Court File No. DC-22-2731

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

VICTOR LACHANCE and
KIRK ALBERT

Applicants/Responding Parties

and

SOLICITOR GENERAL OF ONTARIO and
ATTORNEY GENERAL OF ONTARIO

Respondents/Moving Parties

REPLY FACTUM OF THE MOVING PARTIES

(Motion to dismiss returnable on March 21, 2023)

March 13, 2023

ATTORNEY GENERAL FOR ONTARIO
Crown Law Office – Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

Susan Keenan, LSO#50784Q
Email: Susan.Keenan@ontario.ca
Tel: 416 898 1301
Fax: 416 326 4181

Shayna Levine-Poch, LSO#81515O
Email: Shayna.Levine-Poch@ontario.ca
Tel: 416 895-9333
Fax: 416 326 4181

Lawyers for the Respondents/Moving Parties
The Solicitor General of Ontario and
The Attorney General of Ontario

TO: **SICOTTE GUILBAULT**
4275 ch. Innes Rd, suite 208
Ottawa, ON K1C 1T1

Stéphane Émard-Chabot, LSO #33909U
semard-chabot@sicotte.ca
Tel: 613 368 4309

Counsel for the Applicants/Responding Parties
Victor Lachance and Kirk Albert

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PART I – REPLY SUBMISSIONS

1. The Respondents provide these submissions in reply to the Applicants' March 6, 2023 factum filed in response to the Respondents' motion to dismiss for delay.

A. Single Judge Can Address Delay

2. This Court has confirmed that a "single judge of the Divisional Court has jurisdiction to dismiss an application for judicial review…on the basis of undue delay."[1] This is consistent with the jurisdiction to hear motions set out in s. 21(3) of the *Courts of Justice Act.*[2]

3. Contrary to the Applicants' submissions, there is no presumption that a motion to dismiss for delay should be heard by a full panel of the Court.[3] Such an approach would require respondents to expend time and resources litigating matters that are excessively late up to and including a hearing on the merits. This is contrary to the legislative intent underlying the 30-day period in s. 5 of the *Judicial Review Procedure Act* ("*JRPA*") that late matters should not proceed absent a justified extension, and contrary to the efficient administration of justice and judicial economy.[4] In the usual course, an applicant challenging a decision beyond the 30-day period is required to bring a motion for an extension of time to issue the late application.[5] In this case, the Notice of Application issued despite that it was 2 years late, for unknown reasons.

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[1] *Savic v College of Physicians and Surgeons of Ontario*, 2021 ONSC 4756 (Div Ct), para 24 ["*Savic"*]; *Aljawhiri v Pharmacy Examining Board of Canada*, 2019 ONCA 798, para 3; *Unimac-United Management Corp. v Metrolinx*, 2016 ONSC 2032 (Div Ct), para 7; and *Vangjeli v WJ Properties*, 2019 ONSC 5631 (Div Ct), para 14.
[2] *Courts of Justice Act*, RSO 1990, c C 43, s 21(3).
[3] **Factum of the Applicants/Responding Parties** dated March 6, 2023, para 51 ["Applicants' Factum"].
[4] *Judicial Review Procedure Act*, RSO 1990, c. J. 1 ["*JRPA*"], s 5(1).
[5] See for example *Belyavsky v Walsh*, 2022 ONSC 3135 (Div Ct), paras 8-25 ["*Belyavsky*"]; *Adams v Aamjiwnaang First Nation*, 2022 ONSC 6831, para 12.

4. This Court has indicated that where the matter of delay is unclear, the issue should be adjourned to the full panel on the merits.[6] However, this has rarely been the case. In many of the decisions in which this commentary is found, a single judge of this Court dismissed the application for delay because it was brought outside the applicable timeline for judicial review.[7] It is only where the Court found that the matter was arguably timely on unique facts or in unusual circumstances that it determined the matter should be adjourned to the panel hearing the merits. An example is *Democracy Watch v Ontario Integrity Commissioner*, where the motions judge in obiter expressed that the application was arguably brought at the 6-month mark and while limitation periods were extended due to the pandemic.[8] The motions judge nevertheless dismissed that application on a preliminary basis on other grounds.[9]

5. There is no lack of clarity in this case. This application was issued nearly 2 years late. The uncontested evidence is that the Applicants were aware of the plan to build the facility at the Kemptville site within days after it was publicly announced on August 27, 2020.[10] No

