Court File No. DC 22-2731

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

VICTOR LACHANCE and
KIRK ALBERT

Applicants
(Responding Parties)

– and –

SOLICITOR GENERAL OF ONTARIO and
ATTORNEY GENERAL OF ONTARIO

Respondents
(Moving Parties)

FACTUM OF THE APPLICANTS/RESPONDING PARTIES

(Motion to Dismiss)

March 6, 2023

SICOTTE GUILBAULT LLP
1-5925 Jeanne d'Arc Blvd.
Ottawa ON K1C 6V8

Stéphane Émard-Chabot (LSO #33909U)
semard-chabot@sicotte.ca
Tel: 613.368.4309

Lawyers for the Applicants/Responding Parties, Victor Lachance and Kirk Albert

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

Susan Keenan (LSO 50784Q)
Susan.Keenan@ontario.ca
Tel: 416 898 1301
Fax: 416 326 4181
Shayna Levine-Poch (LSO #81515O)
Shayna.Levine-Poch@ontario.ca
Tel: 416 895 9333
Fax: 416 326 4181

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

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PART I - OVERVIEW

1. The central issue raised by this Application for judicial review is whether the Respondents' decision to build the new Eastern Ontario Correctional Complex (ECC) on farmland in the town of Kemptville constitutes a violation of obligations imposed by the Legislature on all ministers of the provincial Crown through the *Planning Act*.[1]

2. The Respondents seek to have this Application dismissed for delay by invoking the two-year period that passed between the moment they made their decision public and the filing of the Application, as well as resulting consequences such as expenditures incurred during this period.

3. The Applicants submit that three factors weigh heavily in favour of allowing the Application to proceed. First, the case is one of significant public interest. It raises specific statutory obligations imposed on provincial ministers that have yet to be considered by the Courts. In that light, the outcome will guide government decisions throughout Ontario.

4. Second, the nature of the decision itself calls into question the presumptive 30-day limitation period and the weight to be placed on the principles of finality and certainty. Unlike the vast majority of reported judicial review cases, the contested decision does not mark the culmination of a process in which the Applicants played a central role, there is no fulsome public record available, nor was the decision accompanied by any reviewable rationale. In fact, to this day, the Applicants are forced to rely on heavily-redacted documents obtained through lengthy applicants under the *Freedom of Information and Protection of Privacy Act* (FIPPA).[2]

5. Third, the Respondents themselves, through their own repeatedly broken commitments, are the cause of the delay. Dismissing the Application would, in essence, allow the Respondents to exploit the violation of the Applicants' trust to avoid legitimate judicial scrutiny.

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[1] *Planning Act*, RSO 1990, c P.13.
[2] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F. 31.

PART II - FACTS

6. The narrative presented by the Respondents[3] on how the Applicants should have responded in the wake of the August 27, 2020, announcement connects a series of dubious dots to create an image that can only exist through the distorting lens provided by hindsight.

7. Assessing events as they unfolded from the Applicants' perspective depicts a different reality. The Respondents themselves set the process and the pace, volunteering to provide crucial information, only to later fail to provide it and block attempts at obtaining it. The Respondents invited the Applicants to take part in an "engagement journey"[4] that never got off the ground, and proposed a "dialogue" based on "transparency" that turned out to be nothing short of stonewalling.

The Applicants

8. Both Applicants apply to the Court as public interest litigants. They apply in their personal capacity because the two organizations they represent are unincorporated grassroots community groups that coalesced in response to the announcement that a new jail would be built in their midst.

9. Kirk Albert joined the Jail Opposition Group (JOG), founded by the late former municipal Councillor Jim Bertram, in the days following the announcement. JOG's mandate was to seek facts about the proposal and share this information with the community. JOG also wished to advocate for concerned North Grenville residents who shared concerns about the proposed jail and its effects on the town of Kemptville. Mr. Albert quickly took on a leadership role within this group and the broader community in seeking accountability from the Respondents.[5]

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[3] Factum of the Respondents/Moving Parties [Respondents' Factum] at paras 12-14.
[4] **November 26, 2020 Presentation**, Exhibit 3 to Cross-examination of Victor Lachance, Ontario's Motion Record [MR], Tab 7C, p 519; **Compilation of Relevant Quotes from Public Sessions**, Exhibit A to the Affidavit of Victor Lachance dated December 15, 2022 [Lachance Affidavit], Responding Motion Record [RMR] at p 145.
[5] Affidavit of Kirk Albert dated December 16, 2022 [Albert Affidavit], at paras 8-10, RMR pp 21-22.

10. Victor Lachance was initially contacted by concerned neighbours as President of his local community association. As he tried to gather information, Mr. Lachance realized how little anyone, even the Municipality's Mayor, knew about the proposal and what it might mean for Kemptville. Mr. Lachance attended the first public demonstration organized by JOG to denounce the lack of community consultation, joined other residents who had formed the Coalition Against the Proposed Prison (CAPP) in contacting individuals with relevant expertise to provide the community with background information and, ultimately, took on a leadership role within CAPP.[6]

The Respondents' announcement

11. The August 27, 2020 press release and backgrounder contained little information[7] other than to indicate that the government had developed a new "Eastern Region Strategy" (ERS) which included the construction of a new correctional facility on a government-owned site in Kemptville. The exact location and size of the facility were announced later. The ERS also included a new facility in Brockville, expansion of an existing facility in Napanee vague references to potential retrofits to the existing Ottawa-Carleton Detention Centre (OCDC).

12. The first time the Respondents provided any information to the community was over one month after the announcement, during an invitation-only presentation for selected stakeholders held on October 30, 2020.[8] The first information session open to the general public was not held until three months after the announcement, on November 26, 2020.[9] The presentation materials only contained a single slide outlining why the Kemptville site had been selected.[10] No information was shared on other sites considered, on the complete list of evaluation criteria used, how other

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[6] Lachance Affidavit at paras 4-8, pp 125-127.
[7] Affidavit of David Macey dated October 21, 2022, [Macey Affidavit] Exhibit B, MR pp 24-26.
[8] **October 30, 2020 Presentation,** Albert Affidavit, Exhibit C, RMR pp 49-81.
[9] **November 26, 2020 Presentation**, Exhibit 3 to Cross-examination of Victor Lachance, MR, Tab 7C, pp 519-550.
[10] *Supra,* Note 8, RMR at p. 53, Note 9, MR at p. 531.

sites compared based on these criteria, etc. In short, there was no way for the Applicants to assess how or why the Respondents had chosen the Kemptville farmland as the preferred location for the Eastern Ontario Correctional Complex (EOCC).

Placing the Province's decision in its proper context

13. One of the reasons the August 2020 announcement came as a complete surprise to the community is that, for years, the Respondents had been working on a much-contested new 725-bed facility to be built in Ottawa dubbed the Ottawa Correctional Complex (OCC).[11] The ERS marked a ministerial about-face under a new provincial government. This change of direction by the Respondents is an important consideration in this matter.

