Court File No. _____

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

BETWEEN:

CITY OF OTTAWA

Applicant
(Appellant)

– and –

CLUBLINK CORPORATION ULC

Respondent
(Respondent)

– and –

KANATA GREENSPACE PROTECTION COALITION

Intervener

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)

Borden Ladner Gervais LLP
World Exchange Plaza
1300 – 100 Queen Street
Ottawa, ON K1P 1J9

Kirsten Crain | Laura E. Robinson | Amanda Afeich
Tel: 613.787.3741 | 613.369.4754 | 514.395.3888
Fax: 613.230.8842
Email: kcrain@blg.com | lrobinson@blg.com | aafeich@blg.com

Counsel for the Applicant,
City of Ottawa

ORIGINAL TO: **Registrar**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPY TO:

Lax O'Sullivan Lisus Gottlieb LLP
2750 – 145 King Street West
Toronto, ON M5H 1J8

Matthew P. Gottlieb | Crawford G. Smith
John Carlo Mastrangelo
Tel: 416.644.5353 | 416 598 8648|
416.956.0101
Fax: 416.598.3730
Email: mgottlieb@lolg.ca | csmith@lolg.ca |
jmastrangelo@lolg.ca

~AND~

Davies Howe LLP
425 Adelaide Street West, 10th Floor
Toronto ON M5V 3C1

Mark R. Flowers
Tel: 416.263.4513
Fax: 416.977.8931
Email: markf@davieshowe.com

Counsel for the Respondent,
ClubLink Corporation ULC

Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Alyssa Tomkins
Tel: 613.786.0078
Fax: 613.563.9869
Email: alyssa.tomkins@gowlingwlg.com

~AND~

David & Sauvé s.r.l./LLP
283 Sussex Drive
Ottawa, ON K1N 6Z1

Charles R. Daoust
Tel: 343.655.0034
Fax: 613.701.4045
Email: charles@davidsauve.ca

Counsel for the Intervener
Kanata Greenspace Protection Coalition

TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. If a contractual provision is declared void, what impact does this have on the contract? To this basic and broadly important question – and to related questions – Canadian common law currently provides no consistent or coherent answer. The guidance of this Court is required.

2. One related question concerns the appropriate remedy where a contractual provision is "void" versus "illegal", and what is the distinction between these two characterizations. While there are well-settled principles in relation to the impact of an illegal provision, the same cannot be said about a void provision. Some cases hold that the void provisions are omitted; some that they are severed; and others that the provisions are void and unenforceable (and, since they are void, they cannot and need not be severed). In this case, the Court of Appeal for Ontario developed a wholly novel approach, unsupported in the existing case law, and found that related provisions – a concept in and of itself unclear – also fail as a consequence.

3. Another related question is what use, if any, can the court make of a void or illegal provision in determining the intentions of the parties at the time of contracting? The assessment of the parties' intentions is critical to selecting the appropriate remedy that will not do violence to those intentions. Yet, there is a lack of guidance on how to assess the parties' intentions in these circumstances.

4. A final related question is focused specifically on provisions that become void for remoteness by virtue of the rule against perpetuities, either at common law or as codified in statute. Are the principles and remedies available in contract law equally applicable in the perpetuities context, where a provision is presumptively valid but becomes void due to the passage of time?

5. The proposed appeal is from a decision of the Court of Appeal for Ontario addressing the consequences of a finding that two contractual provisions were void by operation of Ontario's *Perpetuities Act*. The Court in effect re-drafted the rest of the parties' agreements unaided by any guiding principles or clear legal framework. The result releases the Respondent from numerous perpetual contractual obligations and grants it a windfall that it never bargained for, while depriving the Appellant, the City of Ottawa (the "**City**"), and its residents of the dedicated open space for recreation and natural environment purposes that was foundational to the original bargain.

6. The same issues of principle arise in several different contexts and, in virtually all of them, there is no clear and coherent set of governing principles. It is time for this Court to bring some clarity to these basic and important issues.

B. Statement of Facts

(i) The Parties and the 1981 Agreement

7. In 1981, Campeau Corporation ("**Campeau**") owned 1400 acres of open space and farmland (the "**Campeau Lands**") in the former City of Kanata ("**Kanata**").[1] Campeau wanted to develop these lands.[2] In negotiating the required planning approvals, Campeau and Kanata contracted that 40% of the Campeau Lands "shall be" left as "open space for recreation and natural environmental purposes" (the "**40% Principle**").[3] The contract, known as the **1981 Agreement**, defined various permitted uses for the "open space" land, such as natural environmental areas, parks, and a future 18-hole golf course.[4] The golf course use was included at Campeau's request, and permitted it to generate revenue from land designated as "open space".

8. The 1981 Agreement specified different methods to protect the 40% Principle. Campeau was required to convey to Kanata the lands set aside for stormwater management, natural environment areas, and park purposes.[5] A different method of protection applied to the land to be operated as a golf course: Campeau would continue to own that land, so long as it operated a golf course "in perpetuity" (s. 5). That provision also provided: (i) Campeau may assign the management of the golf course without Kanata's prior approval (s. 5(1)); (ii) Campeau may sell the golf course if the new owner entered into an agreement with Kanata providing for the operation of the golf course in perpetuity, on the same terms and conditions as Campeau (s. 5(2)); and (iii)

---

[1] In 2001, Kanata's rights and obligations became the City of Ottawa's upon amalgamation.
[2] *City of Ottawa v. ClubLink Corporation ULC*, 2021 ONSC 1298 at paras. 2, 9-10 ["**Application Decision**"].
[3] Application Decision at paras. 11-14; *Ottawa (City) v. ClubLink Corporation ULC*, 2021 ONCA 847 at paras. 3-7 ["**2021 Appeal Decision**"].
[4] Application Decision at para. 16; *Ottawa (City) v. ClubLink Corporation ULC*, 2025 ONCA 34 at paras. 14-15 ["**2025 Appeal Decision**"].
[5] Application Decision at para. 19.