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[6] *Savic*, 2021 ONSC 4756 (Div Ct), paras 24-25.
[7] *De Pelham v Human Rights Tribunal of Ontario*, 2011 ONSC 7006, paras 12-17 ["*De Pelham*"]; *Knot v State Farm Automobile Insurance Company*, 2020 ONSC 7672, paras 18-34 ["*Knot*"]; *Savic*, 2021 ONSC 4756 (Div Ct), paras 26-27, 40-49; *Belyavsky*, 2022 ONSC 3135 (Div Ct), paras 8-25; *Ransom v Ontario*, 2010 ONSC 3156 (Div Ct), paras 23-25, 29-34 ["*Ransom*"], aff'd 2011 ONSC 5594 (Div Ct full panel on appeal), Respondents' Book of Authorities ("BOA"), Tab 4, paras 12-18; *Taylor v Pivotal Integrated HR Solutions*, 2020 ONSC 6108, paras 33-47, upheld at 2021 ONSC 7720 (Div Ct full panel), paras 35-38 ["*Taylor*"]; *Canadian Chiropractic Association v McLellan*, 2011 ONSC 6014 (Div Ct), paras 15-16, 64 ["*Chiropractic*"].
[8] *Democracy Watch v Ontario Integrity Commissioner*, 2021 ONSC 7383, para 46 ["*Democracy Watch*"] where Justice Favreau dismissed the application due to a lack of standing and para 50 where she found this application was not subject to s. 5(1) and the application was brought approximately 6 months after the Annual Report setting out the summary of the investigations and their outcomes was published. Justice Favreau also noted the suspension of limitation periods to September 2020 due to the pandemic. In other words, she found the application might be considered timely on this Court's prior jurisprudence and the suspension of limitation periods. See *Priolo v Workplace Safety and Insurance Appeals Tribunal*, 2023 ONSC 764, para 14 ["*Priolo*"] which confirms this is how the Court has interpreted the *Democracy Watch* decision.
[9] *Democracy Watch*, 2021 ONSC 7383, para 46, 50; *Priolo*, 2023 ONSC 764, para 14.
[10] **Affidavit of Kirk Albert** affirmed December 16, 2022 ["Albert Affidavit"], Responding Motion Record ["RMR"], Tab 2, pp 20-21, paras 6, 10; **Affidavit of Victor Lachance** affirmed December 15, 2022 ["Lachance Affidavit"], RMR, Tab 3, pp 126-127, paras 4-5, 8.

purpose would be served by deferring the issue to a panel hearing the merits of this late application, and judicial economy would be undermined. The record before the Court contains all the necessary evidence on the issue, and cross-examinations have taken place. Nothing more is needed to determine whether the application was brought beyond the 30-day time limit in s. 5(1) of the *JRPA*, whether the prerequisites for an extension in s. 5(2) are met, and how other considerations such as the absence of a reasonable explanation and the length of the nearly 2-year delay should factor into the analysis.

B. Obligation to Act in a Timely Manner

6. The Applicants' submissions focus entirely on the alleged conduct of the Respondents. There is no acknowledgment of the well-established obligation on applicants for judicial review to bring timely applications to Court.[11] Instead, they describe their application as a "last resort".[12] There is also a suggestion that the Court's jurisprudence on late applications and the 30-day period in s. 5(1) should not apply because the matter did not arise from a tribunal proceeding and third parties (it is suggested) are not affected.[13] This misconstrues the purpose that animates the limitation period, namely the finality of public decisions in whatever context they are made.[14] This suggested exception is belied by the many decisions

[11] *Nahirny v Human Rights Tribunal of Ontario*, 2019 ONSC 5501, para 8 ["*Nahirny*"]; *Belyavsky*, 2022 ONSC 3135, para 8; *Ransom*, 2010 ONSC 3156, paras 23-25, 29-31, aff'd 2011 ONSC 5594 (Div Ct full panel on appeal), BOA, Tab 4, paras 12-18; *Allen v Bricklayers Masons Independent Union of Canada Local 1*, 2020 ONSC 3369, paras 33-38 ["*Allen*"].
[12] **Applicants' Factum**, paras 39, 71, 92.
[13] **Applicants' Factum**, paras 87-89.
[14] *Ratman v Workplace Safety and Insurance Appeals Tribunal*, 2022 ONSC 3923 (Div Ct), para 6; *Taylor*, 2020 ONSC 6108, para 45, upheld at 2021 ONSC 7720 (Div Ct full panel), paras 35-38.

