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.[17]

PART III - REPLY TO THE COALITION'S SUBMISSIONS

A. OPEN SPACE STILL PROTECTED UNDER THE 1981 40% AGREEMENT

23. Throughout its submission, the Coalition urges this Court to invoke the doctrine of severance in order to preserve what it calls the "core of the bargain": the protection of open space for recreation and natural environmental purposes. But a finding that the golf course provisions are unenforceable does not reverse the entire 40% bargain. It leaves intact all parks, open space buffers, natural environmental areas and walkway links that remain protected under the 40% Agreement.[18]

24. The only effect of a finding of unenforceability is that the for-profit, members' only golf club no longer needs to be operated as such, as it has for the past forty years, and well beyond the expiry of the governing perpetuity period. All other lands set aside for natural environmental purposes and open space will remain.

B. ESTOPPEL ARGUMENT IS IMPROPER & UNTENABLE IN ANY EVENT

25. Beginning at paragraph 28 of its factum, the Coalition advances a novel argument that was not asserted at any stage of the proceedings: that ClubLink is "estopped from contesting the validity and enforceability of the agreements establishing the 40% principle". This argument raises serious notice and procedural fairness concerns, is not a proper response to ClubLink's

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[17] Appeal Decision, para. 70.
[18] 1988 40% Agreement, Exhibit "J" to the Adams-Wright Affidavit (AR, Tab 2J, p. 323).

submissions on severance, and impermissibly attempts to broaden the scope of the City's application. Specifically:

(a) the Coalition's late-breaking estoppel argument violates the terms of its intervention. In granting the Coalition leave to intervene, Justice MacLeod stipulated that it "cannot add new issues to the application";[19]

(b) estoppel was not pleaded by any party, and no evidence was adduced on this point. The Coalition did not give notice that it would raise this new issue in its motion to intervene and did not advance it at any stage before this Court or the Court of Appeal; and

(c) this argument also goes well beyond the narrow severance issue remitted by the Court of Appeal. It does not respond to any point of law argued in ClubLink's factum. It is an improper attempt to bootstrap an entirely new legal theory to this proceeding, almost two years after the City's application was decided by this Court.

26. Regardless, the Coalition cannot meet its high burden of proving estoppel by convention. Contrary to paragraph 30 of the Coalition's factum, ClubLink gave no "manifest representation by statement or conduct" to surrounding residents that the entirety of the 40% Agreement was valid and enforceable, or that the golf course would operate in perpetuity.[20] To the contrary, ss. 5(4) and 5(5) of the 1981 40% Agreement make clear provision for an evolution in land use on the golf course if neither Campeau or Kanata wished to continue operating it as such.[21] The

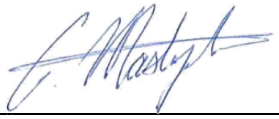
[19] *City of Ottawa v. Clublink Corporation ULC*, 2019 ONSC 7470, para. 26.
[20] *Ryan v. Moore*, 2005 SCC 38, para. 59.
[21] Application Decision, para. 78.

Coalition adduced no evidence of any "shared assumption" between ClubLink and the surrounding residents that the latter's homes would always back on to a golf course.

27. The Coalition has also not established any detrimental reliance on the part of its members. Beyond Ms. Ramsay saying that she paid an unspecified "premium" for her house back in 2010, nothing in the record demonstrates how the 40% Agreement affected the price of homes backing on to the private golf course or how they would be negatively affected if the golf course provisions were found to be unenforceable. Nor has the Coalition demonstrated why any of this matters to the legal effect of the unenforceable ss. 5(4) and 9 on the balance of the agreements as they relate to the golf course.

28. Finally, the Coalition does not cite a single precedent where estoppel by convention was used to preserve contractual obligations that would otherwise be unenforceable under the rule against perpetuities. The latter is a longstanding rule of public policy, and there is no principle or authority that allows Courts to disregard its effect on a contract in the way urged upon this Court by the Coalition.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of July, 2022.