Kanata had a right of first refusal if Campeau received an offer for the sale of the golf course (s. 5(3)).[6]

9. The 1981 Agreement also included a conveyance provision at s. 5(4) that the Court of Appeal found (along with s. 9 below) created a contingent interest in property that had become void for remoteness. Section 5(4) provided:

> In the event that Campeau desires to discontinue the operation of the golf course and it can find no other persons to acquire or operate it, then it shall convey the golf course (including lands and buildings) to Kanata at no cost and if Kanata accepts the conveyance, Kanata shall operate or cause to be operated the land as a golf course subject to the provisions of paragraph 9.[7]

10. Section 9 in turn provided that in the event the land set aside for open space for recreation and natural environmental purposes ceased to be used for those purposes by Kanata, then the owner of the land, if it was Kanata, shall reconvey it to Campeau at no cost.[8]

11. Section 10 of the 1981 Agreement specified: "It is the intent of the parties that this agreement shall establish the principle as proposed by Campeau to provide 40% of the land in the 'Marchwood Lakeside Community' as open space…"[9]. It noted that as development plans were finalized, further agreements may be required to implement the 40% Principle.[10]

12. Campeau and Kanata executed three subsequent contracts. This included the **Golf Course Agreements**, which identified the location of the golf course within the Campeau Lands (the "**Golf Course Lands**").[11] This also included the **1988 Agreement**, which set out the legal description of the specific Campeau Lands that were subject to the 1981 Agreement, as well as the total space requirement of the 40% Principle (543.292 acres, with the golf course being 175.775 acres).[12]

---

[6] 2025 Appeal Decision at para. 16.
[7] 2021 Appeal Decision at para. 17 (emphasis added).
[8] 2021 Appeal Decision at para. 9.
[9] Section 10 of the 1981 Agreement, appended to the *City of Ottawa v. ClubLink Corporation ULC*, 2023 ONSC 5004 ["**Remittal Decision**"].
[10] Application Decision at para. 21; 2021 Appeal Decision at para. 19.
[11] Application Decision at para. 25; 2021 Appeal Decision at paras. 18, 21.
[12] Application Decision at paras. 26-27.

13. Decades have passed. The Campeau Lands are now in the hands of many different owners. Campeau's contractual obligations have been assigned. Large residential subdivisions have been built around an 18-hole golf course. One thing has not changed: 40% of the Campeau Lands (543 acres) continue to be designated as "open space for recreation and natural environmental purposes".

14. The Golf Course Lands have also changed ownership over the years. In 1997, the respondent ClubLink Corporation ULC ("**ClubLink**") purchased the Golf Course Lands from the then-owner Imasco Enterprises Inc. ("**Imasco**") for just over $2.8M. When ClubLink did so, it agreed to assume Campeau's obligations in the original agreements with Kanata (the "**Assumption Agreement**"), with one significant exception.[13] The Assumption Agreement provided that if Kanata ceased to use the Golf Course Lands for recreational and natural environment purposes (per s. 9 of the 1981 Agreement), Kanata must convey the lands to Imasco (and not ClubLink).[14]

15. ClubLink now wishes to develop that land for residential purposes. The contract is a barrier.

(ii) The Initial Application and First Court of Appeal Decision

16. ClubLink's desire to develop the lands triggered the City to apply for a declaration that ClubLink's contractual obligations in the 1981 Agreement and the Assumption Agreement remained valid and enforceable.[15] No relief was sought in respect of the Golf Course Agreements. ClubLink resisted the application in part on the basis that the 1981 Agreement was invalid as ss. 5(4) and 9 (the "**Conveyance Provisions**") created contingent interests in land that had become void for perpetuities.[16]

17. The Application Judge found the 1981 Agreement was a valid and binding contract. He held that the Conveyance Provisions created personal contractual rights as opposed to interests in land, which were therefore not void as contrary to the rule against perpetuities.[17]

18. However, on appeal, ClubLink had partial success. The Court of Appeal found that the Conveyance Provisions of the 1981 Agreement created interests in land that were void and

---

[13] Application Decision at paras. 30-33, 35; 2025 Appeal Decision at para. 23.
[14] Application Decision at para. 31; Remittal Decision at para. 74; Section 10 of the Assumption Agreement, appended to 2023 Remittal Decision.
[15] 2021 Appeal Decision at para. 5.
[16] Application Decision at paras. 98, 104, 178; 2021 Appeal Decision at paras. 6, 66-67.
[17] 2021 Appeal Decision at para. 7.

unenforceable as they had not vested within 21 years.[18] The Court did not expressly address the nuance of the contingent interests in land created by ss. 5(4) and 9 becoming void by operation of the *Perpetuities Act*,[19] with the contractual provisions therefore being unenforceable. Instead, the reasons stated: "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."[20]

19. The Court of Appeal did not consider ClubLink's "severance argument", that the void Conveyance Provisions could not be severed from the 1981 Agreement and, accordingly, all or part of the contract "fails".[21] The Court noted that ClubLink had not identified which provisions of the 1981 Agreement were "so interrelated to ss. 5(4) and 9 and the void contingent interests in land that they must necessarily be inoperative".[22] This severance argument was remitted to the Application Judge for determination.[23]

20. It is this issue of remedy that underlies this proposed appeal.

(iii) The Application Judge's Declarations of "Inoperability"

21. Back before the Application Judge, ClubLink expanded its position and argued that the five related contracts (the 1981 Agreement, the Golf Course Agreements, the 1988 Agreement and the Assumption Agreement) all were invalid as a result of the Court of Appeal's finding that the Conveyance Provisions had become void.[24] ClubLink's argument was premised on the doctrine of severance, arguing that the Conveyance Provisions "cannot be excised from the agreements governing the golf course without fundamentally altering the bargain reached between the parties