of this Court in which late applications have been dismissed in similar circumstances to this case.[15]

7. This approach would also allow litigants to rest on their laurels while they pursued political goals, statutory appeals and judicial reviews under the *Freedom of Information and Protection of Privacy Act*[16] regime, and awaited election results, as the Applicants have stated they did. This would directly undercut the finality of all public decisions and expose decisions that allocate funds for public infrastructure and other projects to perennial and ongoing risk, regardless of how many public dollars had already been invested, and at the discretion of particular applicants as to when it was the right time to bring an application. This is the opposite of this Court's approach to timeliness, which confirms that "…an applicant's decision to pursue alternative avenues of redress is not an acceptable explanation for delay."[17]

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[15] *Wauzhushk Onigum Nation v Minister of Finance (Ontario)*, 2019 ONSC 3491 (Div Ct), paras 176-179 ["*Wauzhushk*"]; *Major Partner Wind Energy Corp. v Ontario Power Authority*, [2015] OJ No 6643, Respondents' Book of Authorities ("BOA"), Tab 3, paras 13-15 ["*Major Partner*"]; *Belyavsky*, 2022 ONSC 3135, paras 9-25; *Know Your City Inc. v The Corporation of the City of Brantford*, 2021 ONSC 154 (Div Ct), paras 46-50 ["*Know Your City*"]; *Knot v State Farm Automobile Insurance Company*, 2020 ONSC 7672 (Div Ct), para 17 ["*Knot*"]; *Taylor*, paras 33-47, upheld at 2021 ONSC 7720 (full panel), paras 35-38; *Chiropractic*, 2011 ONSC 6014, paras 15-16, 64; *Walia v College of Veterinarians of Ontario*, 2020 ONSC 8057 (Div Ct), para 36; *Kaur v The National Dental Examining Board of Canada*, 2019 ONSC 5882, para 4 ["*Kaur*"]; *Nahirny*, 2019 ONSC 5501, paras 5-10; *De Pelham*, 2011 ONSC 7006, para 13-17; *Jeremiah*, [2008] OJ No 3013 (Div Ct), BOA, Tab 1, paras 45-48, 53; *Gigliotti c Collège des Grands Lacs (Conseil d'administration)*, 2005 CanLII 23326 (Div Ct), paras 29-37 ["*Gigliotti*"].

[16] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F 31.

[17] See *Major Partner*, [2015] OJ No 6643, BOA, Tab 3, para 14 where this Court stated, regarding the Applicant's argument that it pursued a political solution: "…**there was no reason why Major could not have pursued a bureaucratic- political solution at the same time as it proceeded with an application for judicial review**." See *Wauzhushk*, 2019 ONSC 3491 (Div Ct), paras 176-179 where this Court stated: "WON has failed to give a reasonable explanation for the delay. When one looks at the chronology set out earlier in these reasons, one can only conclude that **WON made choices about how to proceed**. It chose not to challenge the Decisions around the time they were made…While WON has suggested it was "led down the garden path" by OLG and the Minister, the record does not support that assertion. WON made choices and acquiesced in the procurement process. This Court has held that **delay resulting from an applicant's decision to pursue alternative avenues of redress is not an acceptable explanation for delay**" citing *Major Partner*, 2015 ONSC 6902 (Div Ct), para 14. See also *Ransom*, 2010 ONSC 3156, para 31: "The explanations offered for the delay are not adequate to justify it in all of the circumstances. They merely explain

8. The Applicants have suggested that the application is meritorious. However, the evidence is clear that the Ministry consulted with the Municipality of North Grenville with respect to its local planning policies applying to the site and the response they received was that this facility was permitted.[18] The Applicants seek to draw a distinction between zoning and Official Plan designations, but the former are the more specific measures by which the latter are carried out in planning law.[19] Further, s. 6(2) of the *Planning Act* speaks to consultation with the municipality and that is what the Ministry did. The Applicants themselves admit the municipality told them the land use planning permitted the facility.[20]

9. There is discussion in the Applicants' submissions of the political nature of this application. However, the Notice of Application is focussed entirely on planning law, not politics.[21] In any event, the Applicants' early and ongoing advocacy against the facility did not prevent them from bringing this application forward in a timely way. As this Court stated in *Major Partner Wind Energy Corp. v Ontario Power Authority*, "…there was no reason why [the Applicant] could not have pursued a bureaucratic-political solution at the same time as it proceeded with an application for judicial review."[22] The Applicants say they delayed because they were seeking "information that would allow them to assess whether there were

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that Mr. Ransom has not been sitting idly by; he has been busy pursuing many different options. **But these are choices he has made. They are not an adequate explanation for the delay**."