14. The OCC project dates back at least to March 1st, 2016, when the Respondent retained the services of an architecture firm to undertake Functional Planning and Facility Planning Studies for correctional facilities in four Ontario communities, including Ottawa and Thunder Bay.[12]

15. The record shows that by March 2017, the Respondents had developed a complete "Functional Program" for the construction of a new 725-bed facility to take the place of the OCDC.[13] Joint work between the Respondents and IO had also begun, with provincial civil servants working to identify a location and site attributes for the OCC.[14]

16. By May 4, 2017,[15] the planning work for the OCC had progressed sufficiently for the Respondents to publicly announce the construction of two new facilities: the OCC as well as a new

[11] Affidavit of Justin Piché dated December 16, 2022 [Piché Affidavit], Exhibit A at RMR p 335 and Exhibit B at RMR p 350.
[12] Piché Affidavit - Exhibit C, RMR at p 367, Exhibit D, RMR at p 409; Exhibit E.
[13] Piché Affidavit - Exhibit D, RMR at p 374-375.
[14] Transcript of the Cross-examination of David Macey dated January 27, 2023 [Macey Transcript], MR Tab 3, Q 356 at p 141.
[15] Piché Affidavit - Exhibit A, RMR at p 337.

345-bed facility in Thunder Bay. Whereas the Thunder Bay project has gone forward and will soon open,[16] the OCC project would quietly end up in the trash bin in late 2019.

17. According to the Respondents' witness, David Macey, work to define what type of site would be required for the 725-bed OCC, as well as to get the PDC (planning, design, and compliance) contractor on board to move the project forward, took place concurrently between March 2017 and January 2018.[17] In May 2017, IO began the work of identifying a site that would meet the requirements for the OCC's Functional Program. Simultaneously, IO was developing the procurement documents for the PDC contractor, going to market, negotiating with the successful proponents, and finally signing the contract that was ultimately awarded on January 26, 2018, to NORR Architects – the firm now responsible for the PDC work for the Kemptville project.[18]

18. By early 2018, IO had identified a suitable property in Ottawa and was negotiating for its acquisition.[19] Reaching this stage required a fair amount of work, according to Mr. Macey: exhausting public-sector real estate portfolios and requesting IO's broker to go to the open market to try and source sites as well.[20]

19. As of April 2018, the OCC project timelines envisaged proceeding to the Request for Qualifications (RFQ) stage shortly, issuing the Request for Proposals (RFP) in the Spring of 2019, and ultimately awarding the complete 30-year DBFM (Design, Build, Finance, Maintain) contract – the public-private-partnership delivery model chosen by the government – in 2020 or 2021.[21]

20. On June 7, 2018, general elections took place and a new provincial government came to power. In a June 2018 document prepared by IO, officials contemplated that a new government

[16] Piché Affidavit - Exhibit E, RMR at p 423.
[17] Macey Transcript, MR Tab 3, Q 354 at p 140; Q 356 at pp 141-142; Q 371 at p 146.
[18] Macey Transcript, MR Tab 3, Q 371 at p 146.
[19] Macey Transcript, MR Tab 3, Q 359 at pp 142-243; Q 361, pp 143-144; Q 385, pp 151-152; Q 387, pp 154-155.
[20] Macey Transcript, MR Tab 3, Q 361, pp 143-144.
[21] Piché Affidavit - Exhibit D, RMR at p 409; Macey Cross-examination, Q 372, MR pp 114-115.

might want to review certain elements of the OCC project.[22] IO identified certain significant risks should the new government make changes to the DBFM delivery model or to the project scope:

a. Contracts in place with consultants may need to be renegotiated or cancelled.

b. Delays when construction prices are increasing would place pressure on the budget.

c. Redesign fees might be incurred.

d. The target date to have the facility up and running in 2023 would be in jeopardy.[23]

21. Despite these warnings, the Respondents ultimately shelved the OCC project when they announced the ERS on August 27, 2020 – exactly four years, five months, and twenty-six days after the Respondents retained their first consultant for the OCC. The record does not indicate how this change in direction came about, nor when, exactly, the decision to abandon the OCC project in favour of the ERS was made. What we do know, however, raises questions about the process.

22. By late 2018 or early 2019, a new site selection criterion was added by the Respondents, namely a location "preferably along Highway 416".[24] It is unclear why this change came about, or why this single corridor was selected to the exclusion of other obvious choices in Eastern Ontario, such as East or West of Ottawa along Highway 417, or Southwest along Highway 7.

23. The search radius used for the OCC project, initially set at 40 km from the existing OCDC and applied at least during the first half of 2018, was also modified.[25] By July 2019, all the properties that made the shortlist of five or six potential locations (depending on the list provided) were within the 40 km radius, and none were along Highway 416… except one: the Kemptville site located some 60 km from the existing detention centre, coincidentally abutting Highway 416.[26]

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[22] Piché Affidavit - Exhibit D, RMR at p 375.
[23] Piché Affidavit - Exhibit D, RMR at p 375.
[24] [Macey Affidavit], MR Tab 2, at para 5, p 13; at para 8, p 14; Macey Transcript MR Tab 3, Q 116, pp 67-68, QQ 119-121, pp 68-69.
[25] Macey Transcript MR Tab 3, QQ 362-366, pp 144-145.
[26] Affidavit of Lisa Gallant dated December 15, 2022 [Gallant Affidavit], RMR Tab 4, Exhibit C at pp 188-190 and p 194; Exhibit F at pp 231-233.

24. One of the few documents obtained by JOG and CAPP through FIPPA[27] shows that by July 16, 2019, the Kemptville location was the only contender left: a business case justified the selection, and a decision by the Respondents confirming the Kemptville location as the preferred site was expected by August 9, 2019 – a year before the public announcement.

25. After expending public funds and staff resources on the OCC project for over three years, and with explicit knowledge that a change in direction could result in increased construction costs and the inability to meet their own target date to have the new facility up and running, the Respondents abandoned the OCC project in favour of the ERS and a distant location that fit the new Highway-416 focused search parameters.

The community responds

26. Faced with the impending loss of the Kemptville Agricultural College farmlands – a valued community asset integral to the town's policies for future growth and tourism[28] – and with uncertainty as to the impacts the EOCC would have on daily life in Kemptville, including added strain on police and hospital resources, the Applicants and other residents began looking for ways to respond, either individually or through emerging community groups such as JOG and CAPP.

27. The Applicants describe how they and the broader community quickly developed a two-pronged strategy. The first branch of the strategy focused on information gathering and sharing so that residents could understand on what basis the decision had been made and what it meant for Kemptville. The second branch focused on advocacy: bringing attention to the issue through various activities to ensure public accountability and oppose the manner in which the project was being sprung on the small community.[29]

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[27] Gallant Affidavit, RMR Tab 4 – Exhibits C and F generally.
[28] Albert Affidavit, RMR Tab 2, at para 35, p 28.
[29] Albert Affidavit, RMR Tab 2, Exhibit E at p 88.