---

[18] 2021 Appeal Decision at para. 71.
[19] Section 4(1), which states: "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 … shall be treated as void or declared to be void; […]" (emphasis added).
[20] 2021 Appeal Decision at para. 11. See also paras. 70-71.
[21] 2021 Appeal Decision at para. 67.
[22] 2021 Appeal Decision at paras. 68-69.
[23] 2021 Appeal Decision at para. 70.
[24] Remittal Decision at para. 17.

in the 1980s."[25] Alternatively ClubLink argued that all provisions in those contracts that dealt with the Golf Course Lands must be declared void because they are "integrally related to each other".[26]

22. The City argued that severance is a judicial remedy to cure illegal contracts or clauses and had no application here, where a presumptively valid contingent interest in land had become void due to the *Perpetuities Act*.[27] The City's position was that Court of Appeal's finding that the Conveyance Provisions were void was narrow and did not affect the remainder of the five contracts.

23. The Application Judge concluded that the doctrine of severance did not apply,[28] but went on to effectively apply a blue-pencil severance technique to declare numerous otherwise valid contractual terms (or portions of terms) in the five contracts to be "inoperative". The Application Judge searched for provisions that were "so interrelated to ss. 5(4) and 9 and the void contingent interests in land that they must necessarily be inoperative", understanding his task as looking for "an interrelated link to the void contingent interest".[29] He described the Conveyance Provisions as "essential provisions for the evolution and potential redevelopment of the golf course lands", such that their being declared void "fundamentally changes the bargain that the parties had negotiated".[30]

24. Included in the provisions declared inoperative were ClubLink's obligation to operate the golf course in perpetuity, and the restriction that any sale of the Golf Course Lands to new owners required execution of an agreement to operate a golf course in perpetuity on the same terms and conditions.[31] Additionally, the Application Judge declared the 40% Principle to be "inoperative" as it applies to a redevelopment of the Golf Course Lands by Campeau or its successors.[32]

25. The effect of the Remittal Decision is, among other things: (1) to remove over 175 acres of land from the 40% Principle such that it no longer must be preserved as open space; (2) to take away the City's contractual right of first refusal if ClubLink receives an offer for the Golf Course

---

[25] Remittal Decision at para. 17.
[26] Remittal Decision at para. 18.
[27] Remittal Decision at para. 20.
[28] Remittal Decision at para. 30.
[29] Remittal Decision at para. 40.
[30] Remittal Decision at para. 48.
[31] Remittal Decision at para. 55.
[32] Remittal Decision at paras. 60-61.

Lands; and (3) to release ClubLink from its promise to operate a golf course in perpetuity, thereby increasing the value of the land and delivering a windfall to ClubLink that it never bargained for.

(iv) The Court of Appeal's Declarations of Voidness

26. The Court of Appeal held that the Application Judge's focus on determining that provisions were "inoperative" because they were "interrelated" with the Conveyance Provisions distracted from the overarching question for resolution; that is, how the rest of the 1981 Agreement and related contracts were affected by the voiding of the Conveyance Provisions.[33]

27. The Court considered, but ultimately sidestepped, arguments as to whether severance can apply to contracts where provisions have been declared void due to the rule against perpetuities.[34] The Court also sidestepped arguments about whether "inoperability" is a remedy in contract law. Instead, the Court concluded that the issue was whether all or part of the 1981 Agreement would be void and unenforceable in light of ss. 5(4) and 9 being declared void and unenforceable.[35]

28. The Court considered the Application Judge's conclusion that the parties had intended to strike a balance between the 40% Principle and allowing use of the Golf Course Lands to evolve over time, and concluded that removing the Conveyance Provisions "fundamentally frustrated that balance".[36] The Court concluded that the bargain between the parties relating to the Golf Course Lands was "at an end".[37] The Court declared that "all provisions in the 1981 Agreement and related contracts relating to the golf course lands are to be considered void as a consequence" and, in respect of provisions that "relate to the property as a whole, they are to be interpreted as no longer applying to the golf course lands".[38] In the result, the Court of Appeal upheld the Application Judge's conclusion, though it arrived at this result in a different way.[39]

---

[33] 2025 Appeal Decision at para. 42.
[34] 2025 Appeal Decision at para. 66.
[35] 2025 Appeal Decision at paras. 67-68.
[36] 2025 Appeal Decision at paras. 74-75, 80.
[37] 2025 Appeal Decision at para. 44.
[38] 2025 Appeal Decision at para. 92.
[39] 2025 Appeal Decision at para. 7.

PART II – STATEMENT OF ISSUES

29. The overarching issue raised by this proposed appeal is what is the impact on a contract arising from a declaration that one provision in it is void? This overarching question raises, in turn, three sub-issues:

a. What legal principles determine the effect on a contract if one or more of its provisions is void by operation of statute or common law?

b. What use, if any, can the court make of a void provision in determining the intentions of the parties?

c. What is the impact on the contract, or on the remaining provisions in a contract, where one provision is valid at the time of contracting but subsequently becomes void for remoteness by the operation of the rule against perpetuities?

PART III – STATEMENT OF ARGUMENT

A. The Applicable Legal Principles Where a Contractual Provision is Void

30. The common law in Canada lacks a clear answer, or even a clear set of governing principles, to answer the question: what is the impact on a contract if one or more of its provisions are void by operation of statute or common law? This lacuna stands in stark contrast to the clear principles relating to illegal provisions, and to the uncontroversial rules found in the civil law of Québec.

31. This lack of clarity creates commercial uncertainty, with parties unable to know the consequences if a contract's provisions are declared void. Further, there is a risk, if not likelihood, of inconsistent results depending on which of the common law's approaches, or if Québec's civil law approach, is applied to the same problem, creating uncertainty for cross-provincial agreements. This uncertainty renders these issues of public importance and warrants this Court's intervention.