[18] Zoning compliance was later confirmed to the Ministry in a January 20, 2021 letter from the Municipality at Letter of North Grenville ["**Letter of North Grenville**"], **Undertakings**, undertaking #2, Ontario's Motion Record ["MR"], Tab 4B, p 184.

[19] This is acknowledged in s.14.1 of the North Grenville Official Plan, which is not in evidence but is cited in the Applicants' submissions. That Official Plan also gives specific treatment to the site in question and permits uses other than agricultural.

[20] **Lachance Affidavit**, RMR, Tab 3, pp 126-127, 129-130, paras 5-7, 16; **Transcript of the Cross-Examination of Victor Lachance** dated February 1, 2023 ["Lachance Transcript"], Tab 7, pp 437-442, 469-471, 489-490, 492, qq 40, 43-44, 50-56, 58-59, 176-180, 252-257, 263; **Albert Affidavit**, RMR, Tab 2, p 22, paras 11-12; **Transcript of the Cross-Examination of Kirk Stewart Albert** dated January 31, 2023 ["Albert Transcript"], MR, Tab 6, pp 320-324, 340-343, qq 54-67, 124-138.

[21] **Notice of Application**, RMR, Tab 1, pp 8-9, para 5(a)-5(c).

[22] *Major Partner*, [2015] OJ No 6643, BOA, Tab 3, para 14.

any grounds to challenge the Respondents' decision."[23] But this is precisely why people seek legal advice. JOG's December 3, 2020 minutes indicate that the organization, which was partnered at that time with CAPP, was seeking legal advice specifically with respect to planning law issues.[24] The suggestion that the Applicants didn't know what to ask a lawyer is directly contradicted by these minutes.[25] All litigants, including self-represented parties, are obligated to bring applications in a timely way and not to treat their challenge as a last resort.[26] The same issue JOG identified on December 3, 2020 became the pleaded ground for the application almost 2 years later.

10. The Applicants' suggestion that they were relying on government representatives to give them grounds for a legal challenge is also unreasonable. The Ministry was clear that the facility was planned for the Kemptville site from the initial August 27, 2020 announcement forward, and shared the site selection criteria and the reason that particular site was selected early in the process at the October 30, 2020 and November 30, 2020 sessions attended by the Applicants.[27] The Applicants had all the information they needed to bring their application at that time. The reality is that the Applicants have openly opposed the building of the facility

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[23] **Applicants' Factum**, paras 103, 108.

[24] The Minutes refer to seeking legal advice on planning matters including due diligence, zoning and permitting for the site as well as the municipal process, environmental issues and land claims. Consulting a lawyer on these issues is what ultimately led to the late application being filed almost 2 years later. **Albert Affidavit**, RMR, Tab 2, p 13, paras 15-16; **Minutes of JOG Meeting, Exhibit "J" to Albert Affidavit**, RMR, Tab 3J, p 118, 120; **Lachance Affidavit**, RMR, Tab 3, pp 127, 130, paras 8, 17.

[25] Applicants' Submissions, paras. 41-42.

[26] *Bagherian v Seneca College et al*, 2023 ONSC 1269, para 24; *Taylor*, 2020 ONSC 6108, paras 37-41; *Belyavsky*, 2022 ONSC 3135, paras 16-17; *Savic*, 2021 ONSC 4756, paras 46-47.

