

Court File No. _____

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

BETWEEN:

**VICTOR LACHANCE and
KIRK ALBERT**

Applicants

– and –

**SOLICITOR GENERAL OF ONTARIO and
ATTORNEY GENERAL OF ONTARIO**

Respondents

APPLICATION UNDER Rules 14.05(1), 38 & 68 of the *Rules of Civil Procedure*; Sections 2 and 6 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1

NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW

TO THE RESPONDENTS

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicants. The claim made by the Applicants appears on the following page.

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar by the method of hearing requested by the Applicants, unless the court orders otherwise. The Applicants request that this application be heard:

In person

By telephone conference

By video conference

at the following location

Ottawa Courthouse
161 Elgin St., 2nd Fl.
Ottawa ON K2P 2K1.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the applicant's application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS APPLICATION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for hearing or terminated by any means within five years after the notice of application was filed with the court, unless otherwise ordered by the court.

Date _____ Issued by _____
Registrar

Address of court office: Ottawa Courthouse, 161 Elgin St., 2nd Fl., Ottawa ON K2P 2K1

TO: **Solicitor General of Ontario**
25 Grosvenor Street
Toronto ON M7A 1Y6

AND TO: **Attorney General of Ontario**
Crown Law Office – Civil
720 Bay Street
8th Floor
Toronto ON M7A 2S9

APPLICATION

THE APPLICATION

1. The Applicants make application for the judicial review of the decision of the provincial Crown, represented by the Solicitor General of Ontario (the “Minister”), to build a new correctional facility – currently named the Eastern Ontario Correctional Complex (“EOCC”) – in the town of Kemptville, a community of approximately 4,000 residents located in the Municipality of North Grenville (the “Decision”).

2. The Minister has designated, for the proposed EOCC, approximately 180 acres of farmland that was part of the former Kemptville Agricultural College (the “selected Kemptville site”). Until March 2022, these lands were owned by the Agricultural Research Institute of Ontario (“ARIO”). The lands are designated locally and provincially as agricultural resources, and are classified as having Class 2 soil according to the Canadian Land Inventory as well as under the Ontario Ministry of Agriculture, Food, and Rural Affairs’ farmland classification system.

3. The application is brought under sections 2 and 6 of the *Judicial Review Procedure Act*, RSO 1990, c. J.1 on the grounds that the decision to build the EOCC on agriculturally designated prime farmland constitutes a violation of the Minister’s obligations set out in sections 3(5) and 6(2) of the *Planning Act*, RSO 1990, c. P.13 and are therefore illegal and *ultra vires*.

4. The Applicants have public interest standing to seek the relief described below from this Honourable Court because of the broad coalition they represent, their ongoing personal involvement with the Decision, and the fact that there are no reasonable alternative means available to bring before the Court the significant legal issues triggered by the Solicitor General’s decision.

5. The Applicants seek relief as follows:

- (a) a declaration that the Decision of the Minister to build the EOCC on the selected Kemptville site is not consistent with and is, in fact, contrary to the *Provincial Policy Statement, 2020*, in contravention of the Minister’s obligations under subsection 3(5) of the *Planning Act*;

- (b) a declaration that the Decision of the Minister to build the EOCC on the selected Kemptville site does not have regard for local planning policies embodied in the 2018 *Municipality of North Grenville Official Plan* and other local planning policies, in contravention of the Minister's obligations under subsection 6(2) of the *Planning Act*;
- (c) a declaration that prior to making the Decision to build the EOCC on the selected Kemptville site, the Minister did not consult with the local municipality of North Grenville, in contravention of the Minister's obligations under subsection 6(2) of the *Planning Act*;
- (d) an order by way of *certiorari* quashing the Decision of the Minister on the grounds that it is illegal as well as being *ultra vires* the Minister's authority;
- (e) an order prohibiting the construction of a correctional facility by the Province of Ontario on the selected Kemptville site;
- (f) if necessary, an order extending time for filing this application with the Court pursuant to section 5(2) of the *Judicial Review Procedure Act*;
- (g) such injunctive or interlocutory relief as may be sought by the Applicants, until such time as this application can be determined on its merits;
- (h) an order, in any event of the cause, that no costs be awarded to or against the Applicants because of their status as public interest litigants; and
- (i) such further and other relief as counsel may advise and as this Honourable Court may deem just.

