

Court File No. DC-22-2731

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

B E T W E E N:

**VICTOR LACHANCE and
KIRK ALBERT**

Applicant/Responding Parties

and

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

Respondents/Moving Parties

FACTUM OF THE MOVING PARTIES

(Motion to dismiss returnable on March 21, 2023)

February 17, 2023

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INDEX

PART I – OVERVIEW	1
PART II –FACTS	4
A. No Reasonable Explanation for Late Application	5
B. Substantial Prejudice: Investments in the Kemptville Site During the Delay	10
I. PDC Costs	10
II. Land Acquisition Challenges and Costs	12
III. Due Diligence Costs	16
IV. Staff Time and Resources.....	17
PART III– QUESTIONS IN ISSUE	18
PART IV: SUBMISSIONS	19
A. Late Application Should Be Dismissed	19
B. Length of the Delay	20
C. No Reasonable Explanation.....	22
D. Prerequisite to Extension Not Met: Substantial Prejudice	25
E. If Court’s Prior Approach Applies, Application Should Be Dismissed	28
F. Conclusion: Application Should Be Dismissed	29
PART IV – ORDER REQUESTED	29
SCHEDULE “A”	31
SCHEDULE “B”	33

PART I – OVERVIEW

1. This is a motion to dismiss this application for judicial review, brought almost 2 years after the expiry of the 30-day period in s. 5(1) of the *Judicial Review Procedure Act* (the “*JRPA*”).¹ The Notice of Application, issued August 16, 2022, challenges the Ministry of the Solicitor General’s (the “Ministry”) announcement on August 27, 2020 of a plan to construct a correctional facility at a government-owned site in Kemptville, Ontario.²
2. There is no reasonable explanation for the delay. The plan to locate the facility at the site came to the attention of Victor Lachance and Kirk Albert (the “Applicants”) within a few days after it was announced in an August 27, 2020 press release.³ Kirk Albert “immediately” began organizing to publicly oppose the proposed site, forming the Jail Opposition Group (“JOG”), an organization Mr. Lachance that learned about “immediately” after the announcement.⁴ The Coalition Against the Proposed Prison (“CAPP”) was formed shortly after the announcement and Mr. Lachance joined it in November 2020.⁵
3. The Applicants say they chose political advocacy over bringing this application.⁶ Political advocacy and legal applications are not an ‘either/or’ scenario, nor are they represented as

¹ *Judicial Review Procedure Act*, RSO 1990, c. J. 1 [“*JRPA*”], s.5(1).

² **Notice of Application** dated August 16, 2022 [“Notice of Application”], Responding Motion Record [“RMR”], Tab 1, pp 8-9, paras 1, 5, 8; **Press Release, Exhibit “B” to the Affidavit of David Macey** affirmed October 21, 2022 [“Macey Affidavit”], Ontario’s Motion Record [“MR”], Tab 2B, p 24.

³ **Affidavit of Kirk Albert** affirmed December 16, 2022 [“Albert Affidavit”], RMR, Tab 2, pp 20-22, paras. 6-7, 9-10; **Affidavit of Victor Lachance** affirmed December 15, 2022 [“Lachance Affidavit”], RMR, Tab 3, pp 126-127, paras 3-4, 8; **Transcript of the Cross-Examination of Kirk Stewart Albert** dated January 31, 2023 [“Albert Transcript”], MR, Tab 6, pp 312-319, qq 14-50. **Transcript of the Cross-Examination of Victor Lachance** dated February 1, 2023 [“Lachance Transcript”], MR, Tab 7, p 443, q 63.

⁴ **Albert Affidavit**, RMR, Tab 2, pp 20-22, paras 6-7, 9-10; **Albert Transcript**, MR, Tab 6, pp 312-319, qq 14-50; **Lachance Affidavit**, RMR, Tab 3, p 127, para 8; **Lachance Transcript**, MR, Tab 7, p 443, q 63.

⁵ **Albert Affidavit**, RMR, Tab 2, p 22, para 14; **Lachance Affidavit**, RMR, Tab 3, pp 126-127, paras 3-4, 8; **Lachance Transcript**, MR, Tab 7, pp 443, 446, qq 63, 77.

