CITATION: Lachance et al. v. Solicitor General of Ontario et al., 2023 ONSC 2640
COURT FILE NO.: DC-22-2731
DATE: 2023/04/28

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Victor Lachance and Kirk Albert, Applicants (responding parties)

AND

Solicitor General of Ontario and Attorney General of Ontario, Respondents (moving parties)

BEFORE: Justice Robert Smith

COUNSEL: Stephan Emard-Chabot, counsel for the Applicants

Susan Keenan and Shayna Levine-Poch, counsel for the Respondents

HEARD: March 20, 2023

REASONS FOR DECISION

[1] The Respondents (hereinafter referred to as the "Solicitor General") have brought a motion for an order dismissing the Application for Judicial Review of their decision to build a correctional facility for approximately 250 inmates on farmland in the Town of Kemptville. The Respondents seek to dismiss the Application because it was filed almost 2 years beyond the 30-day limitation period contained in the *Judicial Review Procedure Act*, R.S.O. 1990 c. J.1 (the "JRPA").

[2] The Respondents submit that they will suffer substantial prejudice and hardship if the Application is permitted to proceed. In addition, they argue that there are no apparent grounds for the relief claimed in the Application.

[3] The Applicants (hereinafter sometimes referred to as "Lachance and Albert") submit that their Application should be allowed to proceed and that the Court should exercise its discretion to grant an extension of time in the unique circumstances. Up to this date, the Solicitor General has never released a decision with reasons that a court could review. Rather, the Respondents issued a one-page press release on August 27, 2020, indicating that they had developed a new strategy, which included the construction of a new correctional facility in Kemptville. The Respondents also held a town hall meeting to answer some questions of members of the public.

[4] The Applicants oppose the motion for a dismissal and seek an extension of the time limit to seek judicial review. Alternatively, the Applicants submit that the motion for dismissal should be heard by a full panel of the Divisional Court.

[5] The following issues must be decided:

I. Should the motion to dismiss be referred to a full panel of the Divisional Court?
II. If the answer to question #1 is no, should the Application be dismissed for delay?

Issue #1 - Should the motion to dismiss be referred to a full panel of the Divisional Court?

[6] The JRPA gives authority to a single judge of the Divisional Court to refer a motion to dismiss to a full panel of the Divisional Court where there is no matter of urgency and the delay involved would not cause a failure of justice.

[7] In *Knot v. State Farm Automobile Insurance Company*, 2022 ONSC 7672 (CanLII) at paragraph 3, the court held that there was a strong presumption that motions to dismiss should be heard by a full panel except in the clearest of cases. In *De Pelham v. Human Rights Tribunal of Ontario*, 2011 ONSC 7006 (CanlII) at paragraph 12, the court stated as follows:

> "except where it is plain and obvious that the Application should be dismissed for delay, a motion judge should not dismiss for delay and should leave the issue for the panel"

[8] I find that it is not plain and obvious that the Application should be dismissed for delay for the following reasons:

a. The circumstances are unique and unlike an appearance before a disciplinary board or other tribunal, where the Applicant had an opportunity to participate in the hearing and reasons were given. Here the Respondents only made a one-page press release with very limited reasons for their decision;

b. The reasons for the Respondent's decision to locate the correctional facility in the town of Kemptville were never provided at any one time. Rather, some brief bullet points

were provided in the press release, some further information was provided at a town hall meeting, additional information was obtained after substantial delays from requests made under the *Freedom of Information Act* and finally, the Respondent never responded to many questions that were asked. The Respondents submitted that the Applicants would have received the reasons for the decision in a responding "record" if they had filed their Application for Judicial Review within the 30 days. This is a "catch 22 situation" as the reasons would only be provided after an Application for Judicial Review was commenced where the reasons that had not been previously disclosed;

c. The Respondents would suffer minimal prejudice or hardship if their motion to dismiss was adjourned to a full panel because a Government of Ontario agency already owns the land and the expenses that have been incurred to date are largely staff members of the government, who invoice a separate ministry. In addition, this selection process has been ongoing for several years;

d. While the proposed correctional facility complies with the local municipal bylaw, it does not conform with the Official Plan. Ministers of the Crown are not bound by municipal bylaws in any event and are also not bound by the *Planning Act* for severance purposes. However, section 3(5) of the *Planning Act* states that all Minister's decisions must be consistent with any Provincial Policy Statement adopted by the Minister of Municipal Affairs and Housing. Section 6(2) of the *Planning Act* states that the Minister must consult with the local municipality "before carrying out or authorizing any undertaking". Here, the Town Council was unaware that a correctional facility was going to be built in their town before the press release was published. As a result, there was no consulting as required by the Respondent's Provincial Policy Statement;

e. In addition, Section 2.3 of the Provincial Policy Statement protects agricultural areas for "long-term use for agricultural" purposes. Constructing a jail on 178 acres of Class 2 Agricultural Land would not be consistent with this provision of the Provincial

Policy Statement. It appears that the Respondents did not consider or address the provisions of the Provincial Policy Statement.

[9] The delay to refer this matter to a full panel will not cause substantial prejudice or hardship to the Respondents as this matter has been ongoing since 2018 and there will be minor additional expenses above the 3.2 million already spent.

[10] The Respondents have estimated that total cost to build the correctional facility will be between $200 million and $499 million. The expenses incurred to date of approximately $3.2 million is a small percent, namely 1.5% to 2.7% of the total estimated costs of construction.

Disposition

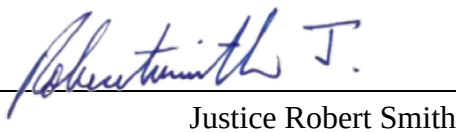
[11] It is not plain and obvious that the Application for an extension of the time limits to bring an Application for Judicial Review will not be successful for the reasons given above. The Applicants have identified several arguable grounds for relief as the Respondents failed to follow several provisions of its Provincial Policy Statement when deciding to build a correctional facility in the town of Kemptville.

[12] Given the strong presumption that motions for dismissal should be heard by a full panel of the Divisional Court and given the minimal additional prejudice or hardship to the Respondents, I order that the motion to dismiss the Application for delay be adjourned to a full panel of the Divisional Court to be heard at the same time as the Application for Judicial Review.

[13] Given my decision on Issue #1, it is not necessary to decide Issue #2

Costs

[14] Costs are reserved to the full panel.



Justice Robert Smith

Date: April 28, 2023

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REASONS FOR DECISION

Robert Smith J.

Date: April 28, 2023