28. Efforts related to information gathering proved particularly difficult from the outset. For example, in the lead up to the November 2020 session, the Respondents asked residents to provide written questions in advance so the information could be available. It turned out that the session was little more than a boiler-plate presentation on provincial correctional facilities and approaches, with little Kemptville specific information. Practically none of the questions were answered.[30]

29. The Respondents, however, did assure the Applicants and other attendees that the session marked the beginning of a "journey" and "dialogue". The Respondents promised to be transparent and accountable. Answers to the numerous questions would be forthcoming and some of the key concerns identified – such as impacts on police and hospital resources – would be addressed through issue-specific working groups. In essence, none of these commitments were ever kept.[31]

30. The only information the Applicants obtained regarding any other aspect of the project following the November 2020 session came from a FIPPA request filed by local resident Lisa Gallant. Dissatisfied with the information presented by the Respondents, in particular in comparison to the comprehensive process followed for the new Ottawa Hospital,[32] Ms. Gallant filed her request the day after the November session. In June 2021, the Respondents released 10 pages of a mostly-redacted 145-page document pertaining to the EOCC site-selection process.[33]

31. A year after the first public session, the Respondents again asked residents to send in their written questions for a follow-up meeting in November 2021. The Applicants, and other residents, essentially resubmitted their year-old list in the hope of finally receiving answers. Once again, the Respondents' presentation included few new details about the project.[34] As questions piled up in

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[30] Albert Affidavit, RMR Tab 2, at paras 18-24, pp 23-25; Lachance Affidavit, RMR Tab 3, at paras 18-28, pp 130-133.
[31] *Ibid*.
[32] Gallant Affidavit, RMR Tab 4, paras 3-6, pp 170-171; Link to TOH process: https://ncc-ccn.gc.ca/projects/the-ottawa-hospital-site-review.
[33] Gallant Affidavit, RMR Tab 4, Exhibit C, p 183.
[34] Albert Affidavit, RMR Tab 2, at para 44, p 32; Lachance Affidavit, RMR Tab 3, at paras 36-40, pp 135-136.

the "chat" function of the video meeting, the function was disabled by the hosts.[35] Even local MPP Steve Clark outwardly expressed his view that, after 15 months, residents should receive answers to their questions.[36] These answers never came.

32. In the wake of the November 2021 session, no longer trusting that the Respondents would live up to their commitments of transparency and accountability, JOG and CAPP members, coordinated a broad FIPPA strategy. Between January and March 2022, 14 additional FIPPA requests were filed with various provincial authorities. To this day, all have been denied and are under appeal.[37]

33. CAPP member Marie-Therese Voutsinos wrote to the Minister of Agriculture, Food, and Rural Affairs on December 1st, 2021, requesting that the transfer of the land to the Respondents be placed on hold to allow for a meaningful dialogue on the future of the property with local stakeholders. A follow-up email was sent on February 18, 2022. The Minister did not reply until March 31, by which point the transfer of the land from ARIO to the Respondents had taken place.

34. Ms. Gallant was somewhat more successful. Her appeal produced a second disclosure in April 2022. Several more pages of the same document were released, providing the Applicants, for the first time, with a better – although incomplete – understanding of how the Kemptville site was chosen. Several other elements, including over 100 pages of emails, were to be released by August 2022 but, in a letter dated October 5, 2022, the Respondents ultimately denied the request. The matter is now with the FIPPA Adjudicator for resolution.

35. On the advocacy front, the Applicants engaged in a continuous, unequivocal campaign opposing the manner in which the EOCC process was unfolding with hundreds of different

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[35] Albert Affidavit, RMR Tab 2, at 45, pp 32-33.
[36] **Compilation of Relevant Quotes from Public Sessions**, Lachance Affidavit, Exhibit A, RMR at p 145; Albert Affidavit, RMR Tab 2, at paras 51-52, p 34.
[37] Affidavit of Lisette Major dated December 15, 2022, RMR Tab 5 [Major Affidavit] at Exhibit C.

activities including media, social media, demonstrations, meetings with various officials, flyers, and lawn signs.[38]

36. As CAPP and JOG sought out other organizations and individuals who could assist in their campaign against the EOCC project. The National Farmers' Union, Canadian Organic Growers, the Ecological Farmers Association of Ontario, and Sustain Ontario all expressed public support.

37. One of the individuals to join their efforts was Professor Justin Piché of the University of Ottawa. Prof. Piché has spent most of his academic career studying the impacts of incarceration and the construction of correctional facilities.[39] Importantly, Prof. Piché also had played a central role in opposing the OCC project that had been abandoned and replaced with the ERS.[40] The opposition efforts in Ottawa having been seemingly successful in blocking the OCC project, JOG and CAPP modeled some of their advocacy initiatives after the anti-OCC campaign.

38. By early 2022, the strategy now focused on the upcoming provincial election. As the change in government in 2018 appeared to have been the catalyst for the switch from the OCC to the ERS approach, it stood to reason that a change in government could, once again, bring about significant change to the Respondents' plans.

39. To this end, the Applicants sought and obtained commitments from all three major opposition parties – NDP, Liberal, and Green – that, if elected, they would either pause the project during an open review of the ERS decision or cancel the project altogether.[41] When, on June 2, 2022, the government was returned to power, the Applicants knew that the political battle had been

[38] Albert Affidavit, RMR Tab 2, at para 29-37, p 26-30; Lachance Affidavit, RMR Tab 3, Exhibit D at p 158; Major Affidavit, RMR Tab 5, Exhibit A at p 312.
[39] Piché Affidavit, RMR Tab 6, paras 1-2, pp 325-326.
[40] Piché Affidavit, RMR Tab 6, Exhibit B at p 350.
[41] Lachance Affidavit, RMR Tab 3, at paras 44-46, pp 137-138.

lost. Concerned that the Respondents would now press forward with the EOCC, the Applicants turned to their ultimate recourse and examined the possibility of legal action.

Seeking legal advice

40. In their factum, the Respondents place great emphasis on the fact that the Applicants, in particular Mr. Albert and JOG, had identified legal recourses as a possible way of contesting the Respondents' decision. Mr. Albert's testimony on this point bears repeating.

41. While a legal recourse was among the various options identified for future action at a December 2020 JOG meeting, and the option was explored with members who had access to legal resources and advice, the consensus was that there were so few details available that JOG members simply had no idea what they would be asking lawyers to advise them on. It therefore seemed logical to wait, receive the information promised by the Respondents, and then consider whether any of this information provided a worthwhile path to a legal remedy.[42]

42. Both Applicants were also told by the Mayor, Deputy Mayor and Chief Administrative Office of the Municipality that the advice they had received was to the effect that there was nothing that could be done to stop the EOCC project, including through zoning rules.[43] Municipal official did not broach other land-use planning mechanisms as potential recourses. In this context, the Applicants admittedly decided that the best and most reasonable course of action was to pursue other avenues before engaging in what was presented to them as a pointless and costly legal battle.

43. By June 2022, however, not knowing how fast the Respondents would proceed with their plans in the wake of the elections, the Applicants became deeply concerned that the community would, one day, wake up to bulldozers tearing down the farm buildings on the site. Their attention

[42] Albert Affidavit, RMR Tab 2 at para 61, p 37.
[43] Albert Affidavit, RMR Tab 2 at paras 38-40, pp 30-31; Lachance Affidavit, MR Tab 3 at para 7, p 127.

shifted to considering legal action as their last resort. They sought legal advice promptly and filed their Application for Judicial Review in the weeks that followed.