THE GROUNDS FOR THE APPLICATION

6. The grounds for the application are set out below.

The decision to build a correctional facility on prime agricultural land

7. Given the opacity and somewhat amorphous nature of the process surrounding the selection of the Kemptville site, several aspects of the Decision remain unclear to this day.

8. What is known is that on August 27, 2020, the Solicitor General of Ontario published a press release announcing plans to build a new 235-bed provincial correctional facility – originally dubbed the “Greater Ottawa Correctional Complex” and later renamed the “Eastern Ontario Correctional Complex” – at the selected Kemptville site. This announcement was made without any prior notice or consultation with the Municipality of North Grenville or its residents.

9. Community reaction was swift, leading to the creation of two grass-roots organizations in opposition of the proposed facility: the Coalition Against the Proposed Prison (“CAPP”) and the Jail Opposition Group (“JOG”). Both groups immediately began to try to engage provincial and municipal decision-makers to determine the basis for the selection of the Kemptville site and whether the announcement was open to reconsideration.

10. In that vein, in the 18 months that followed the August 2020 announcement, a significant number of activities were undertaken by both community groups. Several meetings took place between the two groups and the Mayor and other municipal officials, meetings also took place with the local Member of Provincial Parliament, an online petition was launched, no fewer than three public forums were organized, four demonstrations and other community rallies took place, thousands of flyers were delivered, lawn-signs were installed, a GoFundMe page was created to raise funds for the groups’ activities, several letters were sent to provincial officials, letter-writing campaigns were undertaken, to name only some of the initiatives aimed at shedding light on and objecting to the Minister’s Decision.

11. In addition to the grassroots activities listed above, certain more formal steps were also taken.

12. The first stakeholder meeting organized with the Ministry of the Solicitor General took place on October 30, 2020. One representative from each community group – CAPP and JOG – attended this meeting, including the Applicant Kirk Albert personally on behalf of JOG. Also in attendance were local business leaders, school board trustees, and local hospital executives.

13. This meeting provided general information on the site-selection process, including the criteria and parameters typically considered by the Minister when selecting a site for a correctional facility. Officials representing the Ministry of the Solicitor General indicated, for example, that over 100 properties had been considered for the proposed EOCC. Officials further

stated that factors such as planning and community integration, health care availability, economic and other local benefits were part of the selection process. However, few specific details on the selection of the Kemptville site were provided. When asked specific questions, Ministry officials typically treated them as “take aways”, items to which they would provide a response at a later date.

14. In the wake of this meeting, the Ministry organized an online Public Engagement Meeting on November 26, 2020. Over 200 residents attended the event, but little relevant information was shared on how the Minister had made the Decision and selected the Kemptville site. The Minister’s representatives indicated that North Grenville residents were to send written questions to the Ministry and that these would be answered in a transparent and timely manner. Unfortunately, many of these questions remain unanswered to this day.

15. In order to ensure the promised level of transparency, the first freedom of information (FOI) request was filed on November 27, 2020 seeking to obtain documents on the site-selection process.

16. The resulting documents, obtained on June 4, 2021, revealed that the search for a site had been underway since at least June 2019. By contrast to the assertion that over 100 sites had been considered, the documents refer to 38 sites under consideration for the EOCC, with a shortlist of 6 sites retained. The documents obtained also indicate that the Minister was to make a decision on the Kemptville site by August 9, 2019. The nature and finality of that decision – and whether a decision was indeed made on that date – are not indicated in the documents released by the provincial government.

17. Locally, as over six months had passed since the Minister’s announcement without the North Grenville municipal council formally taking a position on the proposed EOCC or even officially considering the selection of the Kemptville site, both groups strongly encouraged the Mayor and Council to add the topic of the proposed EOCC to a Council meeting agenda.

18. On March 23, 2021, a special meeting of North Grenville municipal council was convened for this purpose. Delegations of local residents were allowed to present in short, timed segments, to convey concerns and seek answers to such fundamental questions as local impacts of the proposal on municipal finances and future costs to be borne by local taxpayers, public

safety, impacts on infrastructure, etc. Members of Council heard presenters but no questions were answered during this meeting.

19. By the end of 2021 and early 2022, the focus of the community groups had shifted away from formal meetings with officials as these meetings were not producing helpful information. Instead, 13 new FOI requests were filed during the month of January 2022 on various aspects of the proposed facility in order to ascertain whether, and to what extent, these aspects had been considered by the Minister in making their decision.