(i) Void versus Illegal Contracts

32. The conceptual distinction between "void" and "illegal" contracts or contractual provisions, and the corresponding impact on available remedies, is directly at issue in this proposed appeal. While there is clear law concerning the impact on a contract of illegal provisions, the common law's treatment of "void" contractual provisions – as well as the law's distinction between "void" and "illegal" provisions – is muddied and requires clarification.

(ii) Illegal Contracts and the Doctrine of Severance

33. In *Transport North American*, this Court provided clear guidance concerning the treatment of illegal contractual provisions. The Court explained that where a contractual provision is illegal, the doctrine of severance permits judges to sever problematic provisions to cure the illegality, leaving the remaining contract to be enforced. This remedy contrasts to the traditional approach of declaring the entire contract void *ab initio*.[40] The Court provided guidance as to the two types of severance (blue-pencil and notional) and set out factors relevant to when severance is appropriate.[41]

34. While the common law is clear in this context, this clarity does not extend to circumstances where a contractual provision is void by virtue of a statute or common law. As explained below, there are diverging approaches in how to treat such provisions, raising conceptual questions about the distinction between "illegal" and "void" provisions, and questions about the overall impact on the contract where a provision is void.

(iii) Numerous Approaches Employed to Address Void Provisions

35. The common law has developed a variety of approaches to deal with void contractual provisions, including: (1) omitting the void provision; (2) severing the void provision; or (3) declaring all of the provision void, even where it is only partially non-compliant with the statute. The Court of Appeal for Ontario has now added a fourth, novel approach: declaring related provisions void as a further consequence of finding that a particular provision is void. The difficulty is that there is uncertainty as to when each of these approaches should be adopted and inconsistency in the case law regarding what impact this initial finding has on the remainder of the contract.

1. Omitting the Void Provision

36. In the perpetuities context, the historical approach has been for a contract to be read as if the void provision is omitted. There is no impact to the remainder of the contract.

---

[40] *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7 at paras. 4, 20-26 ["***Transport North American***"]. See also *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 at paras. 33-42.

[41] *Transport North American* at paras. 24, 27, 38-39, 40, 42.

37. As relevant background: the rule against perpetuities historically was a common law doctrine of property law, rather than one of contract.[42] It is a rule that restricts the length of time which may elapse between the creation of a contingent interest in property, and the vesting of that interest. The rule is often understood as a rule against remoteness of vesting.[43] The common law rule was first codified in Ontario in 1966 and in Alberta in 1972, as examples.[44]

38. Within the period of the common law rule being codified, this Court accepted that: "It is settled beyond argument that an agreement merely personal, not creating any interest in land, is not within the rule against perpetuities. Therefore, it is not void simply because the obligation it creates may last for an indefinite time".[45] Where a multi-clause contract contained both personal rights and contingent interests in property, the rule against perpetuities historically has been understood as only applicable to the latter: "whether [a clause creating an interest in property] is void or not, the rest of the contract is effective and binding."[46]

39. This is demonstrated in this Court's decision in *Harris*, which considered a clause within a commercial lease of a service station with a 200-year term that purported to provide the lessee an option to purchase at the expiry to the lease term. The Court concluded that the option clause created a contingent equitable interest in land, which was void by operation of the rule against

---

[42] *Quercus Algoma Corp. v. Algoma Central Corp.*, 2021 ONSC 2457 at para. 21, citing J.H.C. Morris & W. Barton Leach, *The Rule Against Perpetuities*, 2nd ed. (London, U.K.: Stevens & Sons, 1962).

[43] *Sutherland Estate v. Dyer* (1991), 4 O.R. (3d) 168 (Gen. Div.) at paras. 13, 18-19.
[44] *Perpetuities Act, 1966*, S.O. 1966, c. 113; *The Perpetuities Act*, S.A. 1972, c. 121.
[45] *Canadian Long Island Petroleums Ltd. v. Irving Wire Products*, [1974] 2 S.C.R. 715 at 735-736.
[46] *Tilbury Town Gas Co. v. Maple City Oil and Gas Co.* (1915), 27 D.L.R. 199 (Ont. Supreme Court) at para. 28. See also paras. 21, 27; aff'd (1916), 32 D.L.R. 771 (Privy Council).

perpetuities. The Court held: "the effect of this is that the lease takes effect as if the void limitation[47] created by the option were omitted."[48] The balance of the lease was not undermined.

40. The Court of Appeal's decision in this proposed appeal stands in direct contrast to this existing line of cases, in that it declares void numerous personal contractual obligations that did not create contingent interest in land. Guidance on whether the statutory codification of the rule against perpetuities, or any subsequent development of the common law, justifies this novel approach is required.

2. Severing the Void Provision

41. Cases involving franchise legislation have applied the doctrine of severance to contractual provisions that are void or unenforceable by operation of statute. This approach is inconsistent with case law from the employment standards and consumer protection context, as described in Section A(iii)(3) below. Resolving this inconsistency requires guidance on the conceptual distinction between a provision that is void by operation of statute as opposed to a provision that suffers from statutory illegality (which distinction is more than merely technical[49]), and the appropriate remedy.

42. Section 10 of Ontario's *Arthur Wishart Act* [*AWA*] provides that "[a]ny provision in a franchise agreement purporting to restrict the application of Ontario law or to restrict jurisdiction or venue to a forum outside Ontario is void with respect to a claim otherwise enforceable in Ontario".[50] Yet, in *PQ Licensing S.A.*, the Court of Appeal for Ontario upheld as reasonable the arbitrator's decision to apply a blue-pencil severance technique to a mediation clause that required any mediation to take place in Delaware. Rather that voiding the whole clause, only the reference to Delaware was severed.[51] The Court of Appeal explained that the arbitrator had "severed only

---

[47] Section 1 of the *Perpetuities Act*, R.S.O. 1990, c. P.9 ["***Perpetuities Act***"], defines a limitation as: "any provision whereby property or any interest in property, or any right, power or authority over property, is disposed of, created or conferred."