PART III – QUESTIONS IN ISSUE

44. This motion raises a single issue: whether there are grounds to dismiss this Application for judicial review for undue delay and, if so, whether there grounds are sufficiently plain and obvious to justify a dismissal by a Justice of this Court sitting alone.

PART IV – SUBMISSIONS

45. Judicial review is a discretionary remedy which can be denied on the basis of excessive delay and the Respondents are obviously free to bring this motion.

46. The issue is whether equity should allow the Respondents to exploit their own broken commitments and stonewalling in order to avoid judicial scrutiny, particularly when the decision being challenged constitutes a readily apparent violation of obligations imposed on all ministers of the provincial Crown by the Ontario Legislature.

47. Complicating the analysis somewhat is the fact that there is no single point or moment in time that constitutes a clear "decision" in this case. Instead, we must contend with a continuous, evolving process with distinct steps and milestones. Some milestones, such as the Respondents' expression of interest in the site, date back more than a year prior to the August 2020 public announcement. By the same token, other significant decisions, including the actual acquisition of the Kemptville site, did not materialize until in March 2022, 19 months after the announcement.

48. Rather than engage in theoretical arguments about when the clock might have started ticking for this Application, the Applicants are content to defend the timing of their Application on its merits, based on the statutory rule in force when the matter of the Kemptville jail first became public on August 27, 2020.

49. The framework applicable to determine the outcome of the Respondents' motion is well established. Under s. 5(2) of the *Judicial Review Procedure Act*, the Court has wide discretion to grant an extension "on such terms as it considers proper". [44] The statute sets out two prerequisites to the exercise of the Court's discretion: (1) the presence of apparent grounds for relief; (2) whether the moving party will suffer substantial prejudice or hardship as a result of the delay.

50. Because of the equitable nature of judicial review, even when the statutory conditions are met, the Court is free to consider other factors.[45] Although each case must be dealt with on its own merits – as reflected by the diverse jurisprudence – the following considerations typically form part of the Court's analysis: (1) the length of the delay; (2) whether there is a reasonable explanation for the delay; (3) the nature of the decision under review.

51. There is also a strong presumption that motions to dismiss for delay should be heard by a full panel of the Divisional Court. A single judge "should not dismiss an application for judicial review except in the clearest of cases".[46] Worded differently in the *De Pelham* decision, the presumption is that "except where it is plain and obvious that the application should be dismissed for delay, a motions judge should not dismiss for delay and should leave the issue to the panel."[47]

52. The Applicants submit that the Respondents' case to dismiss the application is without merit and should be denied. Should the Court disagree with this conclusion, the Applicants submit, in the alternative, that because of the "countervailing considerations"[48] in this file, it is not plain and obvious that the applications should be dismissed, and it should be referred to the full panel.

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[44] *Judicial Review Procedure Act*, RSO 1990, c J.1 at s. 5(2).
[45] *Unifor and its Local 303 v Scepter Canada Inc.*, 2022 ONSC 5683 (CanLII) at paras 17-18.
[46] *Knot v State Farm Automobile Insurance Company*, 2020 ONSC 7672 (CanLII) at para 3.
[47] *De Pelham v Human Rights Tribunal of Ontario*, 2011 ONSC 7006 (CanLII) at para 12.
[48] *Democracy Watch v Ontario Integrity Commissioner*, 2021 ONSC 7383 at para 32. [*Democracy Watch*].

The Applicants have readily apparent grounds for the relief they seek

53. The Applicants apply to the Court as public interest litigants. The record is clear that neither Applicant has a personal interest – financial or otherwise – in the outcome of this application beyond their status as residents of the Municipality of North Grenville and their role as leaders of their respective organization. The Applicants' standing is not contested by the Respondents.

54. With respect to the presence of apparent grounds for relief, the Respondents argue that since the Municipality has indicated that it is satisfied that the proposed jail conforms with its zoning bylaw, the substantive issues at play in this Application are essentially resolved – leaving no apparent grounds for relief. With respect, this characterization of the issue misconstrues the grounds relied upon by the Applicants.

55. This Application for judicial review does not – and could not – rely on a local zoning bylaw for the simple reason that the Respondents, as ministers of the Crown, are not bound by such bylaws. The *Planning Act* does not contain a provision binding the Crown and, as a result, the Crown is immune from the statute, as provided in s. 71 of the *Legislation Act*.[49]

56. However, when it adopted the *Planning Act*, the Legislative Assembly established three specific obligations that explicitly bind ministers of the Crown and for which the record indicates that apparent grounds are clearly present:

(1) Under subsection 3(5), all ministerial decisions must be consistent with any Provincial Policy Statement (PPS) adopted by the Minister of Municipal Affairs and Housing.

(2) Under subsection 6(2), all ministers must also have regard for the established planning policies of the municipality where an undertaking will directly affect the municipality.

[49] SO 2006, c 21, Sch F.

(3) Under subsection 6(2), ministers must consult with the local municipality "before carrying out or authorizing any undertaking" that affects the municipality.

57. First, a PPS was in effect at all relevant times when the Respondents were considering the Kemptville site for a new provincial jail – either the 2020 version or its 2014 predecessor. Section 2.3 of the PPS[50] protects agricultural areas for "long-term use for agriculture" and places strict conditions on non-agricultural uses in agricultural areas. Placing a jail on 178 acres of Class 2 agricultural land is not consistent with the provisions of the PPS.

58. Ministerial documents obtained through FIPPA do not include a single reference to the PPS as a consideration site-selection process[51]. It would therefore appear that the Respondents acted in violation of their statutory obligation in this regard.

59. Second, the most important land-use policy document – which municipalities are obligated to adopt – is the local Official Plan. The current North Grenville Official Plan (NGOP) came into force in November 2018. The NGOP[52] designates the selected Kemptville site as "Agricultural" land. In addition, Section 3.3.5 further sets out a site-specific policy for the lands in question that builds on the agricultural policies and reflects the site's long-standing educational use. Nowhere does the NGOP contemplate a vocation for the site such as the one proposed by the Respondents.

60. While the threshold of "having regard for" the NGOP is lower than the requirement to be consistent with the PPS, imposing a use that bears no relation whatsoever to the land-use designation is most arguably a decision that has no regard for the planning policies of North Grenville. This would also constitute a violation of the Respondents' statutory obligations.[53]

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[50] The Provincial Policy Statement 2020 can be found here: https://www.ontario.ca/page/provincial-policy-statement-2020.
[51] Gallant Affidavit, RMR Tab 4 at Exhibit C, p 183 and at Exhibit F, p 209.
[52] The North Grenville Official Plan can be found here: https://www.northgrenville.ca/resources/official-plan.
[53] *Toronto (City) v R & G Realty Management Inc.*, 2009 CanLII 42397 (ON SCDC).

61. Lastly, the record indicates that the Respondents did not consult the Municipality of North Grenville before authorizing the construction of the EOCC on the Kemptville site.[54] Here again, there is an apparent violation of the Respondents' obligations under the *Planning Act*.