⁶ **Albert Affidavit**, RMR, Tab 2, pp 21, 23, 26, 34-37, 40, paras 9-10, 16-17, 29, 54-57, 61, 66; **Albert Transcript**, MR, Tab 6, pp 312-319, qq 14-50; **Lachance Affidavit**, RMR, Tab 3, pp 126-127, 130, 133-135, 137-138, paras 3, 8, 17, 28-32, 34, 36, 44-45; **Lachance Transcript**, MR, Tab 7, pp 443, 464-469, qq 63, 150-175.

such in the Applicants' own records.⁷ Applicants are obliged to bring legal challenges to public decisions in a timely way, lest their delay cause precisely the kind of wasted resources and prejudice that arise in this case.⁸ Engaging in political advocacy is not a reasonable explanation for the Applicants' failure to initiate legal proceedings within the mandatory deadline.

4. The Applicants suggest that they did not have enough information to challenge the announcement.⁹ Yet they quickly formed two organizations that did just that. The Applicants admitted that, when they each heard about the announcement, they saw the proposed facility as inconsistent with Kemptville's "small-town charm" and considered the site farmland.¹⁰ This is the central allegation in the Notice of Application issued almost 2 years later.¹¹
5. The Ministry shared details regarding site selection considerations with the Applicants at sessions on October 30, 2020 and November 26, 2020.¹² By November 2020, JOG and CAPP were partnered in their efforts and CAPP was being advised by "experts" in the area

⁷ **Minutes of December 3, 2020 JOG Meeting, Exhibit "J" to Albert Affidavit**, RMR, Tab 2J, pp 118-121 esp. p.118 bottom, recording the need to take a "parallel path" for legal options and political advocacy; **Albert Affidavit**, RMR, Tab 2, p 37, para 61; **Albert Transcript**, MR, Tab 6, pp 331-333, 359-373, qq 98-103,190-237; **Lachance Transcript**, MR, Tab 7, pp 481-486, qq 214-221, 226-230.

⁸ *Nahirny v Human Rights Tribunal of Ontario*, 2019 ONSC 5501, paras 7-8 ["Nahirny"]; *Belyavsky v Walsh*, 2022 ONSC 3135, para 8 ["Belyavsky"]; *Ransom v Ontario*, 2010 ONSC 3156, paras 23-25, 29-31 ["Ransom"], aff'd 2011 ONSC 5594 (Div Ct), Respondents' Book of Authorities ("RBOA"), Tab 4, para 12.

⁹ **Albert Affidavit**, RMR, Tab 2, p.37, para 61; **Albert Transcript**, MR, Tab 6, pp 326-328, 404-405, qq 79-86, 341; **Lachance Transcript**, MR, Tab 7, pp 482, 501-502, qq 218, 305-309.

¹⁰ **Albert Affidavit**, RMR, Tab 2, pp 20-21, 23, paras 5, 10, 16; **Albert Transcript**, MR, Tab 6, pp 328-331, qq 87-96; **Lachance Affidavit**, RMR, Tab 3, pp 126, 129, paras 3, 15; **Lachance Transcript**, pp 454-455, 463-464, qq 121-126, 148.

¹¹ **Notice of Application**, RMR, Tab 1, pp.8, paras 1-3 and 5.

¹² **Albert Affidavit**, RMR, Tab 2, pp 23-25, paras 18-23; **October 30, 2020 Presentation, Exhibit "C" to Albert Affidavit**, RMR, Tab 2C, p 53; **Albert Transcript**, MR, Tab 6, pp 345-348, 354-356, qq 147-158, 171-174; CBC Article, Exhibit "F" to Albert Affidavit, RMR, Tab 2F, pp 90-93; **Lachance Affidavit**, RMR, Tab 3, pp 127, 130, paras 9, 18; (Lachance listened to an audio recording of the October 30, 2020 shortly after); **Lachance Transcript**, MR, pp 446-450, 453, 456-461, qq 78-88, 96, 111-112, 130-142.

of (1) opposition to correctional facilities and (2) agricultural land.¹³ By December 3, 2020, JOG, who was partnered with CAPP, was actively seeking legal advice regarding potential grounds to challenge the site selection on planning grounds, including zoning, permits, municipal processes, environmental grounds and land claims.¹⁴ At the time, the Applicants knew that the Municipality considered their own local zoning by-law to permit the facility.¹⁵ The designation of the site under the *Planning Act* and planning policies are the legal ground eventually put forward in the August 16, 2022 Notice of Application.¹⁶