[48] *Harris v. Minister of National Revenue*, [1966] S.C.R. 489 at pp. 497-498.
[49] *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152 at para. 68 ["***Cora***"].
[50] *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3, s. 10 (emphasis added).
[51] *PQ Licensing S.A. v. LPQ Central Canada Inc.*, 2018 ONCA 331 at paras. 49-51 ["***PQ Licensing S.A.***"].

the 'provision' for mediation in Delaware, that s. 10 of the *AWA* rendered void".[52] The Court further explained that this would "cure the illegality" while remaining close to the parties' intentions – thus blurring the lines between illegal provisions and provisions void by operation of a statute.[53]

43. This line is further blurred by the Court's acceptance of the use of severance in such circumstances. Severance is a tool used to remedy illegality in a contract. Its use as a remedy where a statute specifically states that non-compliant contractual provisions are void raises questions as to the conceptual distinction between a provision that is "illegal" by virtue of statute and a provision that is "void" by virtue of statute. These are distinct concepts, but the use of severance as a remedy in response to a void provision undercuts that distinction.

44. The Court of Appeal for Ontario remarked on the distinctions between void, unenforceable or severable provisions in *Cora*. The *Cora* case was concerned with s. 11 of Ontario's *AWA*, which provides that any purported waiver or release by a franchisee of a right under the *AWA* is void. In that case, the contractual provision at issue required a franchisee to deliver a release, which would have been void pursuant to s. 11 of the *AWA*. The Court began by explaining the severance remedy, which can apply "[w]here part of a contract is unenforceable because enforcement would be contrary to statute or common law". [54] The Court ultimately refused to "read down" (i.e., to sever) the impugned provision in the franchise agreement at issue because there was no phrase in the provision that could be struck to fix the issue, and notionally severing the provision would undermine the purposes of the *AWA*.[55]

45. Of note, in *Cora* the Court explained that there is a conceptual difference between a contractual term being void, or void in part, by virtue of a statue, and a contractual provision being unenforceable as a result of statute. The Court expressly distinguished this Court's decision in *Seidel v. Telus Communications Inc.*, 2011 SCC 15, noting that "[t]he question in *Seidel* was whether (or to what extent) an impugned provision in the contract itself was void", whereas in *Cora* the statute rendered any release by the franchisee void, such that the contractual provision requiring

---

[52] *PQ Licensing S.A.* at para. 51.
[53] *PQ Licensing S.A.* at para. 52.
[54] *Cora* at para. 35.
[55] *Cora* at paras. 35-39.

that release was unenforceable.[56] The Court went on to explain that "[t]his distinction is more than merely technical":[57]

> [69] 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 s. 11 of the *AWA*. 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.
>
> [70] This extra dimension invokes policy concerns that do not arise where the court is asked to interpret a statutory provision to determine whether and to what extent it renders provisions in an agreement void. In the latter case, the legislature has spoken. In the former, while the holding that a provision is unenforceable results from statute, the degree to which the court is willing to sever the impugned clause requires a different analytical framework. …

46. This distinction highlights the importance of clarifying whether (and, if so, when) severance could be an appropriate remedy to address a contractual provision that is void by operation of statute. Further, the Court's observation that "the legislature has spoken" in cases where a contractual provision itself is void by operation of statute calls into question whether any further remedy (such as severance or declaring related provisions void, which is explored further below) is necessary or even appropriate.

3. Declaring All of the Provision to be Void

47. In some circumstances, the courts have held that where a clause (or part of a clause) is void by virtue of a statute, the whole of the clause will be void and unenforceable – even if that clause can be broken down into various subclauses, only some of which run afoul of the statute. Further, these cases hold that where a clause is void pursuant to statute, any severability clause contained in the contract cannot apply to it because the clause is void – i.e., you cannot sever a void clause. These conclusions are in direct tension with the Court's remarks in *PQ Licensing S.A.*, which permitted severance of a portion of a clause that was void pursuant to the *AWA*.

48. The employment contract context is instructive. Under Ontario's *Employment Standards Act* [*ESA*], there is no contracting out of employment standards, and "any such contracting out or

---

[56] *Cora* at paras. 63-67.
[57] *Cora* at para. 68.

waiver is void".[58] When it comes to termination clauses, the courts have held that where the termination clause contracts out of a particular statutory employment standard, the whole of the termination clause will be rendered null and void, and therefore unenforceable.[59]

49. This is the case even if just a sentence or portion of the termination clause is contrary to the statutory standard.[60] For example, in *Livshin* the termination clause in s. 6 of the contract was broken down into various subclauses, including subclause (c) for termination for just cause, and subclause (d) for termination without just cause. As s. 6(c) was non-compliant with the *ESA*, the Ontario Superior Court held the entire termination clause (i.e., the whole of s. 6) was void.[61]

50. Notably, this approach is in direct contrast to the *PQ Licensing S.A.* case above, where a provision void pursuant to the *AWA* was broken down into component pieces, and only a portion was severed. This approach also contrasts with this Court's decision in *Chandos Construction*, concerning the application of the anti-deprivation rule, which is a common law rule that may render contractual provisions void. In *Chandos*, the impugned provision was subclause (d) in Clause VII Q. Clause VII Q set out four consequences that followed from the insolvency, bankruptcy, or cease of business of one of the parties. One subclause, (d), was declared void as it violated the anti-deprivation rule. The Court did not question the validity of any of the other sub-clauses within Clause VII Q, or any other terms in the broader contract.[62]

---

[58] *Employment Standards Act*, S.O. 2000, c. 41, s. 5(1).
[59] *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at 1000 ["***Machtinger***"]; *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 at para. 21 ["***Wood***"]. This approach has also been followed in New Brunswick. See *Abrams v. RTO Asset Management*, 2020 NBCA 57 at para. 76, application for leave to SCC ref'd 2021 CanLII 20336.
[60] *North v. Metaswitch Networks Corporation*, 2017 ONCA 790 at paras. 25-26 ["***Metaswitch***"]; *Wood* at para. 24.
[61] *Livshin v. The Clinic Network Canada Inc.*, 2021 ONSC 6796 at paras. 25-39, 68.
[62] *Chandos Construction Ltd. v. Deloitte Restructuring Inc.*, 2020 SCC 25 at paras. 3-4, 45.