The Respondents' claims do not constitute a substantial prejudice or hardship

62. The second prerequisite set out in the *JRPA* for the Court to entertain an extension of time is the absence of "substantial prejudice or hardship" to the Respondents.

63. By the plain meaning of these words, the legislation contemplates that some negative or unwanted effects on the moving parties are acceptable – in that these consequences will not automatically lead to the dismissal of an Application. To preclude the Applicants from proceeding, the effects on the Respondents must move beyond the level of an inconvenience or limited negative impacts. They must rise to the level of harm sufficient to constitute hardship.

64. In this case, the prejudice claimed by the Respondents includes elements that legitimately form part of the analysis while others, we submit, are not at all related to the timing of the Application. Among the elements that can be considered, the Applicants do not contest that the roughly $3.2 million were incurred by the Respondents from September 2020 to August 2022:

(1) The cost of site-specific PDC work. The Respondents estimate that only 30% of that work would have to be redone. This amount is pegged at $450,000.[55]

(2) The cost consultant's fees of $13,575.[56]

(3) Site-specific due diligence costs of $1 million.[57]

[54] Lachance Affidavit, RMR Tab 3, at paras 5-6, pp 126-127.
[55] Respondents' Factum at paras 17-19.
[56] Respondents' Factum at para 20.
[57] Respondents' Factum at paras 32-33.

(4) Staff time spent on this project of $1.8 million.[58] It should be said, however, that these salary costs are more akin to fixed costs incurred by the Respondents regardless of this case. These amounts are billed by one branch of the provincial government (IO) to another (Respondents) but there is no evidence on record that IO's or the Respondents' staff complement had to be adjusted for this project to proceed. It would appear that these costs would have been incurred regardless of the EOCC project and this Application.

65. To determine whether this sum, in this particular case, constitutes a substantial prejudice to the Respondents, two factors must be considered. The first is the relative importance of the sum in the context of this project. The envelope for the 235-bed EOCC is currently set at between $200 million and $499 million.[59] Using this range, the loss that is theoretically attributable to the timing of the Application represents between 0.6% and 1.6% of the total project cost. (If we use the Respondents' inflated figure of $7 million,[60] the range falls between 1.4% and 3.5%.) The sum is arguably not negligeable, but it falls short of having a substantial prejudicial impact on the Respondents' ability to proceed with the project elsewhere should the Application be successful.

66. In a construction project of this scale, any number of variables will have a far greater impact on the total costs, yet these increases are simply treated as the cost of doing business. For example, the original estimate for the Thunder Bay facility – the 325-bed project announced at the same time as the now-defunct OCC – was also set at between $200 million and $499 million. By September 2020, this range had been revised to between $500 million and $1 billion. When the final contract was announced on November 3rd, 2022, the actual tally came in at $1.2 billion.[61]

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[58] Respondents' Factum at paras 34-37.
[59] Piché Affidavit, RMR Tab 6 at Exhibit E, p 422.
[60] Respondents' Factum at para 16.
[61] Piché Affidavit, RMR Tab 6 at Exhibit E, p 422.

67. To be clear, the record does not indicate the factors that led to a final amount six times greater than the original low-end estimate, and the Applicants do not claim that a direct parallel can be drawn between the Thunder Bay project and the EOCC proposal. However, these facts do illustrate that the Respondents do not consider cost increases of this magnitude to constitute a sufficient barrier to walk away from a project. In that light, the 1% that might be attributable to the timing of the Application can hardly be qualified as a hardship in this context.

68. The second factor that supports the Applicants' position that the Respondents' costs, in this case, do not constitute a substantial prejudice is the fact that the Respondents themselves had no difficulty walking away from the OCC project after working on it for three years.

69. At para 58, the Respondents are critical of the Applicants for their lack of respect for public expenditures and resources. Ironically, this criticism can readily be directed at the Respondents themselves. Similar amounts of public resources were wasted by the decision to abandon the OCC project in favour a the new ERS. The Respondents refused to reveal the exact sums involved[62] but we know that IO and Respondent staff worked on the OCC project from March 2016 to some time in mid-2019. It would stand to reason that the "staff time" component of the loss attributable to the change in policy would be similar to the $1.8 million claimed in this case.[63]

70. We also know that although the OCC project had not proceeded as far along as the Kemptville project has in terms of milestones reached, the due diligence and PDC work had also begun for the OCC project as a preferred site had been identified for the facility.[64]

71. Determining whether a prejudice is "substantial" inevitably involves considerations of proportionality and context. From the perspective of an objective observer, the Respondents appear

[62] Table of Answers to Undertakings, MR Tab 4 at p 180.
[63] Macey Transcript, MR Tab 3, Q398, p 157.
[64] Macey Transcript, MR Tab 3, Q395, 397, p 156-157.

to treat an expenditure of a few million dollars on a project that they later choose abandon as an entirely acceptable part of their operations. However, when a very similar cost – in type and scale – is the result of citizens being made to wait for information because of broken commitments of accountability, ultimately leaving them with no option but to engage in public interest litigation, these sums suddenly become substantially prejudicial. With respect, when assessing matters of equity, as is required by the nature of this motion, arguments of this type cannot stand.

There is no evidence that the delay, in and of itself, is prejudicial

72. For similar reasons, the Applicants submit that the record does not establish that the timing of the Application will cause a substantial prejudice or hardship to the Respondents.

73. The Respondents were explicitly warned, in July 2018, that a change in the project scope would jeopardise the 2023 target for the opening date. This did not prevent them from profoundly changing the scope of the project by adopting the ERS and restarting much of the development work after working on the OCC project for three years. In addition, impacts on program delivery are not mentioned in the Respondents' Notice of Motion, there is no evidence on record in this regard, and the Respondents' own actions indicate no urgency.

74. It is also important to point out that the Respondents' timetable for the EOCC project continues to evolve. In November 2020, the Respondents stated that the due diligence work required for the project would be completed in 2021, the RFQ process was slated for 2022, the RFP and tender for 2023, and the contract would be awarded at some point in 2024.[65]

75. According to Mr. Macey's testimony, the project is nowhere near as advanced. Due diligence work stands at only 75% complete.[66] IO's *November 2022 Market Update*, the third official revision to the timelines for the EOCC, now sets June 2024 as the target date to issue the

[65] MR Tab 7C, Exhibit 3 of the cross-examination of Victor Lachance, p 546.
[66] Macey Transcript, MR Tab 3, Q 431, p 167.

RFQ, the first quarter of 2025 for the RFP stage, and mid-2026 for awarding the contract.[67] There is no evidence that this Application had any role in these changes.

76. These sliding timelines are not unique to the EOCC project and can also be noted in other recent jail construction projects: Brockville, also announced on August 27, 2020, has been pushed back by two years from its initial timetable, and the actual timetable for the RFP for Thunder Bay was also two years behind schedule. In this light, any suggestion that the timing of this Application could have a prejudicial impact on these remote and sliding deadlines, or even trigger additional contractual liability on the part of the Respondents, does not hold water.