6. Subsection 5(2) of the *JRPA* states an extension of time can only be granted if the Court is satisfied that no substantial prejudice will result to any person affected by reason of the delay.¹⁷ The Respondents face substantial prejudice from the Applicants' delay.
7. During the period of the Applicants' delay, the Respondents invested over 4 million dollars of site-specific public funds in addition to significant public resources in the Kemptville site.¹⁸ If a new site is required, these public funds and resources will be wasted.¹⁹ This work

¹³ **Lachance Affidavit**, RMR, Tab 3, p 129, para 14; **Lachance Transcript**, MR, Tab 7, pp 486-489, qq 231-251; **Albert Transcript**, MR, Tab 6, pp 331-333, 374-378, qq 98-103, 246-259.

¹⁴ **Albert Affidavit**, RMR, Tab 2, p 37, para 61; **December 3, 2020 Minutes of JOG Meeting, Exhibit "J" to Albert Affidavit**, RMR, Tab 2J, pp 118-121; **Albert Transcript**, MR, Tab 6, pp 331-333, 359-373, qq 98-103, 190-237; **Lachance Transcript**, pp 481-486, qq 214-221, 226-230.

¹⁵ **Lachance Affidavit**, RMR, Tab 3, pp 126-127, 129-130, paras 5-7, 16; **Lachance Transcript**, Tab 7, pp 437-442, 469-471, 489-490, 492, qq 40, 43-44, 50-56, 58-59, 176-180, 252-257, 263; **Albert Affidavit**, RMR, Tab 2, p 22, paras 11-12; **Albert Transcript**, MR, Tab 6, pp 320-324, 340-343, qq 54-67, 124-138; Zoning compliance was later confirmed to the Ministry in a January 20, 2021 letter from the Municipality at Letter of North Grenville [**"Letter of North Grenville"**], **Undertakings**, undertaking #2, MR, Tab 4B, p 184.

¹⁶ **Notice of Application**, RMR, Tab 1, pp 8-9, paras 2-3, 5.

¹⁷ *JRPA*, s 5(2).

¹⁸ **Macey Affidavit**, MR, Tab 2, pp 15-18, paras. 11-20; **Transcript of the Cross-examination of David Macey** dated January 27, 2023 [**"Macey Transcript"**], MR, Tab 3, pp 87, 100-101, 105-107, 116, 136-138, 171-173, qq 177, 218-219, 235-239, 269, 282, 343-347, 440-445; **Breakdown of PDC Costs, Undertakings**, undertaking #1, MR, Tab 4A, p 182; **Necessary Watermain Work, Undertakings**, undertaking #3, MR, Tab 4, p 178; **IO Staff Costs, Undertakings**, undertaking #4, MR, Tab 4, p 179; **Due Diligence Work, Undertakings**, undertaking #5, MR, Tab 4, p 179.

¹⁹ **Macey Affidavit**, MR, Tab 2, pp 15-18, paras 11-20; **Macey Transcript**, MR, Tab 3, pp 87, 100-101, 105-107, 116, 136-138, 171-173, qq 177, 218-219, 235-239, 269, 282, 343-347, 440-445; **Breakdown of PDC Costs**,

will need to be redone at the public's expense.²⁰

8. This assumes another appropriate site could be located that meets sufficient project requirements.²¹ Locating such a site was difficult the first time and is anticipated to be more difficult in current market conditions.²² A search for a new site and the need to re-do work creates additional delay and threatens the timely delivery of this needed facility.²³
9. The Applicants have identified the announcement of the Kemptville site in the August 27, 2020 press release.²⁴ Even if the Court determines that some earlier decision is under challenge that precedes the July 8, 2020 coming into force of s. 5 of the *JRPA*, the application should be dismissed.²⁵ This Court's earlier approach equally did not permit applications to be brought after a two-year delay, in the absence of a reasonable explanation, and in the face of substantial prejudice to respondents. This late application should be dismissed.

