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

Intervenor

FACTUM OF THE INTERVENOR
KANATA GREENSPACE PROTECTION COALITION

February 11, 2020

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PART I - OVERVIEW

1. This case is about whether commitments made by a developer in order to secure municipal approval of its residential development must be honoured by its successor in interest which freely and voluntarily assumed those commitments. As part of securing planning approval for its proposed development in the Marchwood Lakeside community of Kanata (now known as "Kanata Lakes"), Campeau Corporation ["**Campeau**"] signed an agreement with the former City of Kanata ["**Kanata**"] in 1981 premised on the principle that 40 percent of the total development area would remain as open space for recreational and environmental purposes ["**40% Principle**"]. The 18-hole Kanata Lakes golf course formed a substantial part of that open space.

2. Thousands of people later became homeowners in this new development relying on the promise that the 40% Principle would be respected, and they would be able to reside in a community with 40 percent greenspace.

3. ClubLink bought the Kanata Lakes golf course in 1996, assumed the commitments made by the original developer and operated the course for over 20 years. Now, in blatant disregard of the commitments it assumed, ClubLink is attempting to develop the golf course and replace the 175 acres of open space with 1,500 houses. The proposed development would drastically change the nature of the Kanata Lakes community, deprive landowners of their cherished greenspace, violate the 40% Principle and frustrate the intent of the original parties.

4. The Kanata Greenspace Protection Coalition ["**Coalition**"] supports and adopts the position of the City of Ottawa [the "**City**"] that the contractual obligations assumed by ClubLink Corporation ULC ["**ClubLink**"] in relation to the operation of the golf course are valid and enforceable.

5. In addition to the contractual obligations relating to the golf course, the Coalition submits that the development is also subject to a restrictive covenant running with the land which requires that the 40% Principle remain intact. In facts remarkably similar to the seminal case of *Tulk v. Moxhay*,[1] equity should intervene again in this case to enforce a covenant to maintain property as open space where a developer seeks to disregard its common law obligations.

6. The Coalition also seeks a determination from the Court as to the validity and enforceability of another restrictive covenant registered on title by ClubLink relating to grading and stormwater management on the golf course lands. This question is addressed at the end of the Factum as a separate issue.

PART II - FACTS

A. 1981 Agreement

7. The 40% Principle was first set out and codified in the 1981 Agreement between Campeau and Kanata relating to the development of the "'Marchwood Lakeside Community' in the City of Kanata."[2]

8. The Coalition represents the interests of many of the landowners in what was known as the Kanata Marchwood Lakeside Community, which now includes the Kanata Lakes neighbourhood, Country Club Estates, CCC575, Catherwood and Nelford Court.[3]

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[1] [1848] 41 E.R. 1143 (Eng. Ch. Div.).
[2] Preamble, 1981 Agreement, Exhibit "F" of the Affidavit of Eileen Adams-Wright sworn October 24, 2019 ["**Adams-Wright October Affidavit**"], Application Record of the Applicant, City of the Ottawa ["**AR**"], Vol. I, Tab 2 at p. 48.
[3] Exhibit 1 of the Affidavit of Barbara Ramsay sworn February 10, 2020 ["**Ramsay February Affidavit**"], AR, Vol. VI, Tab 11 at p. 1774; see also Exhibit "C" to the Affidavit of Donald Kennedy sworn October 25, 2019 ["**Kennedy October Affidavit**"], AR, Vol. VI, Tab 6 at p. 1595, which includes maps detailing the Kanata Marchwood Lakeside Community as encompassing these neighbourhoods.

9. Section 3 of the 1981 Agreement codifies the 40% Principle:[4]

> *3. Campeau hereby confirms the principle stated in its proposal that approximately forty (40%) percent of the total development area of the 'Marchwood Lakeside Community' shall be left as open space for recreation and natural environmental purposes which areas consist of the following:*
>
> *(a) the proposed 18 hole golf course*
> *(b) the storm water management area*
> *(c) the natural environmental areas*
> *(d) lands to be dedicated for park purposes*

10. Section 4 of the 1981 Agreement provides that the exact boundaries and location of the areas referred to in section 3 are to be mutually agreed upon by the parties.[5]

11. Section 5 of the 1981 Agreement relates to the "Methods of Protection" of the 40% Principle and is specific to the golf course and its operations. Subsections 5(4) and 5(5) address the situation whereby Campeau wishes to discontinue the operation of the golf course:

> *(4) 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.*
>
> *(5) In the event 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, not withstanding anything to the contrary in this agreement.*[6]

12. As can be seen, the 1981 Agreement does provide a mechanism by which Campeau would have the right to apply to develop the golf course lands, subject to the *Planning Act*, notwithstanding anything else in the Agreement.