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LIST OF AUTHORITIES

Jurisprudence

1. *Conseil Scolaire Catholique Franco-Nord v. Nipissing Ouest (Municipalité)*, 2021 ONCA 544
2. *Thunder Bay (City) v. Canadian National Railway Company*, 2018 ONCA 517
3. *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152
4. *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6
5. *Ratnanather v. Kosalka* (1995), 24 O.R. (3d) 326; 1995 CanLII 7075 (S.C.)
6. *Quercus Algoma Corporation et al. v. Algoma Central Corporation*, 2021 ONSC 2457
7. *2123201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409
8. *City of Ottawa v. Clublink Corporation ULC*, 2019 ONSC 7470
9. *Ryan v. Moore*, 2005 SCC 38

Secondary Sources

1. A.H. Oosterhoff *et al*, *Oosterhoff on Trusts*, p. 578 (attached as Tab 1).

OOSTERHOFF ON TRUSTS:

TEXT, COMMENTARY AND MATERIALS

Eighth Edition
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for the members of that class even though they do not own the assets as joint tenants or tenants in common, have no rights to possess, use, or receive any particular trust assets, and might never receive any actual benefits from the trust. The trusts in *Keewatin* and *Peace Hills* were trusts for a defined class of persons.

8. Contrast *Re Lipinski's Will Trusts*,[142] with *Re Grant's Will Trusts*,[142] in which a testator left his estate "to the Labour Party Property Committee for the benefit of the Chertsey and Walton C.L.P.", with a gift over to the National Labour Party if the Chertsey headquarters should cease to be in the Chertsey district. Vinelott J. said:[143]

> Reading the gift in the will in the light of the rules governing the Chertsey and Walton C.L.P., it is, in my judgment, impossible to construe the gift as a gift made to the members of the Chertsey and Walton C.L.P. at the date of the testator's death with the intention that it should belong to them as a collection of individuals, though in the expectation that they and any other members subsequently admitted would ensure that it was in fact used for what in broad terms has been labelled "headquarters' purposes" of the Chertsey and Walton C.L.P.

Vinelott J. gave two reasons why the gift was void. First, the local party's constitution required it to transfer its property to the national party if the latter demanded it and the local party could not alter its rules unilaterally and divide the property among its members. Secondly, the gift was to trustees (the Property Committee) and not to the unincorporated association, so that a trust was clearly intended. As to the first reason, could not the local party simply have disaffiliated itself from the national party by resolution? As to the second reason, could *Denley* have been invoked to save the gift?

9. In *Conservative & Unionist Central Office v. Burrell (Inspector of Taxes)*,[144] the inspector of taxes argued that the conservative party was an unincorporated association and therefore liable to pay tax. Otherwise, it could not receive donations, since the treasurer would not be holding the money in trust for anyone. The Court of Appeal disagreed, saying that a trust for party members was unnecessary because the donors could restrain the treasurer's misuse of the money. Although the court did not connect the donors' rights to the *Quistclose* trust, the principle is the same and it should also apply to gifts to unincorporated associations that do not produce trusts for their members (at least if the gifts are *inter vivos*).

8.4.3 The Rule Against Perpetuities

A non-charitable purpose trust cannot be saved as a trust for persons if that would violate the rule against perpetuities. If there is a remote or even fanciful possibility that new beneficiaries could join the class beyond the perpetuity period, then the trust is invalid from the start under the common law rule.

The rule was created because common law judges were concerned about uncertainty regarding the ownership of assets. Uncertainty was permitted provided it did not last too long. For example, I can make a testamentary trust for all my grandchildren, even though that class of beneficiaries will not close and be ascertained until all my children are dead. Thus, the common law allows me to control assets through the next generation into the one after that, but no further.

142 (1979), [1980] 1 W.L.R. 360, [1979] 3 All E.R. 359 (Ch. Div.).
143 *Ibid.*, at W.L.R. 374.
144 (1981), [1982] 2 All E.R. 1, [1982] 1 W.L.R. 522 (C.A.).

A trust for all my great grandchildren would fail because the ownership of the trust assets would remain uncertain too long.

At common law, the perpetuity period is defined as a life in being plus 21 years. People are lives in being if they are alive as human beings or conceived as embryos or foetuses at the time the trust is created. This definition makes sense when applied to trusts and wills that dictate the use of family assets by successive generations. The rule limited the extent to which testators could control the use of their assets after death. As Professors Lawson and Rudden said, "there comes a time when even the dead must die; and the effect of the Rule is to fix the latest date for this at the time when our grandchildren grow up."[145] Returning to the example of a testamentary trust for my grandchildren, the rule would allow me to delay vesting of beneficial ownership until they reach the age of 21, but no later.