PART II –FACTS

10. In the Notice of Application issued on August 16, 2022, the Applicants allege that the plan to build a correctional facility on the site of the former Agricultural College in Kemptville is

Undertakings, undertaking #1, MR, Tab 4A, p 182; **Necessary Watermain Work, Undertakings**, undertaking #3, MR, Tab 4, p 178; **IO Staff Costs, Undertakings**, undertaking #4, MR, Tab 4, p 179; **Due Diligence Work, Undertakings**, undertaking #5, MR, Tab 4, p 179.

²⁰ **Macey Affidavit**, MR, Tab 2, pp 15-18, paras 11-20; **Macey Transcript**, MR, Tab 3, pp 87, 100-101, 105-107, 116, 136-138, 171-173, qq 177, 218-219, 235-239, 269, 282, 343-347, 440-445; **Breakdown of PDC Costs, Undertakings**, undertaking #1, MR, Tab 4A, p 182; **Necessary Watermain Work, Undertakings**, undertaking #3, MR, Tab 4, p 178; **IO Staff Costs, Undertakings**, undertaking #4, MR, Tab 4, p 179; **Due Diligence Work, Undertakings**, undertaking #5, MR, Tab 4, p 179.

²¹ **Macey Affidavit**, MR, Tab 2, pp 14, 16, paras 6, 17; **Macey Transcript**, MR, Tab 3, pp 169-170, qq 436-437.

²² **Macey Affidavit**, MR, Tab 2, pp 14, 16, paras 6, 17; **Macey Transcript**, MR, Tab 3, pp 169-170, qq 436-437.

²³ David Macey explains that no contract can be entered for the construction of the facility until there is certainty about the site: **Macey Transcript**, MR, Tab 3, pp 168-169, qq 433-435.

²⁴ **Notice of Application**, RMR, Tab 1, pp 8-9, paras 1-3, 5.

²⁵ Subsection 5(4) of the *JRPA* provides that s. 5(1) applies with respect to the judicial review of a decision that is made or of a matters that occurs on or after the day section 2 of Schedule 10 to the *Smarter and Stronger Justice Act* comes into force, which was on July 8, 2020.

inconsistent with protections for agricultural land in the *Provincial Policy Statement, 2020* and local planning policies, and is therefore contrary to s. 3(5) and s. 6(2) of the *Planning Act*.²⁶

11. The Municipality advised the Applicants in a meeting on November 11, 2020 and have since advised the Ministry that zoning laws *permit* a correctional facility on the site.²⁷ The Applicants seek an order in the nature of *certiorari* quashing the decision, declaring it illegal and prohibiting construction of the facility at the Kemptville site.²⁸

A. No Reasonable Explanation for Late Application

12. The Applicants admit that their reaction to the August 27, 2020 announcement was “swift” and that they quickly founded two organizations to oppose the proposed facility.²⁹ The Applicants engaged in extensive political advocacy against building the facility on the site over the ensuing two years without ever applying for judicial review.³⁰
13. The particulars of the unreasonable delay, in evidence before the Court, are as follows:
 - a) The plan to locate the correctional facility on the Kemptville site came to both Applicants’ attention within a few days after it was announced in an August 27, 2020 public press release.³¹

²⁶ **Notice of Application**, RMR, Tab 1, pp 8, 14-15, paras 1, 30, 37.

²⁷ **Lachance Affidavit**, RMR, Tab 3, pp 129-130, para 16; **Lachance Transcript**, pp 489-490, 492, qq 252-257, 263; **Letter of North Grenville, Undertakings**, undertaking #2, MR, Tab 4B, p 184.

²⁸ **Notice of Application**, RMR, Tab 1, pp 8-9, para 5.

²⁹ **Notice of Application**, RMR, Tab 1, p 10, para 9; **Albert Affidavit**, RMR, Tab 2, pp 20-21, paras 6, 9-10; **Lachance Affidavit**, RMR, Tab 3, p 127, para 8.

³⁰ **Notice of Application**, RMR, Tab 1, p 10, para 10; **Albert Affidavit**, RMR, Tab 2, pp 26-27, 30, 32-35, 37, 39, paras 29-31, 37, 43, 47, 54-56, 60, 65; **Albert Transcript**, MR, Tab 6, pp 324-326, 331, 335-339, 356-358, qq 68-78, 97, 108-121, 175-189; **Lachance Affidavit**, RMR, Tab 3, p 142, para 62; **List of Activities, Exhibit “D” to Lachance Affidavit**, RMR, Tab 3D, pp 158-163; **Lachance Transcript**, MR, Tab 7, pp 464-469, qq 149-175.