[27] **October 30, 2020 Presentation, Exhibit "C" to Albert Affidavit**, RMR, Tab 2C, p 53; **November 26, 2020 Presentation, Exhibit 3 to Cross-examination of Victor Lachance**, MR, Tab 7C, p 531 "Site Selection"; **CBC Article quoting Mr. Albert**, **Exhibit "F" to Albert Affidavit**, RMR, Tab 2F, pp 90-93; Regarding quotes said to be drawn from these sessions, Mr. Lachance admitted he only listened to an audio recording of the October 30, 2020 session which he did not produce, and that other persons may have contributed to the list of quotes who are not witnesses. He also admitted the context for these quotes are excluded from the list. As such, Mr. Lachance's list of quotes lacks reliability and context.; **Lachance Transcript**, MR, pp 446-450, 453, 456-461, qq 78-88, 96, 111-112, 130-142; **Lachance Affidavit**, RMR, Tab 3, pp 127, 130, paras 9, 18; **Albert Affidavit**, RMR, Tab 2, pp 23-25, paras 18-23; **Albert Transcript**, MR, Tab 6, pp 345-348, 354-356, qq 147-158, 171-174.

in Kemptville from the time they heard about it, regardless of the ongoing provision of information, because they believe that Kemptville will be a "prison town".[28]

C. Substantial Prejudice

11. The most striking aspect of the Applicants submissions is the suggestion that substantial prejudice will not accrue to the Ministry through the Applicants' failure to bring this application in a timely way. The Applicants do not contest that roughly $3.2 million dollars of public funds were invested by the Respondents in the project proceeding at the site from September 2020 to August 2022 during the period of the Applicants' delay.[29] Yet, the Applicants suggest that the waste of millions of dollars of public money from their delay is the "cost of doing business" and should not be considered substantial prejudice.[30] The Applicants suggest that the wasted funds and resources are not be enough to require the Ministry to walk away from the project.

12. It would be an unjustifiably high bar if millions of dollars in wasted public money from an applicant's failure to act were not enough to show substantial prejudice, leaving aside the real risk of not being able to find a suitable alternative site for the facility in the face of increasingly competitive market conditions, all of which is in evidence before the Court.[31] The onus to seek judicial review in a timely manner is not lessened for those who challenge

[28] **Lachance Transcript**, MR, Tab 7, p 436, q 36; **Albert Transcript**, MR, Tab 6, pp 312-319, qq 14-50.
[29] **Applicants' Factum**, para 64.
[30] **Applicants' Factum**, paras 14-21, 38, 66-70.
[31] A: "We know that the market continues to be challenging and especially in consideration of this type of facility and we know that market values have continued to increase.", **Transcript of the Cross-examination of David Macey** dated January 27, 2023 ["Macey Transcript"], MR, Tab 4, pp 113-115, q 259-262; Evidence of difficulty in process of finding an appropriate site in the **Affidavit of David Macey** affirmed October 21, 2022 ["Macey Affidavit"], MR, Tab 2, p 17, para 18.

public infrastructure projects, nor is there less of a concern with respect to the waste of public expenditures arising from an applicant's delay.

13. The Applicants suggested that all the staff time spent on this project during the period of delay would have been incurred anyway.[32] This fails to acknowledge the evidence that both Infrastructure Ontario and Ministry staff would have been devoted to other priorities and projects if the Kemptville project had to be put on hold because of a timely application.[33] Instead, those resources were spent on the project and are now in jeopardy of being a wasted investment of time and effort.

14. The Applicants point to investments in a former plan for a larger facility in Ottawa.[34] The evidence before this Court is clear that the Ministry attempted but was unable to secure a site for that project, and after that the plan to build smaller facilities in a larger geographic radius was made, including the smaller facility at the Kemptville site.[35] This evidence does not indicate the Ministry was comfortable wasting money, as the Applicants suggest. Rather, it shows how difficult it is to secure appropriate sites for such facilities.

15. Ultimately, after the extensive efforts made to find a suitable site, the Ministry secured a hold on the Kemptville site through an expression of interest on October 23, 2019 while it investigated the feasibility of that site.[36] The municipality of North Grenville had purchased the vast majority of the Kemptville campus lands in 2018 but did not purchase this smaller