The common law rule does not work well when the beneficiaries of the trust are not related by birth, but are employees of a corporation or members of an unincorporated association. The lives in being are the present employees or members when the trust takes effect. Since it is possible that someone born after that date (and therefore not a life in being) could join the company or association more than 21 years after all the lives in being are dead, a trust for present and future employees or members would violate the common law rule.

In the cases reproduced above, in which purpose trusts were declared valid as trusts for persons, the problem of perpetuities did not arise. In *Re Denley's Trust Deed*,[146] the trust was expressly limited to the perpetuity period of certain lives in being, named in the trust deed when it was made in 1936, plus 21 years. In *Re Lipinski's Will Trusts*,[147] the bequest was construed as a trust (or gift) for the present members of the association, who were all lives in being. If the rule against perpetuities had been violated, the employees and members would not have formed acceptable classes of trust beneficiaries.

In many Canadian jurisdictions, the problem of perpetuities is alleviated by statute, thereby greatly expanding the possibility of construing trusts for purposes as trusts for persons. The rule against perpetuities has been abolished in Manitoba,[148] Saskatchewan,[149] and Nova Scotia.[150] Because of this, it was possible to uphold a trust for the benefit of the present and future members of Indian bands in *Keewatin Tribal Council Inc. v. Thompson (City)*,[151] as discussed above. That trust would have been invalidated by the common law rule.

145 F.H. Lawson and B. Rudden, *The Law of Property*, 3rd ed. by B. Rudden (Oxford: Oxford University Press, 2002) at 190.
146 Footnote 70, *supra*.
147 [1976] Ch. 235, [1977] 1 All E.R. 33.
148 By *The Perpetuities and Accumulations Act*, S.M. 1982-83-84, c. 43, s. 3. See now C.C.S.M., c. P33.
149 By the *Trustee Act, 2009*, S.S. 2009, c. T-23.01, s. 58.
150 *Perpetuities Act*, S.N.S. 2011, c. 42, s. 3.
151 [1989] 5 W.W.R. 202, 61 Man. R. (2d) 241 (Q.B.).

In Alberta, British Columbia, Northwest Territories, Nunavut, Ontario, and Yukon Territory,[152] the common law rule has been modified by statute. Yukon Territory enacted the *Perpetuities and Accumulations Repeal Act 2001*,[153] which repeals the rules against perpetuities and the *Accumulations Act 1800*.[154] However, this Act has not yet been proclaimed. Under these statutes trusts (and other dispositions of property) are not invalid just because they create interests that might remain contingent beyond the perpetuity period. They are presumptively valid until it is established that the uncertainty cannot be resolved before the perpetuity period expires. This is known as the "wait and see" rule.

If a non-charitable purpose trust benefits the present and future members of an association, the "wait and see" rule allows it to take effect as a valid trust for persons. The lives in being are all the present members of the association when the trust takes effect and the trust is allowed to operate until 21 years after all the present members are dead. In most cases, this limit would not create a problem, because the trust assets would be spent or the association discontinued before the end of the perpetuity period. If not, then the remainder will be disposed of, either by other clauses in the trust or by a resulting trust for the settlors or their estates.

The common law rule still applies in New Brunswick, and Newfoundland and Labrador. In Prince Edward Island, the perpetuity period has been modified by statute, but there is no presumptive validity for interests that might remain contingent beyond the modified period.[155] The Newfoundland and Labrador Act[156] concerns employee benefit trusts only. Therefore, most trusts for present and future members of an association would be void in those jurisdictions, because of the remote possibility of membership changing beyond the perpetuity period, regardless of how that period is defined.

In *Taylor v. Scurry-Rainbow Oil (Sask) Ltd.*,[157] the Saskatchewan Court of Appeal held that the common law rule can be modified by the common law and should not be applied to commercial interests in the same way it applies to control family wills and trusts. In that case, a petroleum "top lease" did not offend the policy of the rule and was therefore exempt from it. Tallis J.A. said:[158]

> Since common law rules are judge-made rules, the Court can make exceptions to such rules when changing conditions so mandate. Common law rules may be tweaked to do justice between the parties when a rigid and mechanistic application of a rule would run counter to the object and purpose of the rule.