77. From a legal perspective, the Respondents point to two decisions of this Court and argue that this case "is on all fours" with those decisions and should be dismissed. With respect, the facts and the factors that led to a dismissal for delay in those cases bear no resemblance to this matter.

78. In *Wauzhushk Onigum Nation*, the Applicants had, since 2012, participated in a competitive procurement process to obtain a casino license. When the outcome of the process was announced in December 2016, the Applicants learned that they were not the successful proponents. Contracts between the successful licensees and provincial authorities were finalized in May 2017. In September 2018, without ever having raised concerns previously, the Applicants sought judicial review of the process and its outcome. By this point, there was a real likelihood of litigation involving the successful proponent and "damages would be significantly larger and the litigation more complex given the passage of time."[68] None of those factors are present here.

79. The *Know Your City* decision is just as easily distinguishable. In that case, the Applicant was unable to demonstrate apparent grounds that the sale of the municipal property was tainted, the Applicant had questionable standing to bring the Application, and the Respondent municipality

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[67] Piché Affidavit, RMR Tab 6, Exhibit E, p 422.
[68] *Wauzhushk Onigum Nation v Minister of Finance (Ontario)*, 2019 ONSC 3491 (CanLII) at para 187. [*Wauzhushk*]

had already entered into a binding agreement to sell the property to a third party whose interests would have been directly affected. The case at bar bears no resemblance to those facts.[69]

80. The Respondents also cite *Gigliotti*. In that case of purported public interest litigation, the Applicant took 29 months to perfect an application to overturn a the closure of a community college. By that point, all elements of the shuttered college had been transferred to two other colleges. In the words of the Court, to reverse that decision after a complex transition of this type "would create havoc".[70] The prospect of negative consequences of this type is not present here.

The need to find another site is not a relevant consideration for this motion

81. In their factum,[71] the Respondents include the sums invested to purchase the Kemptville site as a component of the substantial prejudice attributable to the timing of the Application. The Applicants submit that that the purchase of a valuable asset, which, after being the subject of due diligence work, can readily be resold, should not be considered as an unrecoverable expenditure.

82. Mr. Macey's testimony is to the effect that property values have generally continued to increase in Eastern Ontario. If this is correct, it would invariably apply to the value of the Kemptville site as well. Fluctuations in the market are neutral for the Respondents.

83. The record also indicates that the Municipality and a private consortium have both expressed interest in acquiring the property with of view of maintaining its historical agricultural, educational, and research vocation.[72] Active discussions were, in fact, under way, involving the local MPP and cabinet minister, when the Respondents formally expressed interest in the property.

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[69] *Know Your City Inc. v The Corporation of the City of Brantford*, 2021 ONSC 154 (CanLII) at paras 2-5 and 45-50. [*Know Your City*]
[70] *Gigliotti v Conseil d'administration du Collège des Grands Lacs,* 2005 CanLII 23326 (ON SCDC) at para 36.
[71] Respondents' Factum at paras 21-31.
[72] Albert Affidavit, RMR Tab 2, at paras 34-35, pp 27-28.

84. It is unfortunate that the Applicants have not been able to obtain a clear answer as to why the Municipality was not allowed to purchase all the site in 2018. As we know, the bulk of the former Campus was acquired by North Grenville and converted into a thriving community hub housing businesses, schools and day care facilities – whereas the remainder of the land, now slated for the jail project, was kept within the province's real estate portfolio.

85. The Respondents also argue that there would be "land acquisition challenges"[73] associated with having to find a new location for the proposed correctional centre. The Applicants submit that these considerations have nothing to do with the timing of the Application. Instead, these are challenges that the Respondents will face if the Application is successful on its merits. Even if this Application had been filed the day after the announcement, the need to find a new location would arise if, as the Applicants claim, the selection of the Kemptville site constituted a contravention of the Respondents' statutory obligations. These considerations cannot, therefore, form part of the analysis of whether the Respondents will face hardship as a result of the timing of the Application.

The effects of the nature of the decision on the length of the delay

86. The presumptive 30-day limitation period added to the *JRPA* in 2020 mirrors the limitation period to file a traditional appeal under the *Rules of Civil Procedure*.[74] This recent change likely reflects an intent to bring certainty and finality to all types of litigation files in a timely manner.

87. In most cases, the 30-day rule makes sense. Whether in a traditional appeal or in judicial review proceedings, litigants have typically been involved in the case for some time – often years, there is a complete record of evidence, the evidence has been tested, and a decision has been rendered with accompanying reasons, marking the culmination of the proceedings. From that date

[73] Respondents' Factum at paras 21-31.
[74] Rule 61.04(1), *Rules of Civil Procedure*, RRO 190, Reg 194.

forward, it stands to reason that the objectives of finality and certainty play a paramount role in assessing the timing of a further challenge such as an Application for judicial review.

88. The case law also shows that the nature of the litigation plays an important role in assessing how strict the calculation of the undue delay should be. For example, in matters of labour relations[75] or disciplinary proceedings,[76] this Court has held that "timely resolution of a dispute is particularly important"[77] and that such applications should "proceed expeditiously".[78] Similar rationale has been applied where the interests of a third party would be affected.[79]

89. The present case, however, is of a different order. First, the decision being challenged is a matter of public interest and is fundamentally a political one. Further, the process itself has been completely backwards – because of the Respondents' choice to proceed in secrecy until their mind was made up. When their decision was finally announced in August 2020, there was no record provided susceptible of public – let alone judicial – scrutiny. The first piece of the puzzle – a superficial deck of slides – was not made available to the general public until 90 days after the announcement. In a context such as this, the 30-day presumptive limitation period cannot be relied upon as a logical starting point to assess whether the timing of the Application is problematic.

90. At what point in time do citizens who wish to challenge a discretionary ministerial decision of this type, with barely a shred of a record to go on, ultimately have to make the call and proceed to Court? The answer involves a balancing act which, the Applicants submit, should favour public

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[75] For example: *Allen v Bricklayers Masons Independent Union of Canada Local 1*, 2020 ONSC 3369; *Belyavsky v Walsh*, 2022 ONSC 3135; *Ransom v Ontario*, 2010 ONSC 3156; *Ratman v Workplace Safety and Insurance Appeals Tribunal*, 2022 ONSC 3923; *Taylor v Pivotal Integrated HR Solutions*, 2020 ONSC 6108.
[76] For example: *The Canadian Chiropractic Association v Dr. Barry McLellan, Coroner*, 2011 ONSC 6014; *Kaur v The National Dental Examining Board of Canada*, 2019 ONSC 5882; *Walia v College of Veterinarians of Ontario*, 2020 ONSC 8057.
[77] *Nahirny v Human Rights Tribunal of Ontario*, 2019 ONSC 5501 at para 9.
[78] *Amodeo v Ontario Labour Relations Board*, 2010 ONSC 1611 at para 6.
[79] For example: *Wauzhushk*, supra Note 68; *Know Your City, supra*, Note 69; *Foster v The City of Oshawa*, 2020 ONSC 681.

accountability and not deprive citizens, without good reason, of their fundamental right to question the legality of political decisions.