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[32] **Applicants' Factum**, para 64.
[33] **Macey Affidavit**, MR, Tab 2, p 18, para 20; **Macy Transcript,** qq 343-348, 440-441, pp 136-138 and 171-172. **IO Staff Time, Undertakings**, undertaking #4, MR, Tab 4, p 179.
[34] **Applicants' Factum**, paras. 14-21, 38, 66-70.
[35] **Macey Transcript**, MR, Tab 4, qq 51-59, 85, 116-118, 142, 356-359, 387-393, 452, pp 48-51, 58, 67-68, 75, 141-143, 154-156, 175.
[36] **Macey Affidavit**, MR, Tab 2, p 14, para 8; **Expression of Interest, Exhibit "A" to Macey Affidavit**, MR, Tab 2A, p 20; **Macey Transcript**, MR, Tab 4, pp 69, 166-167, qq 122, 425-428.

site.[37] The Ministry then made public the plan to build the facility at the site via the August 27, 2020 press release.[38]

16. The Applicants attempt to distinguish this Court's decision in *Wauzhushk Onigum Nation v Minister of Finance (Ontario),* in which it dismissed a late application due to prejudice to the Ministry from the applicants' delay in the form of "incurred costs in designing and running the procurement process" for a gaming operation.[39]

17. Contrary to the Applicants' submissions, the Court in that case was concerned with the disruption of the Respondents' settled economic arrangements and the waste of significant public resources if the late application were allowed, both of which also arise in this case.[40] Here, such costs include extensive site-specific work done in order to prepare for an RFQ[41] and RFP[42] to secure a contractor for the building of the facility at the Kemptville site, which would be wasted if a new site were required.[43] As it stands, the project can't proceed while this litigation is ongoing (resulting in the same type of delay referenced in *Wauzhushk*) because of the risk of a breach of contract if the Ministry entered into a contract and then the

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[37] **Letter from the Minister of Agriculture, Exhibit "I" to Albert Affidavit**, RMR, p 112; **Albert Transcript**, MR, Tab 6, pp 383-384, qq 281-283; **Google Maps Images of Kemptville Campus, Exhibit 2 to the Albert Transcript**, MR, Tab 6B, p 423.
[38] **Press Release, Exhibit "B" to Macy Affidavit**, MR, Tab 2B, p 24.
[39] *Wauzhushk*, 2019 ONSC 3491, paras 183-188.
[40] *Wauzhushk*, 2019 ONSC 3491, paras 183-188.
[41] Request for Qualifications.
[42] Request for Proposals.
[43] This includes unrecoverable PDC costs, due diligence costs, site holding costs for 2 years and Infrastructure Ontario staff costs; **Macey Affidavit**, MR, Tab 2, pp 15-18, paras 11-20; **Macey Transcript**, MR, Tab 3, pp 86-87, 100-101, 105-107, 116, 136-138, 171-173, qq 176-177, 218-219, 235-239, 269, 282, 343-347, 440-445; **Breakdown of PDC Costs, Undertakings**, undertaking #1, MR, Tab 4A, p 182; **Necessary Watermain Work, Undertakings,** undertaking #3, MR, Tab 4, p 178; **IO Staff Costs, Undertakings,** undertaking #4, MR, Tab 4, p 179; **Due Diligence Work**, **Undertakings**, undertaking #5, MR, Tab 4, p 179.

site changed.[44] As in *Wauzhushk* and *Major Partner Wind Energy*, the collective costs, disruption and delay represent substantial prejudice and include harm to the public interest.[45]

18. The Applicants also misconstrue the Court's findings of prejudice in *Know Your City Inc. v the Corporation of the City of Brantford* and *Gigliotti v Conseil d'administration du College des Grand Lacs*.[46] In *Know Your City*, the Court found that prejudice arose where, during the Applicants' delay, the municipality found a buyer for the property in question and authorized the sale just after the late application was initiated, and that sale would be nullified if the application were allowed.[47] It was the disruption of settled economic arrangements made by the respondent and the costs that the respondent would face from that disruption that amounted to prejudice.

19. In this case, during the Applicants' delay, the Ministry purchased the Kemptville site on March 15, 2022 in addition to investing extensive site-specific funds and resources.[48] The evidence before the Court is that the funds used to purchase the site could have been used for a different land acquisition or other purpose.[49] Further, if the application were ultimately