³¹ **Albert Affidavit**, RMR, Tab 2, pp 20-21, paras 6, 10; **Lachance Affidavit**, RMR, Tab 3, pp 126-127, paras 4-5, 8.

- b) Both Applicants value the “small-town charm” of Kemptville and, from the time they heard about the announcement, considered the site to be farmland that they wanted preserved.³²
- c) Upon learning of the announcement on September 2, 2020, Kirk Albert “immediately” reached out to Jim Bertram and formed the Jail Opposition Group.³³ Victor Lachance was aware of the forming of JOG at that time and joined the Coalition Against the Proposed Prison in November 2020.³⁴
- d) In October 2020, both Applicants spoke with the Mayor and members of the Council of North Grenville and learned that the municipality was not taking action to oppose the building of a correctional facility on the Kemptville site.³⁵
- e) By November 2020, JOG and CAPP had partnered in their efforts to oppose the facility.³⁶ One of their concerns was why “class 2 agricultural land in the rural town of Kemptville could ever been selected as an appropriate location for a 235-bed facility...”³⁷
- f) The Mayor, Deputy Mayor and the Chief Administrative Officer of North Grenville maintained their position when challenged by Victor Lachance at a meeting on

³² **Albert Affidavit**, RMR, Tab 2, pp 20-21, paras 5, 10 (“agricultural heritage”); **Lachance Affidavit**, RMR, Tab 3, p 129 para 3 (“farmland”) and 15 (“small communities such as Kemptville”).

³³ Kirk Albert formed “JOG” and Victor Lachance joined “CAPP” along with other participants: **Albert Affidavit**, RMR, Tab 2, pp 20-21, paras 6, 10.

³⁴ **Albert Affidavit**, RMR, Tab 2, p 22, para 14; **Lachance Affidavit**, RMR, Tab 3, pp 126-127, paras 3-4, 8; **Lachance Transcript**, MR, Tab 7, pp 443, 446, qq 63, 77.

³⁵ **Albert Affidavit**, RMR, Tab 2, p 22, paras 11-12; **Albert Transcript**, MR, Tab 6, pp 34-36, qq 124-138; **Lachance Affidavit**, RMR, Tab 3, pp 126-127, paras 5, 7; **Lachance Transcript**, MR, Tab 7, pp 437-442, qq 40, 43-44, 50-56, 58-59.

³⁶ **Albert Affidavit**, RMR, Tab 2, p 23, paras 15-16; **Albert Transcript**, MR, Tab 6, pp 331-333, qq 98-103; **Lachance Affidavit**, RMR, Tab 3, pp 127, 130, paras 8, 17.

³⁷ **Albert Affidavit**, RMR, Tab 2, p 23, para 16.

November 11, 2020.³⁸ At that meeting, Mr. Lachance learned that the Municipality believed that the current municipal zoning of the property “could be interpreted as allowing for a jail...”³⁹ He admitted on cross-examination that the Municipality was not giving him legal advice on this point and that he had the ability to seek his own legal advice on the matter at that time.⁴⁰

- g) On October 30, 2020 and November 26, 2020, representatives of JOG and CAPP attended Ministry information sessions regarding the proposed site.⁴¹ At those sessions, information was shared about the factors that led to the site selection.⁴²
- h) The Ministry explained that there was value for money in acquiring a government-owned site whereas a private land purchase was expected to cost many millions of dollars.⁴³ Other factors the Ministry identified included that the Kemptville site is the appropriate size, within the catchment area of the existing Ottawa facility, adjacent to

³⁸ **Lachance Affidavit**, RMR, Tab 3, pp 129-130, paras 15-16; **Lachance Transcript**, Tab 7, pp 489-490, 492, qq 252-257, 263.

³⁹ **Lachance Affidavit**, RMR, Tab 3, p 129-130, para 16; **Lachance Transcript**, Tab 7, pp 489-490, 492, qq 252-257, 263.

⁴⁰ **Lachance Transcript**, MR, Tab 7, pp 379-380, qq 265-271.