20. In order to allow for some breathing room to community stakeholders while these FOI requests were being processed, both CAPP and JOG deployed efforts to prevent the transfer of the farmland from ARIO – whose mandate is centered on agricultural research – to the Ministry of the Solicitor General.

21. In addition, with the provincial elections slated for June 2, 2022, opposition parties were making their position on the proposed EOCC known. By March, 2022, the Liberal Party called for a moratorium on the project until further consultation could take place, the New Democratic Party had expressed its opposition to the project as had the Green Party. In short, there was every chance the Decision would be reversed should a new government be elected.

22. On March 3, 2022, the Board of Directors of ARIO authorized the transfer of the selected Kemptville site to the Province and the transfer was registered on title on March 15, 2022. Once again, these steps were taken without any public notice or consultation.

23. To this day, practically all of the 13 access to information requests filed in 2022 are outstanding or have been denied and are under appeal.

The violations of the Crown's explicit obligations under the *Planning Act*

24. Unlike private property owners, the provincial Crown enjoys general immunity from statutes that regulate new construction in Ontario such as the *Planning Act* and the *Building Code Act*. The Crown is therefore free to disregard any number of local bylaws regulating matters such as zoning and land use, heritage conservation, development charges, and site plan control. The Crown does not even have to apply for a building permit when undertaking a construction project for its own purposes.

25. However, this immunity is not absolute. When adopting the *Planning Act*, the Legislative Assembly established three specific obligations that explicitly bind Ministers of the Crown, obligations which have not been respected in this case.

The Provincial Policy Statement, 2020

26. The Crown's first obligation is found in section 3 of the *Planning Act*. Subsection 3(1) enables the Minister of Municipal Affairs and Housing to issue, with the approval of the Lieutenant Governor in Council, documents called "policy statements" addressing matters "relating to municipal planning that in the opinion of the Minister are of provincial interest".

27. In turn, subsection 3(5) explicitly binds all ministers of the Crown, compelling them to abide by policy statements. Specifically, the legislative text provides that all Ministerial decisions "shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision".

28. The most recent policy statement, *Provincial Policy Statement, 2020* ("PPP 2020") came into effect on May 1, 2020 and was in effect when the Minister announced that the selected Kemptville site had been retained and that the new EOCC would be built there.

29. Section 2.3 of PPP 2020 speaks, in detail, to the importance of protecting agricultural areas for "long-term use for agriculture" and places strict conditions on allowing non-agricultural uses in prime agricultural areas. It is worth noting that the agricultural policies set out in Section 2.3 are, for all intents and purposes, identical to the policies found in the previous provincial policy statement adopted in effect from 2014 to 2020.

30. In this case, the Minister's Decision will result in the loss of 178 acres of prime agricultural land. This outcome cannot be said to be "consistent with" the policies of PPP 2020. As a result, the Decision to build the EOCC on the selected Kemptville site constitutes a violation of the Minister's obligations under subsection 3(5) of the *Planning Act* and is *ultra vires* the Minister's legislative authority.

Local planning policies

31. The Crown's second specific obligation, found in subsection 6(2) of the *Planning Act*, is to "have regard for, the established planning policies" of the municipality where a ministry's undertaking "will directly affect" the municipality.

32. The core planning policies in effect in the Municipality of North Grenville are found in the North Grenville Official Plan (NGOP) adopted under the *Planning Act*. The current NGOP came into force on November 22, 2018, after undergoing the periodic revision required by the *Planning Act*. The *Planning Act* also requires that municipalities ensure that their local official plans are "consistent with" the provincial policy statement in effect at the time.

33. The NGOP designates the selected Kemptville site as "Agricultural" land. The opening paragraph of the Agricultural chapter of the NGOP states that lands with this designation "are areas with highly valued soils in accordance with the Canada Land Inventory (CLI) mapping and therefore have potential for agricultural production, areas demonstrating a concentration of farming actively, as well as pockets of lesser valued soils within the greater context of a prime agricultural area." Not surprisingly, the selected Kemptville site has yielded crops of various types for several decades as part of the site's agricultural educational and research vocation.

34. Section 3.3.5 of the NGOP further sets out a specific policy applicable to the selected Kemptville site that conforms with the broader spirit of the general agricultural policies set out in the NGOP while reflecting the long-standing educational use in place at this location. Historical non-agricultural uses are permitted (post-secondary education institution) while future development is guided by "three pillars", namely "Education & training", "Health & wellness", and "Economic development". Nowhere do local planning policies contemplate a vocation such as the one proposed by the Minister.