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[4] S. 10 of the 1981 Agreement also states that *"[i]t 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…*", Exhibit "F" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 52.
[5] S. 4, 1981 Agreement, Exhibit "F" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 50.
[6] Exhibit "F" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 51.

13. The mechanism, however, includes a condition precedent by which Campeau would need to first try to find other persons to acquire the golf course or operate it, be unable to do so, then offer to convey the golf course to Kanata at no cost and finally have Kanata refuse the conveyance. It is only upon the occurrence of these four (4) events that the owner's right to apply to develop the golf course may be triggered.

14. Section 9 provides that if Kanata is the owner of any of the land set aside for open space for recreation and natural environmental purposes and this land ceases to be used for such purposes, Kanata is required to reconvey the land to Campeau at no cost.[7] As with section 5, the discretion in relation to the continued protection of greenspace is with the municipality.

B. <u>1988 Agreement</u>

15. The original 40 percent agreement of 1981 suggested that further study would be required to determine exactly where open space was to be dedicated. Once this was done, the parties entered into the 1988 Agreement.[8]

16. The 1988 Agreement effectively adopts and amends the 1981 Agreement (which it refers to as the "Forty Percent Agreement") to limit the application of the 40% Principle to the lands described at its Schedule "A", which the Agreement defines as the ["**Current Lands**"]. Schedule "A" includes the legal description for these lands.[9]

17. Section 4 of the Agreement incorporates by reference the concept plan submitted by Campeau and approved by Kanata City Council for the development of area known as Marchwood

[7] S. 9, 1981 Agreement, Exhibit "F" of the Adams-Wright October Affidavit, AR, Vol. 1, Tab 2 at p. 52.
[8] Exhibit "J" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 302.
[9] Schedule "A", 1988 Agreement, Exhibit "J" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 308.

Lakeside ["**Concept Plan**"].[10] The Concept Plan indicates where within the Current Lands that the open space lands for recreational and natural environmental purposes would be [the "**Open Space Lands**"].[11] Approximately 32 percent of the Open Space Lands is occupied by the previously specified golf course, i.e. one third of the entire 40 percent of the dedicated open greenspace is comprised of the golf course ["**Golf Course Lands**"].[12]

18. The preamble of the 1988 Agreement also states that "the City wishes to ensure that the obligations under the Forty Percent Agreement and the Subdivision Agreement in respect of the Current Lands are binding on successors in title of Campeau."[13] In this regard, section 7 of the 1988 Agreement expressly provides:

> *7. It is hereby agreed that the Forty Percent Agreement and this Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of Campeau and the City and shall run with and bind the Current Lands for the benefit of the Kanata Marchwood Lakeside Community.*[14] [Emphasis added]

19. The 1988 Agreement is registered on title of every residential lot in Kanata Lakes.[15]

C. ClubLink Assumption Agreement

20. On November 1, 1996, ClubLink agreed to be bound by the covenants and obligations set out in the 1981 and 1988 Agreements [the "**ClubLink Assumption Agreement**"].[16] Those obligations had previously been assigned to Genstar Development Company Eastern Ltd., which

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[10] Exhibit "C" of the Kennedy October Affidavit, AR, Vol. VI, Tab 6 at p. 1595.
[11] Exhibit "J" of the Adam-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 304.
[12] Kennedy October Affidavit at para. 19, AR, Vol. VI, Tab 6 at p. 1575; see also Exhibits "B.1" to "E.2", and Schedule "C" of Exhibit "J" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at pp. 29-61, 323.
[13] Preamble, 1988 Agreement, Exhibit "J" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 302.
[14] S. 7, 1988 Agreement, Exhibit "J" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 307.
[15] OMB Decision, Exhibit "A" to the Affidavit of Brett Deighan sworn December 13, 2019, AR, Vol. VI, Tab 9 at p. 1704; see also Exhibit "V" to the Adams-Wright October Affidavit, R, Vol. III, Tab 2 at p. 869; which is a parcel register for a residential lot adjacent to the Golf Course Lands. The parcel register confirms that both the 1981 and 988 Agreements are registered on title.
[16] Preamble, para. "L", ClubLink Assumption Agreement, Exhibit "S" of the Adams-Wright October Affidavit, AR, Vol. III, Tab 2 at p. 790.

later amalgamated with Imasco Enterprises Inc. ["**Imasco**"].