⁴¹ **Albert Affidavit**, RMR, Tab 2, pp 24-25, paras 22-23; **October 30, 2020 Presentation, Exhibit “C” to Albert Affidavit**, RMR, Tab 2C, p 53; Albert confirmed on cross-examination he told the CBC that Ministry officials listened to attendees in **CBC Article, Exhibit “F” to Albert Affidavit**, RMR, Tab 2F, pp 90-93; **Albert Transcript**, MR, Tab 6, pp 345-348, 354-356, qq 147-158, 171-174; **Lachance Affidavit**, RMR, Tab 3, pp 127, 130, paras 9, 18 (Lachance listened to an audio recording of the October 30, 2020 shortly after); **Lachance Transcript**, pp 446-450, 453, 456-461, qq 78-88, 96, 111-112, 130-132, 141-142; **November 26, 2020 Presentation, Exhibit 3 to Cross-examination of Victor Lachance**, MR, Tab 7C, p 531 “Site Selection”.

⁴² **October 30, 2020 Presentation, Exhibit “C” to Albert Affidavit**, RMR, Tab 2C, p 53; **Albert Transcript**, MR, Tab 6, pp 345-348, qq 147-158; **Lachance Transcript**, pp 446-450, 453, 456-461, qq 78-88, 96, 111-112, 130-142, 141-142; **November 26, 2020 Presentation, Exhibit 3 to Cross-examination of Victor Lachance**, MR, Tab 7C, p 531 “Site Selection”.

⁴³ **October 30, 2020 Presentation, Exhibit “C” to Albert Affidavit**, RMR, Tab 2C, p 53; **Albert Transcript**, MR, Tab 6, pp 345-348, qq 147-158; **Lachance Transcript**, MR, Tab 7, pp 456-457, 460-461, qq 130-132, 141-142; **November 26, 2020 Presentation, Exhibit 3 to Cross-examination of Victor Lachance**, MR, Tab 7C, p 531 “Site Selection”.

Highway 416, that there were no development impediments, and that staff homes are proximate.⁴⁴

- i) As early as November 2020, CAPP consulted “experts” in their efforts to oppose the facility at the site.⁴⁵ These experts included Professor Justin Piché, a professor in criminology at the University of Ottawa with extensive experience in public advocacy against correctional facilities.⁴⁶ JOG’s December 3, 2020 meeting minutes, confirmed on cross-examination, record that a connection to graduate law students was available through Professor Piché.⁴⁷

- j) By November 2020, CAPP was consulting “expert” agrologist Marie-Therese Voutsinos, M.Sc. Agriculture.⁴⁸ Later, on April 8, 2022, Ms. Voutsinos wrote to the Minister of Agriculture advocating for preserving the site as “prime agricultural land comprising mainly class 2 and 3 soils”.⁴⁹ This is the same pleaded basis for the application, which was still not issued for several months after Ms. Voutsinos’ letter.⁵⁰

⁴⁴ **October 30, 2020 Presentation, Exhibit “C” to Albert Affidavit**, RMR, Tab 2C, p 53; **November 26, 2020 Presentation, Exhibit 3 to Cross-examination of Victor Lachance**, MR, Tab 7C, p 531 “Site Selection”.

⁴⁵ **Lachance Affidavit**, RMR, Tab 3, p 129, para 14; **Lachance Transcript**, MR, Tab 7, pp 486-489, qq 231-251; **Albert Transcript**, MR, Tab 6, pp 331-332, 362-363, 365-366, 374-378, qq 98-103, 201-204, 212-214, 246-259.

⁴⁶ **Transcript of the Cross-Examination of Justin Piché** dated January 30, 2023 [“Piché Transcript”], pp 194-201, qq 9-39; **Lachance Affidavit**, RMR, Tab 3, p 129, para 14; **Lachance Transcript**, MR, Tab 7, pp 486-489, qq 231-251; **Albert Transcript**, MR, Tab 6, pp 331-332, 361-363, 365-366, 374-378, qq 98-103, 198-204, 212-214, 246-259.

⁴⁷ JOG’s December 20, 2020 meeting minutes state: “Justin Piché has access to law grad students who need volunteer hours, pro bono – Jess says students are the best route. **Kirk asks Jim to find local help.**” “Erika: students vs. lawyers – ask lawyers first what we should get students to do”, **Minutes of JOG Meeting, Exhibit “J” to Albert Affidavit**, RMR, Tab 3J, p 118-119; **Albert Transcript**, MR, Tab 6, p 362-363, 365-266, q 203-204, 212-214.