51. Of further interest is the fact that in *Metaswitch* the Court of Appeal for Ontario held that the whole of the termination clause will be void if part of it is contrary to the statutory standards, characterizing the whole of the termination clause as "illegal".[63] This again blurs the line between statutory illegality and voidness.

52. Moreover, in *Metaswitch*, the Court of Appeal concluded that where a clause is void pursuant to a statute, and where the contract also contained a severance clause, "there is nothing to which the severability clause can be applied" because the void clause is void. As a result, the severability clause is "inoperative".[64]

53. Along similar lines, in the consumer protection context, the Court of Appeal for Ontario stated that: "A term that is void is a term that is a nullity. It is different in kind from a term that is voidable. A term that is void has no legal force or effect and there is nothing to be saved by a curative provision".[65] This is in direct tension with the approach from *PQ Licensing S.A.*, where severance was applied to a provision that was void. The remarks from *Metaswitch* and *Schnarr* sit uneasily with the Court's guidance in the franchise legislation context that portions of a void provision may be severed, and these cases raise conceptual questions about the legal impact of a provision being void by virtue of a statute.

54. The Courts' analysis in each of the above cases (franchise, employment, consumer protection and bankruptcy law) all centered on the impugned provision itself. None of the cases considered that a void provision could or should have an impact on any other terms in the contract.

4. Declaring Related Provisions to be Void as a Consequence

55. Finally, the Court of Appeal in this case has developed a novel remedy – unsupported by existing authority – pursuant to which the Court may strike "related" provisions of a contract as a consequence of a particular provision being declared void by operation of statute.

---

[63] *Metaswitch* at para. 25.
[64] *Metaswitch* at para. 41. See also *Waksdale v. Swegon North American Inc.*, 2020 ONCA 391 at paras. 13-14, leave to SCC ref'd, 2021 CanLII 1109.
[65] *Schnarr v. Blue Mountain Resorts Limited*, 2018 ONCA 313 at para. 79 (emphasis added), leave to SCC ref'd, 2019 CanLII 7956.

56. In this case, the Court accepted that the application of the *Perpetuities Act* to the Conveyance Provisions gave rise to the "larger question" of how the remainder of the parties' agreements were affected, and specifically whether all or part of the 1981 Agreement and related contracts would be void and enforceable as a result of the Conveyance Provisions being declared void and unenforceable.[66] This analysis proceeded despite the fact that the *Perpetuities Act* specifically provides that an interest that does not vest within the perpetuity period will be "treated as void or declared to be void" (which suggests, as noted in *Cora*, that "the legislature has spoken" with respect to the result).

57. The Court determined that the "key" is "determining whether the bargain struck over the golf course lands, and reflected in the 1981 Agreement and related contracts, could survive the removal of the conveyancing provisions".[67] The Court concluded that, based on the Application Judge's conclusion that the parties' intention was to strike a balance between the 40% Principle and allowing the Golf Course Lands' use to evolve over time, the removal of the Conveyance Provisions "fundamentally frustrated that balance", such that the bargain struck could not be sustained.[68] The "original bargain was spent, and the parties' agreement with respect to the golf course lands could no longer continue".[69] The Court thus declared that all provisions in the 1981 Agreement and related contracts "relating to the golf course lands are to be considered void".[70]

58. This novel approach suggests that each time a court voids a contractual provision due to operation of statute, the parties and the court will have to consider whether the entirety of the contract continues, or whether there are "related" provisions that should also be declared void. This approach is also linked to the parties' intentions – what balance or agreement did they intend to strike, and is that agreement frustrated as a result of the statute rendering a particular provision void? Yet, as explained further in Section III(B) below, how to ascertain parties' intentions in the face of a void provision does not have a clear-cut answer.

---

[66] 2025 Appeal Decision at paras. 42, 68.
[67] 2025 Appeal Decision at para. 69.
[68] 2025 Appeal Decision at paras. 75, 78, 80.
[69] 2025 Appeal Decision at para. 80.
[70] 2025 Appeal Decision at para. 92.

(iv) Québec's Approach

59. In its current state, the common law offers a "'piecemeal' approach" which "fails to take a consistent or principled approach to similar problems" that arise when a contractual provision is found void – the same issues that prompted this Court to provide guidance on good faith in contract law in *Bhasin*.[71] This muddled approach stands in contrast to Québec's civil law, which has developed a coherent, principled framework to address this issue more systematically. Under the Civil Code Québec ("**CCQ**"), a contract which contains a null or unenforceable clause is unaffected unless it is determined that such a clause is an essential part of the contract. This rule, which was initially developed by the case law,[72] is codified in Québec at art. 1438 of the CCQ:

> 1438. A clause which is null does not render the contract invalid in other respects, unless it is apparent that the contract may be considered only as an indivisible whole.
>
> The same applies to a clause without effect or deemed unwritten.