21. At section 3 of the ClubLink Assumption Agreement, ClubLink covenanted and agreed that from that date, every covenant, proviso, condition and stipulation contained in the Forty Percent Agreement (defined as both the 1981 and 1988 Agreements) would "*apply and bind [ClubLink] in the same manner and to the same effect as if [ClubLink] had executed the same in the place and stead of Campeau or Imasco*."[17]

22. At section 9, Imasco covenanted that it would insert a clause into all agreements of purchase and sale for lots still owned by Imasco that are within 100 metres of the Golf Course Lands requiring homeowners to agree that they will not claim against the City, ClubLink or Imasco for any property damage or injury suffered as a result of activities on the golf course.[18]

23. Section 11 of the ClubLink Assumption Agreement addresses the 40% Principle expressly:

> *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 as open space for recreation and natural environmental purposes (the "Open Space Lands") as referred to in Section 3 of the 1981 Agreement, so that 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. If the use of the Golf Course Lands as a golf course or otherwise as Open Space Lands is, with the agreement of the City, terminated, then for determining the above 40% requirement, the Golf Course Lands shall be deemed to be and remain Open Space Lands.*

24. The 1996 ClubLink Assumption Agreement was registered on title to the Golf Course

[17] S. 3(b), ClubLink Assumption Agreement, Exhibit "S" of the Adams-Wright October Affidavit, AR, Vol. III, Tab 2 at p. 791.
[18] S. 9, ClubLink Assumption Agreement, Exhibit "S" of the Adams-Wright October Affidavit, AR, Vol. III, Tab 2 at p. 792.

Lands on January 8, 1997.[19]

PART III - LAW AND ARGUMENT

A. The 40% Principle is a Restrictive Covenant that Binds the Golf Lands for the Benefit of the Lands in the Kanata Marchwood Lakeside Community

i. A restrictive covenant is an exception to the doctrine of privity of contract

25. Property law principles permit restrictive covenants relating to land to be enforced despite the lack of privity of contract.[20] In this case, the Coalition represents the interests of many of the landowners whose land is benefited by the covenant in question.

ii. Requirements for a restrictive covenant and their application in this case

26. The Coalition submits that the 1988 Agreement creates a restrictive covenant requiring that 40 percent of the total development area for the Kanata Marchwood Lakeside Community, including the golf course, be left as open space for recreation and natural environmental purposes. The covenant was assumed, restated and then registered on title by ClubLink in the 1996 ClubLink Assumption Agreement.

27. The requirements for a restrictive covenant are well-established.[21] We identify each of them and address their application to the present case below.

a) The covenant must be negative in substance and constitute a burden on the covenantor's land analogous to an easement.

28. The restrictions originally set out at section 3 of the 1981 Agreement and incorporated into the 1988 Agreement provides that 40 percent of the total development area for the Kanata

[19] P. 1, ClubLink Assumption Agreement, Exhibit "S" of the Adams-Wright October Affidavit., AR, Vol. III, Tab 2 at p. 787.
[20] See e.g. *2129152 Ontario Inc. v. Pliamm et al.*, 2017 ONSC 4451 at para. 57.
[21] See e.g. Victor Di Castri, *Registration of Title to Land* (Toronto: Thomson Reuters, 1987) (loose-leaf updated 2013, release 1), ch. 10 at pp. 10-4, 10-5; s. 119 of the *Land Titles Act*, R.S.O. 1990, C. L.5.

Marchwood Lakeside Community be left as open space for recreation and natural environmental purposes.

29. This covenant meets the requirement of being negative in nature. To constitute a positive covenant, the agreement must do more than just restrict the use of the applicant's property; it must also require them to engage in positive acts in order to fulfill its terms. While some covenants may be expressed in positive language, when analyzed, they are really negative in nature.[22] Indeed, a covenant to maintain property as a garden free of buildings was found to be a negative covenant in the seminal case of *Tulk v. Moxhay*.[23] The Coalition submits that the covenant at issue in this case is similar and should be treated in the same way.