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[44] David Macey explains that no contract can be entered for the construction of the facility until there is certainty about the site: **Macey Transcript**, MR, Tab 3, pp 168-169, qq 433-435. *Wauzhushk*, 2019 ONSC 3491, para 185.
[45] *Wauzhushk*, 2019 ONSC 3491, paras 187-188; *Major Partner*, [2015] OJ No 6643, BOA, Tab 3, para 15.
[46] *Know Your City*, 2021 ONSC 154 (Div Ct), paras 15, 49; *Gigliotti*, 2005 CanLII 23326 (Div Ct), paras 29-37.
[47] *Know Your City*, 2021 ONSC 154 (Div Ct), paras 15, 49.
[48] **Macey Affidavit**, MR, Tab 2, pp 15-18, paras 11-20; **Land Transfer Invoice, Exhibit "C" to Macey Affidavit**, MR, Tab 2C, p 28; **Macey Transcript**, MR, Tab 3, pp 87, 100-101, 105-107, 116, 136-138, 171-173, qq 177, 218-219, 235-239, 269, 282, 343-347, 440-445; **Breakdown of PDC Costs, Undertakings**, undertaking #1, MR, Tab 4A, p 182; **Necessary Watermain Work, Undertakings,** undertaking #3, MR, Tab 4, p 178; **IO Staff Costs, Undertakings,** undertaking #4, MR, Tab 4, p 179; **Due Diligence Work**, **Undertakings**, undertaking #5, MR, Tab 4, p 179**.**
[49] A: "[T]hose funds were reserved for the acquisition of the property versus whatever other priorities there may have been, given that there's finite funding in any given fiscal year.", **Macey Transcript**, MR, Tab 4, pp 113-114, q 259.

allowed, the Ministry would be forced to try to locate a different site (which was difficult to begin with) in more challenging market conditions that now exist.[50]

20. In *Gigliotti,* the Court found similar prejudice where, if the late application were allowed, millions in public funds would be required to re-open a college shuttered 3 years before and arrangements for the provision of services made during the period of the delay would be vitiated.[51] The arrangements and the millions in invested funds and resources with respect to the site in this case reflect the same type of prejudice if this late application is allowed. In addition to the above cases, other decisions of this Court found the risk of wasted funds alone justified dismissal of late applications.[52]

21. The Applicants rely on *Lalonde v Ontario (Commission de restructuration des services de santé)*, but delay was not raised in that case.[53] It is unknown how the Court might have addressed a motion to dismiss the application and, as such, it has no bearing on the current motion.

22. Satisfying the Court that no substantial prejudice would arise to any person by reason of the Applicants' delay in bringing the application is a legislative prerequisite to an extension of time, set out in s. 5(2).[54] The evidence is clear that this prerequisite is not met in this case. Nor is there a reasonable explanation for the failure to initiate the application in a timely way

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[50] A: "We know that the market continues to be challenging and especially in consideration of this type of facility and we know that market values have continued to increase.", **Macey Transcript**, MR, Tab 4, pp 113-115, q 259-262; Evidence of difficulty in process of finding an appropriate site in **Macey Affidavit**, MR, Tab 2, p 17, para 18.
[51] *Gigliotti*, 2005 CanLII 23326 (Div Ct), paras 32-37.
[52] *Kaur*, 2019 ONSC 5882, paras 11-12 where prejudice was found from the potential need to reconstitute a committee that would be "costly and time consuming" and preservation costs; *Allen*, 2020 ONSC 3369, para 39 where the Union had "spent time and money trying to enforce" the award under challenge which constituted prejudice.
[53] *Lalonde v Ontario (Commission de restructuration des services de santé)*, 1999 CanLII 19910 (ON SCDC), aff'd in *Lalonde v Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 (ON CA).
[54] *Unifor and its Local 303 v Scepter Canada Inc.*, 2022 ONSC 5683, para 17.

over the course of the 2 years after the Applicants learned of the decision. The evidence before the Court of prejudice to the Respondents, respect for public resources, the principle of finality, and this Court's recognition of the obligation on applicants not to treat applications for judicial review as a "last resort" all support granting this motion to dismiss.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 13, 2023

ATTORNEY GENERAL FOR ONTARIO
Crown Law Office – Civil Law

Susan Keenan, LSO #50784Q /
Shayna Levine-Poch #81515O

Lawyers for the Respondents/Moving Parties

SCHEDULE "A"