60. As previously explained by this Court, art. 1438 allows a court to "neutralize the legally problematic clause rather than categorically concluding that the parties to a synallagmatic contract did not intend to make an exchange".[73] Courts should only look beyond the problematic clause and into the contract as a whole if the clause constitutes the main stipulation without which the contract becomes devoid of purpose, or without which the objective pursued by the parties would not be

---

[71] *Bhasin v. Hrynew*, 2014 SCC 71 at para. 42. See also *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at para. 45.
[72] *Produits V-To Inc. c. Bolduc*, [1976] C.S. 1325; *Perreault* c. *Productions Prisma Inc.*, [1976] C.S. 1329; *Cameron c. Canadian Factors Corp.*, [1971] R.C.S. 148. See also Didier Lluelles & Benoît Moore, *Droit des obligations*, 3rd ed. (Montréal: Thémis, 2018), at No. 1721 ["***Droit des obligations***"].
[73] *6362222 Canada inc. v. Prelco inc.*, 2021 SCC 39 at para. 101.

achieved.[74] And, since the principle is that a contract is divisible, the party claiming the invalidity of the whole contract must show that the contract cannot survive the nullity of the disputed clause.[75]

(v) The Common Law Needs a Coherent Approach

61. It is apparent there are a multiplicity of possible approaches where a provision in a contract is void. Void provisions could be omitted, or severed; they could be simply declared void and unenforceable; or they could result in other "related" provisions – or even the whole contract – being found void and unenforceable. Clarity is required as to the correct approach or, if the remedy falls along a spectrum (like with illegality), when the different approaches should be applied.

B. The Use Courts Can Make of a Void Provision in Determining the Parties' Intentions

62. Given the interrelationship between the parties' intention and the appropriate remedy or result arising from a finding that contractual provisions are void by operation of statute, this Court should offer updated guidance on how to assess the parties' intentions in light of voided provisions.

63. The intention of the parties is to be determined by "read[ing] the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract".[76] How to ascertain the parties' intention where provisions within the contract are subsequently declared void is currently unclear. However, it is a vitally important question, because how the courts approach the question of the remedy or impact arising from a provision being void by operation of statute or common law should reflect the fundamental proposition that courts ought not to rewrite the parties' agreement or do "violence" to the parties' intentions.[77]

64. In *Machtinger v. HOJ Industries Ltd.*, this Court held that a provision in an employment contract that is null and void is "null and void for all purposes, and cannot be used as evidence of the parties' intention". Further, "[i]f the intention of the parties is to make an unlawful contract, no

---

[74] *Lejay c. Syndicat de copropriété les Fougeroles du Relais*, 2021 QCCS 2884, aff'd 2023 QCCA 530; Vincent Karim, *Les obligations* (5th ed. 2020), vol. 1, at No. 2640. See also *Droit des obligations* at No. 1721.
[75] *Droit des obligations* at No. 1721.
[76] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 47, 57-58.
[77] See *Transport North American* at paras. 28, 32.

unlawful contractual term can be derived from their intention".[78] This principle was more recently stated by the Court in *Metaswitch* ("[b]ecause the termination clause is void, it cannot be used as evidence of the parties' intentions to comply with the [*ESA*]").[79]

65. Updated guidance is needed on how *Machtinger* operates in light of *Sattva*'s call to consider the words of the contract, consistent with the surrounding circumstances known at the time of contract formation. The direction to ignore the existence of, and specific text included in, a void provision sits uneasily with the requirement for parties' intentions to be derived from the contract as a whole. To the extent that the surrounding circumstances relate to the parties' negotiation of the void provision, the void provision might also provide evidence of the parties' intentions.

66. The question of how to interpret the parties' intentions takes on particular significance in the perpetuities context, where provisions creating contingent interests or entitlements are valid up until the expiry of the relevant time period. Does *Machtinger* require consideration of the provision as evidence of the parties' intentions for the first 21 years, but preclude its consideration if a contractual interpretation dispute arises at 21 years and a day? Clarity in this regard is required to permit parties to draft contracts, wills and trusts that accurately reflect their intentions.

67. It has been over 30 years since this Court's decision in *Machtinger*. The landscape of contractual interpretation has developed with *Sattva*. It is time for this Court to provide updated guidance as to how the holding in *Machtinger* applies in these circumstances.

C. The Impact on the Contract Where a Provision is Void for Perpetuities

68. Finally, the proposed appeal poses questions specific to the perpetuities context, specifically whether general contractual remedies are equally applicable, which require guidance from this Court. For example, whether severance can apply where a provision becomes void by virtue of the rule against perpetuities is an open question. Despite full argument on this point, the Court in this case left this question to "another day".[80]

69. Additionally, it is highly questionable whether "related" contractual rights should be declared void when a particular provision is found void for remoteness, given that the provincial

---

[78] *Machtinger* at 1001.
[79] *Metaswitch* at para. 42. See also *Wood* at para. 58.
[80] 2025 Appeal Decision at para. 66.

legislatures have decided, by enacting "savings provisions", that dependent limitations should not fail simply because they are preceded by an invalid limitation.[81] This displaces the traditional rule that if a limitation is void for perpetuities, a dependent and expectant limitation will also be void.[82]

70. The Court of Appeal's approach in this case, and its decision to declare void any portions of the parties' agreements relating to the Golf Course Lands, raises the critical question of whether it is open to Courts to re-write a bargain on its own accord (without reference to any legal or equitable framework) where particular provisions have become void for remoteness; and, if so, what is the appropriate framework to guide that analysis?

71. Moreover, the Court's approach is out of step with respect to the civil law. The Québec legislature has explicitly opted for a sanction that would not interfere with the rest of the contract where it has addressed the issue of perpetuity in restrictive covenants in Québec property law.[83]

72. The practical impact on this case cannot be overstated. Whether or not "related" provisions are also void and unenforceable, or whether they can be severed, answers the critical question of whether the fundamental bargain reached between Campeau and Kanata – that Campeau could develop the Campeau Lands, in exchange for and subject to the 40% Principle – remains in effect. This is of significant interest to the parties, but also of general public importance insofar as the parties' bargain and the results of this case impact on the City's municipal planning and development, as well as access to green space for its residents.