30. It must be acknowledged that covenants providing for the operation of a golf course have generally been deemed to be positive in nature.[24] The distinguishing factor in this case, however, is that the golf course is simply one of the means by which the 40% Principle can be respected. This can be contrasted with the situation in *Aquadel Golf Course Ltd. v. Lindell Beach Holiday Resort Ltd.*, where the B.C. Court of Appeal held that "*[i]f the first paragraph were interpreted to mean that Whitlam did not have to use the lands as a golf course, and could allow it to return to wilderness, the remaining paragraphs of the Agreement would be meaningless and unenforceable*."[25]

31. The opposite is true in this case: the 40% Principle is not dependent on the use of the lands as a golf course. Only section 5 of the 1981 Agreement specifically addresses the operation of a golf course. Other provisions in the Agreements refer only to the use of the land as open space for

[22] *4348037 Manitoba Ltd. v. 2804809 Manitoba Ltd.*, 2003 MBQB 123 at para. 12.
[23] *Supra* note1.
[24] See e.g. *Aquadel Golf Course Ltd. v. Lindell Beach Holiday Resort Ltd*., 2009 BCCA 5.
[25] *Ibid.* at para. 18.

recreation and natural environmental purposes. Moreover, section 10 of the 1996 ClubLink Assumption Agreement confirms that, in the event the use of the golf course is terminated with the consent of the City, the lands shall be deemed to be and remain Open Space Lands.

32. The other question that arises under this prong is whether or not the purported covenant actually imposes a burden on the lands. More specifically, because subsections 5(4) and 5(5) of the 1981 Agreement contemplate a scenario whereby Campeau can develop the property irrespective of anything in the Agreement, is there actually a burden?

33. The Coalition submits that there is indeed a burden in the sense that there is a condition precedent requiring ClubLink to try to find another person to acquire or operate the golf course, give the City an opportunity to purchase the lands and have the City decline before this possibility even arises. This provides an important measure of protection to the benefited lands. The fact that this possibility exists does not undermine its status as a burden to the lands.

b) The covenant must be one that touches and concerns the land, i.e. it must be imposed for the benefit of or to enhance the value of the benefited land.

34. A restrictive covenant much touch and concern land.[26] The requirement that 40 percent of the Current Lands be maintained as open space for recreation and natural environmental purposes benefits and enhances the value of the remaining 60 percent of the lands.

35. It is well-established that the benefit and enhanced value of a covenant can be inferred. In one case, the B.C. Court of Appeal adopted as "*unassailable*" the conclusion of the trial judge that "*[t]he restrictive covenants and building schemes have practical benefits to the respondents […]. These benefits include increased privacy, low density housing, and the quality of life which flows*

[26] *Canada Safeway Ltd. v. Thompson (City)* (1996), 112 Man. R. (2d) 94 (Q.B.) at para. 27, *per* Clearwater J., aff'd (1997) 118 Man. R. (2d) 34 (C.A.).

from those two factors."[27]

36. In the case at bar, the intangible benefits from urban greenspace are well-documented and have an obvious impact on property values.[28] As was found by Justice MacLeod in the context of the Intervention Motion in this case, "*it is sufficient that the homeowners stand to lose the benefit of 40% green space which they believe was guaranteed. The impact on the nature and character of the neighbourhood if the development proceeds would obviously be profound*."[29]

c) The benefited as well as the burdened land must be defined with precision in the instrument creating the restrictive covenant.

37. For a restrictive covenant to be enforceable, the deed itself must so define the land to be benefited as to make it easily ascertainable.[30]

38. The 1988 Agreement provides that the 40% Principle applies to the Current Lands, for which the relevant legal descriptions are provided in Schedule "A".[31] Section 4 of the Agreement incorporates by reference the Concept Plan, which indicates the Open Space Lands and specifies where the lots would be. [32] The Open Space Lands are the burdened lands, while the remaining lands within the Current Lands are the benefited lands.

39. The preamble and section 3 of the 1988 Agreement also incorporate by reference the Subdivision Agreement registered on title as Instrument No. 568244.[33] The Subdivision Agreement describes the location of the subdivision surrounded by the Open Space Lands (the

[27] *Gubbels v. Anderson* (1995), 8 B.C.L.R. (3d) 193 at paras. 23-25 (C.A.).
[28] Ramsay February Affidavit at paras. 8, 12-13, AR, Vol. VI, Tab 11 at p. 1776.
[29] 2019 ONSC 7470 at para. 16.
[30] *Dyer Estate v. Tozer* (2008), 78 R.P.R. (4th) 111 at para. 35, *per* Wood J. (Ont. S.C.J.), citing *Galbraith v. Madawaska Club Ltd.*, [1961] S.C.R. 639 at p. 653.
[31] Schedule "A", 1988 Agreement, Exhibit "J" of the Adams-Wright October Affidavit AR, Vol. I, Tab 2 at p. 308.
[32] Exhibit "C" of the Kennedy October Affidavit.
[33] Preamble, 1988 Agreement, Exhibit "J" of the Adams-Wright October Affidavit, Vol. I, Tab 2 at pp. 303-04.

burdened lands).[34]

d) The conveyance or agreement should state the covenant is imposed on the covenantor's land for the protection of specified land of the covenantee.