91. The Respondents' central argument is that the Applicants breached their duty to "put their best foot forward, seek legal advice and initiate legal applications in a timely way" and that this could have been done in the weeks that followed the August 2020 announcement.[80] With respect, neither the facts nor the law support this contention.

92. It is well established that judicial review is an equitable recourse of last resort and that an application can be dismissed if it is brought prematurely. In *Strickland*, the Supreme Court of Canada confirmed this principle and set out a non-exhaustive list of factors that can be considered in assessing whether an applicant has properly exhausted adequate alternative remedies.[81] Furthermore, in *Democracy Watch*, this Court warned litigants about misusing the judicial review process: "*Without articulating a clear and serious legal issue, the applications for judicial review have the air of a fishing expedition* […]"[82]

93. What could the Applicants have conceivably relied on to seek legal advice and initiate this Application when they are still denied access to the full record of how the decision to build the EOCC on the Kemptville site was made? Had they proceeded as swiftly as the Respondents contend they should have, the Applicants would undoubtedly have faced a motion to dismiss for prematurity: answers to the questions the Respondents solicited from citizens' would, of course, be given in due time, authorities would, of course, engage in the ongoing dialogue, set-up subject-matter working groups, and ensure transparency, as promised. November 2020 marked the beginning of a "journey". All the Applicants had to do was trust the Respondents. They did.

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[80] Respondents' Factum at para 50.
[81] *Strickland v Canada (Attorney General)*, 2015 SCC 37, at paras 40-45. These factors were summarized by this Court in *Savic v College of Physicians and Surgeons of Ontario*, 2021 ONSC 4756, at para 28.
[82] *Democracy Watch, supra* Note 48, at para 38.

94. A year later, none of the commitments had been fulfilled, yet at the November 2021 public session, the Respondents again asked for written questions, promised answers, etc.[83] Despite a healthy dose of growing skepticism, the Applicants nonetheless continued to believe that the Respondents would keep their word. Now, this trust is being turned against them.

95. The FIPPA request filed by Lisa Gallant – the only way the Applicants have been able to garner any meaningful information about the Respondents' decision – continues to be blocked, despite commitments that more information would be forthcoming. The record, so far, provides the Applicants with ample apparent support for their claims. However, there is no way of knowing what other information has been withheld from the Applicants, such as professional advice from land-use planners or the results of environmental studies commissioned by the Respondents.

96. Of the 22 cases cited by the Respondents, none are like this one. The Applicants submit that the case that provides the closest parallel to the present circumstances is the *Lalonde*[84] decision of this Court relating to the closure of the Montfort hospital in Ottawa. Admittedly, the stakes for the Franco-Ontarian community in *Lalonde* were of a different nature than in this case, as were the constitutional arguments. However, there are also striking similarities.

97. At its core this case is also about the preservation of a valued community asset – the agricultural lands for which community-based proposals were being actively pursued. As was the case for Montfort, the initial decision was made behind closed doors and its announcement came as a surprise to the affected community. In both cases, the community rallied and opposed the provincial decision. This opposition was unequivocal, continuous, and relied exclusively on advocacy and political pressure on decision-makers to seek a reversal of the decision.

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[83] Compilation of Relevant Quotes from Public Sessions, Lachance Affidavit, RMR Tab 3 Exhibit A at p 145.
[84] *Lalonde v Ontario (Commission de restructuration des services de santé)*, 1999 CanLII 19910 (ON SCDC) affirmed in *Lalonde v Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 (ON CA).

98. Of particular significance in the context of this motion, community leaders did not turn to the Courts and seek for judicial review in either case until they had come to the conclusion that there were no political recourses left. As it happens, slightly more than two years passed in *Lalonde* before the community exhausted all other alternatives and, armed with their arguments regarding the illegality of the decision, marched off to Divisional Court.[85]

99. The only notable difference is that, in *Lalonde*, the delay of more than two years is not even mentioned: no motion to dismiss, no questions from the Court. According to the February 1997 decision, Montfort should have been shuttered by the time the Application was filed. Even though the legal challenge deeply upset the government's ambitious healthcare restructuring plans, community representatives were permitted to argue the merits of their case.

100. After their own two-year political battle, the residents of Kemptville seek the same opportunity to obtain a judicial determination with respect to the legality of Ontario's actions.

101. The Applicants submit the public interest nature of the questions raised by this Application should weigh heavily in assessing its timing. The Respondents' obligations under the *Planning Act* apply to all provincial ministers and do not yet seem to have been considered by the Courts. Ultimately, the outcome of this case will guide how governmental decisions that potentially run roughshod of the Province's own land-use regulations are made throughout in Ontario. In this light, the equities of the case favour denying the Respondents' Motion to dismiss.

The Applicants' actions were entirely reasonable

102. The Respondents' central argument is that political advocacy and legal remedies can both be pursued at the same time – and should have been. Not having done so, the Applicants have no reasonable explanation for not filing their Application until August 2022. With respect, concluding

[85] *Ibid.,* Court of Appeal decision at paras 49-50.

that ordinary citizens, placed in the position of the Applicants, would have acted as proposed by the Respondents glosses over key factual considerations, not the least of which are the Respondents' own actions.

103. A review of the timeline – from the announcement to the filing of the Application – supports the Applicants' position that their actions were, at all times, reasonable – and amply explain why they filed their Application when they did. It should be noted that, between the milestone dates below, the Applicants assiduously and continually worked on seeking information that would allow them to assess whether there were any grounds to challenge the Respondents' decision, as well as making sure their concerns were heard.

i) August 27, 2020 – The Respondents announce the new ERS and the Kemptville EOCC project. The only information available is a press release and backgrounder. Community mobilization begins within days and several residents coalesce around the nascent JOG and CAPP groups.

ii) October 9, 2020 – CAPP obtains a meeting with the Mayor and Deputy Mayor seeking more information. No information is available, but municipal officials communicate the advice they have received that the project cannot be stopped.

iii) October 29, 2020 – JOG obtains a meeting with the Mayor and receives essentially the same responses.

iv) October 30, 2020 – Respondents' invitation only stakeholder meeting.

v) November 26, 2020 – Respondents' first public engagement session. The Respondents make a number of promises to engage with the community, share information, set-up working groups, answer questions provided in advance, etc. The waiting game begins.

vi) November 27, 2020 – Lisa Gallant submits a FIPPA request on the site-selection process.

vii) March 9 and 23, 2021 – North Grenville Municipal Council considers the EOCC project publicly for the first time and hears public delegations on the EOCC project.

viii) June 4, 2021 – First disclosure in response to the Gallant FIPPA request. Nine months after the announcement, the Respondents release 10 pages of a mostly-redacted 145-page document pertaining to the site-selection process. Appeal submitted on June 22, 2021.

ix) November 17, 2021 – Respondents' second public engagement session. The local MPP underscores that delays in obtaining information are becoming problematic for residents and municipal officials. More promises by the Respondents.

x) January 4, 2022 – In response to the Respondents' stonewalling, CAPP and JOG begin coordinated FIPPA campaign. 14 FIPPA requests filed by March 2022.

xi) Early 2022 – The focus of CAPP and JOG activities shifts to the upcoming Ontario provincial elections.

xii) April 25, 2022 – Second release of information pursuant to the Gallant FIPPA request. Further appeal filed to obtain over 100 pages of emails the Respondents are withholding.

xiii) June 2, 2022 – Ontario provincial elections.

xiv) June 30, 2022 – First meeting with legal counsel to seek advice.

xv) August 16, 2022 – Application for judicial review is filed.