⁴⁸ **Lachance Affidavit**, RMR, Tab 3, p 129, para 14; **Lachance Transcript**, MR, Tab 7, pp 486-489, qq 231-251; **Albert Transcript**, MR, Tab 6, pp 331-332, 362-363, 365-366, 374-378, qq 98-103, 201-204, 212-214, 246-259.

⁴⁹ **Letter from Marie-Theres Voutsinos, Exhibit “I” to Albert Affidavit**, RMR, Tab 2I, p 107; **Albert Transcript**, MR, Tab 6, pp 488-491, qq 246-259.

⁵⁰ **Notice of Application**, RMR, Tab 1, pp 8, 14, paras 2, 30, 33.

- k) As of December 3, 2020, JOG was actively seeking legal advice, including reaching out to local lawyers, seeking pro bono legal advice and reaching out to graduate law students.⁵¹ By this time, JOG and CAPP had partnered in their efforts to oppose the facility.⁵² JOG identified specific local lawyers and assigned a member to reach out to them.⁵³
- l) The December 3, 2020 JOG meeting minutes refer to seeking legal advice on planning matters, including due diligence, zoning and permitting for the site as well as the municipal process, environmental issues and land claims.⁵⁴ Planning matters were ultimately the pleaded basis for the August 16, 2022 Notice of Application.⁵⁵
- m) Over the ensuing months and years, both Applicants, through JOG and CAPP, actively engaged in a variety of forms of public and political advocacy against the selection of the site in Kemptville for a prison.⁵⁶

⁵¹ JOG's December 3, 2020 meeting minutes state: "**ACTION: Seek local legal counsel** pro bono assistance – **municipal process, environmental, land claims.**", "Justin Pirche has access to law grad students who need volunteer hours, pro bono – Jess says students are the best route. **Kirk asks Jim to find local help.**", "Erika: students vs. lawyers – ask lawyers first what we should get students to do", "Securing expertise within our group...we have to be strategic and run a **parallel path. LEGAL**", "8a/ Law school access exists through Justin. Law students to volunteer and explore viability and other aspects of the proposed correctional facility, **due diligence, permits & zoning. We also need to seek local legal support and attempt to get some pro-bono help.**", "...it will get increasingly more complex and possibly require fundraising, legal consultation...", **Minutes of JOG Meeting, Exhibit "J" to Albert Affidavit**, RMR, Tab 3J, p 118-121; **Albert Transcript**, MR, Tab 6, pp 331-333, 359-373, qq 98-103, 190-237; **Lachance Transcript**, pp 481-483, 484-486, qq 214-221, 226-230; **Albert Affidavit**, RMR, Tab 2, p 37, para 61.

⁵² **Albert Affidavit**, RMR, Tab 2, p 13, paras 15-16; **Albert Transcript**, MR, Tab 6, pp 331-333, qq 98-103; **Lachance Affidavit**, RMR, Tab 3, pp 127, 130, paras 8, 17.

⁵³ "**Kirk asks Jim to find local help.**" Minutes refer to "Connie Lamble, Tom Byrne, Janson..." Mr. Albert admitted that Connie Lamble, Tom Byrne and Janson Law Firm are all lawyers in Kemptville. **Minutes of JOG Meeting, Exhibit "J" to Albert Affidavit**, RMR, Tab 3J, p 118; **Albert Transcript**, MR, Tab 6, pp 331-333, 359-373, qq 98-103 and 190-237; **Lachance Transcript**, pp 481-483, qq 214-221 and 226-230; **Albert Affidavit**, RMR, Tab 2, p 37, para 61.

⁵⁴ **Albert Affidavit**, RMR, Tab 2, p 13, paras 15-16; **Minutes of JOG Meeting, Exhibit "J" to Albert Affidavit**, RMR, Tab 3J, p 118, 120; **Lachance Affidavit**, RMR, Tab 3, pp 127, 130, paras 8, 17.

⁵⁵ **Notice of Application**, RMR, Tab 1, pp 8-9, para 5(a)-5(c).