40. In this case, section 7 of the 1988 Agreement expressly provides that it "*shall run with and bind the Current Lands for the benefit of the Kanata Marchwood Lakeside Community*."[35] The preamble of 1988 Agreement referentially incorporates the definition of the "Marchwood Lakeside Community" as being that as set out in the 1981 Agreement at Schedule "A", without the excess lands included in the former agreement.

41. In other cases, terms referring to people such as "*not only for the residents of Itaska but for all members of the public*"[36] were held to be insufficiently precise to specify the land of the covenantee. In this case, the "Marchwood Lakeside Community" has been repeatedly defined as incorporating land, as opposed to people.

e) Unless the contrary is authorized by statute, the titles to both the benefited land and the burdened land are required to be registered.

42. Both the titles to the benefited and burdened lands are registered.[37]

43. It is also important to note that, while subsection 119(4) of the *Land Titles Act* does not require it,[38] the 1981 Agreement, 1988 Agreement and 1996 ClubLink Assumption Agreement are all registered on title of the burdened lands.[39] The 1981 and 1988 Agreements are also registered on title to the benefited lands. It is thus clear that it was the parties' intention to create an interest

[34] See Instrument No. 56844, Subdivision Agreement, Exhibit "H" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at pp. 266, 285-87.
[35] S. 7, 1988 Agreement, Exhibit "J" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 307.
[36] *Thierman v. Itaska Beach (Summer Village)*, 2002 ABQB 343 at paras. 22-24.
[37] Exhibits "B" to "E" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at pp. 29-61.
[38] S. 119(4), *Land Titles Act*, R.S.O. 1990, c. L.5.
[39] See e.g. Exhibit "V" of the Adams-Wright October Affidavit, AR, Vol. III, Tab 2 at p. 869.

in land, i.e. a restrictive covenant, which binds and runs with the land.[40]

f) The covenantee must be a person other than the covenantor

44. In this case, the covenantor is Campeau/ClubLink. The covenantees are the eventual landowners of the Marchwood Lakeside Community.

45. In 1996, when the covenant was restated and registered by ClubLink, the covenantees were Imasco and the homeowners who had purchased lots within the Current Lands.

g) Conclusion

46. The Coalition submits that all of the requirements for a restrictive covenant are met, such that the Current Lands should be held to be subject to a restrictive covenant (the 40% Principle).

B. <u>The Restrictive Covenant Registered on Title in January 1997 is Valid and Enforceable</u>

i. Restrictive Covenant Relating to Grading

47. On the same day that the ClubLink Assumption Agreement was registered, ClubLink also registered a further list of covenants and restrictions it agreed would run with and bind the Golf Course Lands (referred to as the "Golf Lands" in the ClubLink Assumption Agreement).[41]

48. Schedule 1 to Schedule "B" describes the "Benefited Lands" to which the restrictive covenant is to attach.[42] The legal description of the properties in question confirm that they are largely the lots comprising the "Current Lands."

49. The additional covenants relate to the grading and storm water management facilities on

[40] See *Qureshi v. Gooch*, 2005 BCSC 1584 at para. 21, citing *Nylar Foods Ltd. v. Roman Catholic Episcopal Corp. of Prince Rupert* (1988), 48 D.L.R. (4th) 175 at pp. 176-77, *per* McLachlin J.A. (as she then was) (B.C. C.A.).
[41] See Exhibit "R" to the Adams-Wright October Affidavit, AR, Vol. III, Tab 2 at p. 782.
[42] *Ibid*. at p. 786. Paragraph 3(ii) of Schedule "B" notes that the "Benefitted Lands" are the lands owned by Imasco that were primarily intended for residential development.

the Golf Course Lands. In particular, ClubLink agreed as follows:

> *3. Each and every part of the Golf Lands shall be subject to the following restrictions and covenants:*
>
> *(i) [ClubLink] agrees that:*
>
> *(a) it shall not alter the grading of the Golf Lands or any of the storm water management facilities on or serving the Golf Lands; and*
>
> *(b) there should be no construction of any buildings, structures or other improvements on the Golf Lands which may cause surface drainage from the Golf Lands to be discharged, obstructed or otherwise altered,*
>
> *in a manner that materially adversely affects [Imasco]'s or the City of Kanata's storm water management plan in respect of [Imasco's]Benefitted Lands as such plan exists as at November 1, 1996.* [Emphasis added]

ii. Validity and Enforceability of the Covenant

50. ClubLink has not advised of any basis upon which the above-listed covenant would not be valid and enforceable.

51. The Coalition seeks a declaration from this Honourable Court that section 3(i) of Schedule "B" of the instrument LT1020194 is valid and enforceable. The question of whether ClubLink's proposed development breaches this covenant is not before the Court and would need to be determined at a later time.

52. Instrument LT1020194 clearly complies with the requirements for a restrictive covenant: **1)** the restriction is both negative and a burden on the Golf Course Lands; **2)** the covenant touches and concerns land (dealing specifically with grading and stormwater management); **3)** the burdened lands are expressly identified in Box (6) of the Form 4 Document General and the benefited lands are legally described at Schedule 1 to Schedule "B"; **4)** section 1 of Schedule "B" expressly provides that the covenant is intended to benefit the Benefitted Lands; and **5)** the title to the Golf Course Lands is registered, and the covenantor (ClubLink) is a person other than the covenantee

(Imasco and the owners of the lots comprising the Benefitted Lands).

PART IV - ORDER SOUGHT

53. The Kanata Greenspace Protection Coalition requests that this Honourable Court:

i. Declare that the Current Lands are subject to a restrictive covenant requiring that 40 percent of the total development area for the Kanata Marchwood Lakeside Community be left as open space for recreation and natural environmental purposes;

ii. Declare that the restrictive covenant set out at s. 3 of instrument LT1020194 remains valid and enforceable;

iii. Such further and other relief as counsel may advise and this Honourable Court may order.

February 11, 2020

ALL OF WHICH IS RESPECTFULLY SUBMITTED

CAZA SAIKALEY S.R.L./LLP

Alyssa Tomkins
Charles Daoust

SCHEDULE "A"

LIST OF AUTHORITIES

I. Case Law

1. *2129152 Ontario Inc. v Pliamm et al.*, 2017 ONSC 4451
2. *4348037 Manitoba Ltd. v. 2804809 Manitoba Ltd.*, 2003 MBQB 123
3. *Aquadel Golf Course Ltd. v. Lindell Beach Holiday Resort Ltd*., 2009 BCCA 5
4. *Canada Safeway Ltd. v. Thompson (City)* (1996), 112 Man. R. (2d) 94 (Q.B.), aff'd (1997) 118 Man. R. (2d) 34 (C.A.)
5. *City of Ottawa v. Clublink Corporation ULC*, 2019 ONSC 7470
6. *Dyer Estate v. Tozer* (2008), 78 R.P.R. (4th) 111 (Ont. S.C.J.)
7. *Galbraith v. Madawaska Club Ltd.*, [1961] S.C.R. 639
8. *Gubbels v. Anderson* (1995), 8 B.C.L.R. (3d) 193 (C.A.)
9. *Nylar Foods Ltd. v. Roman Catholic Episcopal Corp. of Prince Rupert* (1988), 48 D.L.R. (4th) 175 (B.C. C.A.).
10. *Qureshi v. Gooch*, 2005 BCSC 1584
11. *Thierman v. Itaska Beach (Summer Village)*, 2002 ABQB 343
12. *Tulk v. Moxhay*, [1848] 41 E.R. 1143 (Eng. Ch. Div.)

II. Secondary Sources

1. Victor Di Castri, *Registration of Title to Land* (Toronto: Thomson Reuters, 1987) (loose-leaf updated 2013, release 1), ch. 10.

SCHEDULE "B"

STATUTES, REGULATIONS AND BY-LAWS

LAND TITLES ACT, R.S.O. 1990, C. L.5

CONDITIONS, RESTRICTIONS, COVENANTS, ETC.