Authorities Relied Upon

1. *Adams v Aamjiwnaang First Nation,* 2022 ONSC 6831
2. *Aljawhiri v Pharmacy Examining Board of Canada*, 2019 ONCA 798
3. *Allen v Bricklayers Masons Independent Union of Canada Local 1,* 2020 ONSC 3369
4. *Bagherian v Seneca College et al,* 2023 ONSC 1269
5. *Belyavsky v Walsh,* 2022 ONSC 3135
6. *Canadian Chiropractic Association v McLellan*, 2011 ONSC 6014
7. *De Pelham v Human Rights Tribunal of Ontario*, 2011 ONSC 7006
8. *Democracy Watch v Ontario Integrity Commissioner*, 2021 ONSC 7383
9. *Gigliotti c Collège des Grands Lacs (Conseil d'administration)*, 2005 CanLII 23326 (Div Ct)
10. *Jeremiah v Ontario Human Rights Commission,* [2008] OJ No 3013 (Div Ct)
11. *Kaur v The National Dental Examining Board of Canada,* 2019 ONSC 5882
12. *Knot v State Farm Automobile Insurance Company,* 2020 ONSC 7672 (Div Ct)
13. *Know Your City Inc. v The Corporation of the City of Brantford*, 2021 ONSC 154 (Div Ct)
14. *Lalonde v Ontario (Commission de restructuration des services de santé)*, 1999 CanLII 19910 (ON SCDC)
15. *Lalonde v Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 (ON CA)
16. *Major Partner Wind Energy Corp. v Ontario Power Authority,* 2015 ONSC 6902 (Div Ct), BOA, Tab 3

17. *Nahirny v Human Rights Tribunal of Ontario*, 2019 ONSC 5501

18. *Priolo v Workplace Safety and Insurance Appeals Tribunal*, 2023 ONSC 764

19. *Ransom v Ontario*, 2010 ONSC 3156 (Div Ct)

20. *Ransom v. Ontario*, 2011 ONSC 5594 (Div Ct) (full panel), BOA, Tab 4

21. *Ratman v Workplace Safety and Insurance Appeals Tribunal*, 2022 ONSC 3923

22. *Savic v College of Physicians and Surgeons of Ontario*, 2021 ONSC 4756 (Div Ct)

23. *Sobczyk v Ontario*, 2022 ONSC 88

24. *Taylor v Pivotal Integrated HR Solutions*, 2020 ONSC 6108

25. *Unifor and its Local 303 v Scepter Canada Inc.*, 2022 ONSC 5683

26. *Unimac-United Management Corp. v Metrolinx*, 2016 ONSC 2032 (Div Ct)

27. *Vangjeli v WJ Properties*, 2019 ONSC 5631 (Div Ct)

28. *Walia v College of Veterinarians of Ontario*, 2020 ONSC 8057

29. *Wauzhushk Onigum Nation v Minister of Finance (Ontario)*, 2019 ONSC 3491 (Div Ct)

SCHEDULE "B"

Courts of Justice Act,* *RSO 1990, c C 43

Composition of court for hearings

21 (3) A motion in the Divisional Court shall be heard and determined by one judge, unless otherwise provided by the rules of court.

***Judicial Review Procedure Act*, RSO 1990, c J 1**

Time for bringing application

5 (1) Unless another Act provides otherwise, an application for judicial review shall be made no later than 30 days after the date the decision or matter for which judicial review is being sought was made or occurred, subject to subsection (2).

Extension

(2) The court may, on such terms as it considers proper, extend the time for making an application for judicial review if it is satisfied that there are apparent grounds for relief and that no substantial prejudice or hardship will result to any person affected by reason of the delay.

…

Court File No.: DC-22-2731

VICTOR LACHANCE AND KIRK ALBERT	v	SOLICITOR GENERAL OF ONTARIO AND ATTORNEY GENERAL OF ONTARIO
Applicants/Responding Parties		Respondents/Moving Parties

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

PROCEEDING COMMENCED AT OTTAWA

REPLY FACTUM OF THE MOVING PARTIES
(motion to dismiss)

MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office – Civil
720 Bay Street – 8th Floor
Toronto, ON M7A 2S9

Susan Keenan, LSO #50784Q
Email: Susan.Keenan@ontario.ca
Tel: 416 898 1301
Fax: 416 326 4181

Shayna Levine-Poch, LSO #81515O
Email: Shayna.Levine-Poch@ontario.ca
Tel: 416 895 9333
Fax: 416 326 4181

Lawyers for the Respondents/Moving Parties
The Solicitor General of Ontario and
The Attorney General of Ontario