35. In addition, the proposed EOCC has implications for a number of other local planning policy documents, including the Kemptville Campus Master Plan, the North Grenville Strategic Plan, and the North Grenville Tourism Strategy.

36. While the test of “having regard for” local planning policies is somewhat less strict than the Minister’s obligation to “be consistent with” the PPP 2020, completely disregarding local planning designations for primarily agricultural land with an educational vocation cannot be said to meet the requirement placed on the Minister by subsection 6(2) of the *Planning Act*.

37. As a result, the Decision to build the EOCC on the selected Kemptville site constitutes a violation of the Minister’s obligations under subsection 6(2) of the *Planning Act* and is therefore illegal and *ultra vires* the Minister’s legislative authority.

The Minister’s obligation to consult the municipality

38. Lastly, subsection 6(2) of the *Planning Act* also requires the Minister to consult with the local municipality “before carrying out or authorizing any undertaking” that directly affects the municipality. There is no doubt that the construction of a 235-bed correctional facility in a community of 4000 residents will have a profound and direct impact on the municipality, its ratepayers, its infrastructure, and future growth and development.

39. All the information available to date from the Province and the Municipality indicate that no consultation took place prior to the announcement on August 27, 2020. This constitutes the third violation of the Minister’s obligations under the *Planning Act*, rendering the Decision illegal and *ultra vires*.

The Applicants are public interest litigants

40. Victor Lachance is a founding member of CAPP. The unincorporated body was formed by a group of residents of Kemptville and the greater North Grenville area who are concerned about the proposal to build the EOCC on prime farmland, demolishing existing farm buildings in the process.

41. Kirk Albert is a founding member of JOG. The unincorporated body is a grassroots organization of concerned citizens that formed in the days following the Minister’s

announcement. It has been focused on advocating for Kemptville residents, seeking information to inform the community, and holding elected officials accountable for their positions on this project.

42. Over time, CAPP and JOG combined their efforts and, collectively, can count on the support of approximately 225 members under the direction of a steering committee of six members. Victor Lachance and Kirk Albert are part of the steering committee.

43. In addition to the work undertaken by the Applicants and the groups they represent, the following organizations are on the record as supporting CAPP's and JOG's opposition to the EOCC project:

- a. Ecological Farmers Association of Ontario
- b. Agritech Alliance Canada Ltd.
- c. Elizabeth Fry Society of Ottawa
- d. P4W Memorial Collective
- e. CPEP Criminalization and Punishment Education Project

44. The following organizations are on the record as supporting CAPP's and JOG's efforts to preserve the farmland at the selected Kemptville site:

- a. Canadian Organic Growers
- b. Just Food (Ottawa)
- c. National Farmers' Union (Ontario)
- d. Sustain Ontario

45. As founding and active members of CAPP and JOG, spearheading a broad coalition opposing the construction of the EOCC on prime agricultural land, the Applicants meet the requirements set out for Public Interest Litigants:

- a. The proceeding involves issues the importance of which extends beyond the immediate interests of the Applicants.

- b. The Applicants have no personal, proprietary or pecuniary interest in the outcome of the proceeding.
 - c. The issues have not been previously determined by a court in a proceeding against the same respondent. In fact, the Crown's obligations under the *Planning Act* do not appear to have been judicially considered in any proceeding.
 - d. The Respondent has a clearly superior capacity to bear the costs of the proceeding.
 - e. The Application is neither vexatious nor frivolous.
46. Finally, the Applicants have public interest standing to seek the relief described above from this Honourable Court because there are no reasonable alternative means available to bring the issues engaged on this application before the Court.

DOCUMENTARY EVIDENCE

47. The following documentary evidence will be used at the hearing of the application:
- a. Affidavit of Victor Lachance to be sworn at a later date.
 - b. Affidavit of Kirk Albert to be sworn at a later date.
 - c. Affidavit of a professional planner to be retained at a later date.
 - d. Such further and other evidence as counsel may advise and as this Honourable Court may permit.

August 15, 2022

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

Lawyers for the Applicants

Court File No: _____

VICTOR LACHANCE and KIRK ALBERT *and* **SOLICITOR GENERAL OF ONTARIO and ATTORNEY GENERAL OF ONTARIO**
Applicants *Respondents*

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

Proceeding commenced at Ottawa

**NOTICE OF APPLICATION
FOR JUDICIAL REVIEW**

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

Lawyers for the Applicants