Registration of conditions and restrictions, on application

119 (1) Upon the application of the owner of land that is being registered or of the registered owner of land, the land registrar may register as annexed to the land a condition or restriction that the land or a specified part thereof is not to be built upon, or is to be or is not to be used in a particular manner, or any other condition or restriction running with or capable of being legally annexed to land. R.S.O. 1990, c. L.5, s. 119 (1).

Registration of conditions, restrictions and covenants, on transfer

(2) The land registrar may register as annexed to the land a condition, restriction or covenant that is included in a transfer of registered land that the land or a specified part thereof is not to be built upon, or is to be or is not to be used in a particular manner, or any other condition, restriction or covenant running with or capable of being legally annexed to land. R.S.O. 1990, c. L.5, s. 119 (2).

Registration of covenants, on application

(3) Upon the application of the owner of land that is being registered or of the registered owner of land, the land registrar may register as annexed to the land a covenant that the land or a specified part thereof is not to be built upon, or is to be or is not to be used in a particular manner, or any other covenant running with or capable of being legally annexed to land. R.S.O. 1990, c. L.5, s. 119 (3).

Idem

(4) A covenant shall not be registered under subsection (3) unless,

(a) the covenantor is the owner of the land to be burdened by the covenant;

(b) the covenantee is a person other than the covenantor;

(c) the covenantee owns land to be benefitted by the covenant and that land is mentioned in the covenant; and

(d) the covenantor signs the application to assume the burden of the covenant. R.S.O. 1990, c. L.5, s. 119 (4).

Notice and modification or discharge of covenants

(5) The first owner and every transferee, and every other person deriving title from the first owner, shall be deemed to be affected with notice of such condition or covenant, but any such condition or covenant may be modified or discharged by order of the court on proof to the satisfaction of the court that the modification will be beneficial to the persons principally interested in the enforcement of the condition or covenant. R.S.O. 1990, c. L.5, s. 119 (5).

Covenants or conditions running with land

(6) The entry on the register of a condition or covenant as running with or annexed to land does not make it run with the land, if such covenant or condition on account of its nature, or of the manner in which it is expressed, would not otherwise be annexed to or run with the land. R.S.O. 1990, c. L.5, s. 119 (6).

Subsequent transfers

(7) Where a condition or covenant has been entered on the register as annexed to or running with land and a similar condition is contained in a subsequent transfer or a similar covenant is in express terms entered into with the owner of the land by a subsequent transferee, or vice versa, it is not necessary to repeat the condition or covenant on the register or to refer thereto, but the land registrar may, upon a special application, enter the condition or covenant either in addition to or in lieu of the condition or covenant first mentioned. R.S.O. 1990, c. L.5, s. 119 (7).

Removal of entry of condition or covenant from register

(8) Where a condition or covenant has been entered on the register as annexed to or running with land for a fixed period and the period has expired, the land registrar may, at any time after ten years from the expiration of the period, remove the entry from the register. R.S.O. 1990, c. L.5, s. 119 (8).

Condition, etc., expires after 40 years

(9) Where a condition, restriction or covenant has been registered as annexed to or running with the land and no period or date was fixed for its expiry, the condition, restriction or covenant is deemed to have expired forty years after the condition, restriction or covenant was registered, and may be deleted from the register by the land registrar. R.S.O. 1990, c. L.5, s. 119 (9).

Effect of conditions and restrictions

(10) Where a condition or restriction has been registered as annexed to land, the condition or restriction is as binding upon any person who becomes the registered owner of the land or a part thereof as if the condition or restriction had been in the form of a covenant entered into by the person who was the registered owner of the land at the time of the registration of the condition or restriction. R.S.O. 1990, c. L.5, s. 119 (10).

Exceptions

(11) The following provisions do not apply to a covenant or easement established under the *Agricultural Research Institute of Ontario Act*:

1. Clause (4) (c).

2. The rule with respect to modification and discharge of covenants in subsection (5). 1994, c. 27, s. 7.

Same

(12) The following provisions do not apply to a covenant or easement entered into or granted under the *Conservation Land Act* or under clause 10 (1) (c) or section 37 of the *Ontario Heritage Act*:

1. Clause (4) (c).

2. The rule with respect to modification and discharge of covenants in subsection (5).

3. Subsection (9). 2006, c. 23, s. 33; 2009, c. 33, Sched. 11, s. 4.

CITY OF OTTAWA
Applicant

- and -

CLUBLINK CORPORATION ULC
Respondent

Court File No.: 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
OTTAWA

FACTUM OF THE INTERVENOR

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