104. Throughout this period, the Applicants were essentially forced to follow the process and the pace set out by the Respondents. The repeated promises of transparency from the Respondents themselves drove the delays. There is much irony in now being told, in the context of this Motion to dismiss, that this trust was misplaced and that the Applicants should have acted sooner.

105. By the time the Respondents met the community for the second time, 15 months had passed since their announcement. The only information available to the Applicants at that date was a press

release, a backgrounder, a couple of slides from the October/November 2020 presentation decks, and 10 pages obtained through the Gallant FIPPA. The Applicants submit that it was entirely reasonable for them to conclude that they had nothing to bring to a lawyer to seek advice.

106. In addition, the local municipal leadership – the Mayor, Deputy Mayor and the CAO – had publicly taken the position that, in their opinion, there were no grounds to oppose the Respondents' decision. It is also reasonable for citizens to rely on representations of this nature when deciding on a course of action.

107. When the November 2021 public session generated only more doubtful promises, and they began to realize that the Respondents might be stringing them along, the Applicants – quite reasonably – turned to a concerted FIPPA campaign to obtain the records that would allow them – and any legal counsel – to fully assess whether the Respondents' decision was open to review.

108. On December 13, 2021 the applicants sought again to have the transfer of the property put on hold to give the community time to receive information. The response from the government did not come until March 31, 2022 – after the transfer had been completed.

109. While the FIPPA requests worked they way through the system, the focus shifted to the election campaign. No longer trusting the Respondents' good faith, armed with commitments from all three opposition parties, and in light of the demise of the OCC project when the last change of government occurred, it was entirely reasonable for the Applicants to rely on the exercise of their democratic rights as a way to reverse a political decision.

110. Immediately after the last hope of a political reversal was lost, and concerned that they might, one day, wake up the sound of construction crews on the Kemptville farmland because the Respondents were still keeping them in the dark, the Applicants took what little information they had and sought legal advice. Again, an imminently reasonable course of action.

111. The principle that a person seeking equity must come with clean hands is as old as equity itself. In this case, the Applicants submit that the Respondents, because of their own repeatedly broken promises, are not in a position to argue that it would be unfair for this Application to proceed. If there was undue delay, and if there is a substantial prejudice, it flows from the Respondents' own deliberate course of action.

PART V – ORDER REQUESTED

112. The Applicants respectfully request an Order denying the Respondents' Motion to dismiss the Application for delay.

Lawyer for the Applicants,
Stéphane Émard-Chabot

SCHEDULE A

1. *Allen v Bricklayers Masons Independent Union of Canada Local 1*, 2020 ONSC 3369
2. *Amodeo v Ontario Labour Relations Board*, 2010 ONSC 1611
3. *Belyavsky v Walsh*, 2022 ONSC 3135
4. *De Pelham v Human Rights Tribunal of Ontario*, 2011 ONSC 7006
5. *Democracy Watch v Ontario Integrity Commissioner,* 2021 ONSC 7383
6. *Foster v The City of Oshawa*, 2020 ONSC 681
7. *Gigliotti v Conseil d'administration du Collège des Grands Lacs,* 2005 CanLII 23326
8. *Kaur v The National Dental Examining Board of Canada*, 2019 ONSC 5882
9. *Knot v State Farm Automobile Insurance Company*, 2020 ONSC 7672
10. *Know Your City Inc. v The Corporation of the City of Brantford,* 2021 ONSC 154
11. *Lalonde v Ontario (Commission de restructuration des services de santé)*, 1999 CanLII 19910 (ON SCDC), affirmed in *Lalonde v Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 (ON CA)
12. *Nahirny v Human Rights Tribunal of Ontario*, 2019 ONSC 5501
13. *Ransom v Ontario*, 2010 ONSC 3156
14. *Ratman v Workplace Safety and Insurance Appeals Tribunal*, 2022 ONSC 3923
15. *Savic v College of Physicians and Surgeons of Ontario*, 2021 ONSC 4756
16. *Strickland v Canada (Attorney General)*, 2015 SCC 37
17. *Taylor v Pivotal Integrated HR Solutions*, 2020 ONSC 6108
18. *The Canadian Chiropractic Association v Dr. Barry McLellan, Coroner*, 2011 ONSC 6014
19. *Toronto (City) v R & G Realty Management Inc.,* 2009 CanLII 42397
20. *Unifor and its Local 303 v Scepter Canada Inc.*, 2022 ONSC 5683

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

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

SCHEDULE B

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

***Judicial Review Procedure Act*, RSO 1990, c J.1, ss. 5(1) and 5(2)**

Powers to direct tribunal to reconsider

5(1) On an application for judicial review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision, the court may direct the tribunal whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of a specified matter, the whole or any part of a matter to which the application relates.

(2) In giving a direction under subsection (1), the court must

> **(a)** advise the tribunal of its reasons, and
>
> **(b)** give it any directions that the court thinks appropriate for the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.

***Legislation Act*, SO 2006, c 21, Sch F, s. 71**

Crown not bound, exception

71 No Act or regulation binds Her Majesty or affects Her Majesty's rights or prerogatives unless it expressly states an intention to do so. 2006, c. 21, Sched. F, s. 71.

***Planning Act*, RSO 1990, c P.13, ss. 3(5), 6(2)**

Policy statements and provincial plans

3(5) A decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Tribunal, in respect of the exercise of any authority that affects a planning matter,

> **(a)** shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision; and

[…]

Planning policies

6(2) A ministry, before carrying out or authorizing any undertaking that the ministry considers will directly affect any municipality, shall consult with, and have regard for, the established planning policies of the municipality. R.S.O. 1990, c. P.13, s. 6 (2).

***Rules of Civil Procedure*, RRO 190, Reg 194, r. 61.04(1)**

Commencement of Appeals

Time for Appeal and Service of Notice

61.04 (1) An appeal to an appellate court shall be commenced by serving a notice of appeal (Form 61A or 61A.1) together with the certificate required by subrule 61.05 (1), within 30 days after the making of the order appealed from, unless a statute or these rules provide otherwise,

(a) on every party whose interest may be affected by the appeal, subject to subrule (1.1); and

(b) on any person entitled by statute to be heard on the appeal. O. Reg. 14/04, s. 31; O. Reg. 536/18, s. 2 (1).

Court File No: DC 22-2731

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

FACTUM OF THE APPLICANTS/RESPONDING PARTIES

SICOTTE GUILBAULT LLP
1-5925 Jeanne d'Arc Blvd.
Ottawa ON K1C 6V8

Stéphane Émard-Chabot
(LSO #33909U)
semard-chabot@sicotte.ca
Tel: 613.368.4309

Lawyers for the Applicants/Responding Parties