PART IV – SUMISSIONS ON COSTS

73. The Applicant seeks costs in the cause.

PART V – ORDER

74. The Applicant respectfully requests that leave to appeal be granted, with costs in the cause.

---

[81] *Perpetuities Act*, s. 10. See also *Perpetuities Act*, R.S.A. 2000, c. P-5, s. 13; *Perpetuity Act*, R.S.B.C 1996, c. 358, s. 17.
[82] *Re Metcalfe*, [1946] O.R. 882 (H. Ct. J.), citing *Worthing Corporation v. Heather*, [1906] 2 Ch 532.
[83] *Droit des obligations* at No. 2157.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of March 2025.

Per: 

_____

Kirsten Crain | Laura E. Robinson | Amanda Afeich
Counsel for the Applicant,
City of Ottawa

PART VI – TABLE OF AUTHORITIES

Case Law

No.	Authority	Paragraph Reference
1.	*2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152.	41, 44, 45, 56
2.	*6362222 Canada inc. v. Prelco inc.*, 2021 SCC 39.	60
3.	*Abrams v. RTO Asset Management*, 2020 NBCA 57.	48
4.	*Bhasin v. Hrynew*, 2014 SCC 71.	59
5.	*Canadian Long Island Petroleums Ltd. v. Irving Wire Products*, [1974] 2 S.C.R. 715.	38
6.	*Cameron* c. *Canadian Factors Corp.*, [1971] R.C.S. 148.	59
7.	*Chandos Construction Ltd. v. Deloitte Restructuring Inc.*, 2020 SCC 25.	50
8.	*City of Ottawa v. ClubLink Corporation ULC*, 2021 ONSC 1298.	7, 8, 11, 12, 14, 16
9.	*City of Ottawa v. ClubLink Corporation ULC*, 2023 ONSC 5004.	11, 14, 21, 22, 23, 24, 25
10.	*C.M. Callow Inc. v. Zollinger*, 2020 SCC 45.	59
11.	*David Schnarr, et al. v. Blue Mountain Resorts Limited, et al.*, 2019 CanLII 7956.	53
12.	*Harris v. Minister of National Revenue*, [1966] S.C.R. 489.	39
13.	*Lejay c. Syndicat de copropriété les Fougeroles du Relais*, 2021 QCCS 2884.	60
14.	*Lejay c. Syndicat de copropriété les Fougeroles du Relais*, 2023 QCCA 530.	60
15.	*Livshin v. The Clinic Network Canada Inc.*, 2021 ONSC 6796.	49
16.	*Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986.	48, 64, 65, 66, 67
17.	*North v. Metaswitch Networks Corporation*, 2017 ONCA 790.	49, 51, 52, 53, 64

No.	Authority	Paragraph Reference
18.	*Ottawa (City) v. ClubLink Corporation ULC*, 2021 ONCA 847.	7, 9, 10, 12, 16, 17, 18, 19
19.	*Ottawa (City) v. ClubLink Corporation ULC*, 2025 ONCA 34.	7, 8, 14, 26, 27, 28, 56, 57, 68
20.	*Perreault* c. *Productions Prisma Inc.*, [1976] C.S. 1329.	59
21.	*PQ Licensing S.A. v. LPQ Central Canada Inc.*, 2018 ONCA 331.	42, 47, 50, 53
22.	*Produits V-To Inc.* c. *Bolduc*, [1976] C.S. 1325.	59
23.	*Quercus Algoma Corp. v. Algoma Central Corp.*, 2021 ONSC 2457.	37
24.	*Re Metcalfe*, [1946] O.R. 882 (H. Ct. J.).	69
25.	*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.	63, 65, 67
26.	*Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6.	33
27.	*Sutherland Estate v. Dyer* (1991), 4 O.R. (3d) 168 (Gen. Div.).	37
28.	*Swegon North America Inc. v. Benjamin Waksdale*, 2021 CanLII 1109.	52
29.	*Tilbury Town Gas Co. v. Maple City Oil and Gas Co.* (1915), 27 D.L.R. 199 (Ont. Supreme Court).	38
30.	*Tilbury Town Gas Co. v. Maple City Oil and Gas Co.* (1916), 32 D.L.R. 771 (Privy Council).	38
31.	*Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7.	33, 63
32.	*Waksdale v. Swegon North American Inc.*, 2020 ONCA 391.	52
33.	*Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158.	48, 49, 64
34.	*Worthing Corporation v. Heather*, [1906] 2 Ch 532.	69

Other Source Documents

No.	Document	Paragraph Reference
1.	Didier Lluelles & Benoît Moore, *Droit des obligations*, 3rd ed. (Montréal: Thémis, 2018), at No. 1721.	59, 60, 71
2.	J.H.C. Morris & W. Barton Leach, *The Rule Against Perpetuities*, 2nd ed. (London, U.K.: Stevens & Sons, 1962).	37
3.	Vincent Karim, *Les obligations* (5th ed. 2020), vol. 1, at No. 2640.	60

Statutes, Regulations, Rules, etc.

No.	Statute, Regulation, Rule, etc.	Section, Rule, Etc.
1.	*Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3.	ss. 10, 11
	Loi Arthur Wishart de 2000 sur la divulgation relative aux franchises, LO 2000, c 3.	ss. 10, 11
2.	*Employment Standards Act*, S.O. 2000, c. 41.	s. 5(1)
	Loi de 2000 sur les normes d'emploi, LO 2000, c 41.	s. 5(1)
3.	*Perpetuities Act*, R.S.A. 2000, c. P-5.	s. 13
4.	*Perpetuity Act*, R.S.B.C. 1996, c. 358.	s. 17
5.	*Perpetuities Act*, RSO 1990, c P.9.	ss. 1, 10
	Loi sur les dévolutions perpétuelles, LRO 1990, c P.9.	ss. 1, 10
6.	*The Perpetuities Act*, S.A. 1972, c. 121.	n/a
7.	*Perpetuities Act, 1966*, S.O. 1966, c. 113	n/a

PART VII – STATUTES, LEGISLATION, RULES, ETC.

See Part VI.