It may be too late for a court to "tweak" the rule to save a trust for an unincorporated association, but it is not clear that anyone has seriously considered that possibility.

152 *Perpetuities Act*, R.S.A. 2000, c. P-5; R.S.N.W.T. 1988, c. P-3; R.S.N.W.T. (Nu.) 1988, c. P-3; R.S.O. 1990, c. P.9; R.S.Y. 2002, c. 168; *Perpetuity Act*, R.S.B.C. 1996, c. 358.

153 S.Y. 2001, c.12, not in force.

154 39 & 40 Geo 3, c. 98 (U.K.)

155 *Perpetuities Act*, R.S.P.E.I. 1988, c. P-3.

156 *The Perpetuities and Accumulations Act*, R.S.N.L. 1990, c. P-7.

157 2001 SKCA 85.

158 *Ibid.*, at D.L.R. 76.

Notes and Questions

1. Under section 91(24) of the *Constitution Act, 1867*, the federal government has jurisdiction over "Lands Reserved for Indians", which includes both reserve lands and lands subject to aboriginal title.[159] Therefore, the provincial perpetuities legislation would not apply to contingent interests in that land. Nevertheless, the common law rule against perpetuities probably does not apply either, given the Supreme Court of Canada's statement that "common law real property concepts do not apply to native lands".[160] However, provincial perpetuities legislation applies to land that is owned beneficially by Indians, but not located on a reserve or subject to aboriginal title,[161] and to assets other than land.[162]

2. Pension trusts are excepted by statute from the rule against perpetuities in Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, Nova Scotia, Northwest Territories, Nunavut, Ontario, and Yukon Territory.[163]

Problems

1. Discuss the validity of the following *inter vivos* gifts:

(a) $10,000 on trust to provide facilities for the playing of rugby for my employees and others;

(b) $20,000 on trust to promote the music of "The Comically Hip", a popular singing group;

(c) $15,000 on trust for the maintenance of my pet turtle;

(d) $5,000 on trust for the Ruffian's Hockey club, an unincorporated association, to improve its club house. The club has no constitution or rules.

2. Tom is a full member of the Cardinal Squash Club, an unincorporated association. His daughter, Olivia, is a student member who pays one half the subscription rate. Tom's father died, leaving $20,000 to the club in trust "for the purpose of constructing new change rooms." The members have unanimously decided to wind up the club. The $20,000 legacy has not yet been paid over. Advise Tom and Olivia regarding their rights (a) as members of the squash club and (b) as the residuary beneficiaries under Tom's father's will.

3. When Barry was accepted into law school, his sister, Rhonda, sent him a cheque for $15,000, with a letter that stated, "This is my gift to you, but it can be used only to pay your law school tuition fees and for no other purpose." Is there a trust and, if so, what are its terms?

159 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

160 *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657, 147 D.L.R. (4th) 385 at 392, *per* Lamer C.J.C.; additional reasons at [1997] 2 S.C.R. 678.

161 *Keewatin Tribal Council Inc. v. Thompson (City)*, [1989] 5 W.W.R. 202, 61 Man. R. (2d) 241 (Q.B.).

162 See *Peace Hills Trust Co. v. Canada Deposit Insurance Corp.*, 2007 ABQB 364 at [46].

163 *Perpetuities Act*, R.S.A. 2000, c. P-5, s. 22; R.S.N.W.T. 1988, c. P-3, s. 19; R.S.N.W.T. (Nu.) 1988, c. P-3, s. 19; R.S.O. 1990, c. P.9, s. 18; R.S.Y. 2002, c. 168, s. 22; *Perpetuities and Accumulations Act*, R.S.N.L. 1990, c. P-7, s. 2; *Perpetuity Act*, R.S.B.C. 1996, c. 358, s. 4; *Property Act*, R.S.N.B. 1973, c. P-19, s. 3; *Trustee Act*, R.S.N.S. 1989, c. 479, s. 67.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Rule against perpetuities to continue; saving

2 Except as provided by this Act, the rule of law known as the rule against perpetuities continues to have full effect.

CITY OF OTTAWA
Applicant

-and-

CLUBLINK CORPORATION ULC
Respondent

Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
OTTAWA

REPLY FACTUM OF CLUBLINK CORPORATION ULC

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