⁵⁶ **Albert Affidavit**, RMR, Tab 2, pp 26-27, 30, 32-35, 37, 39, paras 29-31, 37, 43, 47, 54-56, 60, 65; **Lachance Affidavit**, RMR, Tab 3, p 142, para 62; **List of Activities, Exhibit "D" to Lachance Affidavit**, RMR, Tab 3D, p 158-163.

14. The Applicants did not apply for judicial review until August 16, 2022, almost 2 years after the announcement.⁵⁷

B. Substantial Prejudice: Investments in the Kemptville Site During the Delay

15. If the application is allowed and the Court grants the order requested by the Applicants prohibiting the facility from being built at the site, the Respondents face substantial prejudice in the form of millions of public dollars and significant public resources and time wasted.

16. Since the August 27, 2020 announcement, and in reliance on the absence of any legal challenge to the site selection, the Ministry has invested more than 7 million dollars in the project.⁵⁸ This includes Planning, Design and Conformance (“PDC”) work, land acquisition costs, due diligence, and staff time and resources.⁵⁹ Of this total, over 4 million dollars are site-specific and will be wasted if a new site is required.⁶⁰

I. PDC Costs

17. The Ministry has paid \$1,371,853.40 for necessary PDC work undertaken by consultants during the period of June 26, 2020 to July 31, 2022.⁶¹ This includes an assessment of all

⁵⁷ **Notice of Application**, RMR, Tab 1, p 8.

⁵⁸ **Macey Affidavit**, MR, Tab 2, pp 15-18, paras 11-20; **Macey Transcript**, MR, Tab 3, pp 86-87, 100-101, 105-107, 116, 136-138, 171-173, qq 173, 176-177, 218-219, 235-239, 269, 282, 343-347, 440-445; **Breakdown of PDC Costs, Undertakings**, undertaking #1, MR, Tab 4A, p 182; **Necessary Watermain Work, Undertakings**, undertaking #3, MR, Tab 4, p 178; **IO Staff Costs, Undertakings**, undertaking #4, MR, Tab 4, p 179; **Due Diligence Work, Undertakings**, undertaking #5, MR, Tab 4, p 179.

⁵⁹ **Macey Affidavit**, MR, Tab 2, p 16, para 11; **Macey Transcript**, MR, Tab 3, pp 86-87, 100-101, 105-107, 116, 136-138, 171-173, qq 173, 176-177, 218-219, 235-239, 269, 282, 343-347, 440-445.

⁶⁰ This includes unrecoverable PDC costs, due diligence costs, site holding costs for 2 years and Infrastructure Ontario staff costs; **Macey Affidavit**, MR, Tab 2, pp 15-18, paras. 11-20; **Macey Transcript**, MR, Tab 3, pp 86-87, 100-101, 105-107, 116, 136-138, 171-173, qq 176-177, 218-219, 235-239, 269, 282, 343-347, 440-445; **Breakdown of PDC Costs, Undertakings**, undertaking #1, MR, Tab 4A, p 182; **Necessary Watermain Work, Undertakings**, undertaking #3, MR, Tab 4, p 178; **IO Staff Costs, Undertakings**, undertaking #4, MR, Tab 4, p 179; **Due Diligence Work, Undertakings**, undertaking #5, MR, Tab 4, p 179.

⁶¹ **Macey Affidavit**, MR, Tab 2, p 16, para 14; **Macey Transcript**, MR, Tab 3, p 86, q 176; **Breakdown of PDC Costs, Undertakings**, undertaking #1, MR, Tab 4A, p 182;

existing project background information and site due diligence reports; development of a site-specific Master Plan Report, including detailed analysis of existing site constraints; development of Conceptual Site Layouts and Block Schematics to test that the requirements set out in the Functional Program and Output Specifications can be operationalized in a physical layout; work with the relevant authorities to assess requirements needed to secure approvals and permits and to incorporate them into the project documents; conducting and participating in community consultations meetings; and development of the Project Specific Output Specifications (“PSOS”).⁶²

18. The PSOS is a framework that sets out the Ministry’s objectives and vision for the project, the fixed minimum technical and functional requirements, and the specifications for the project.⁶³ This framework becomes part of the Project Agreement to build the facility. This work has included extensive workshops with various subject matter experts and review for draft output specifications.⁶⁴ The PSOS is progressing toward 75% complete.⁶⁵
19. If a new site is required, approximately 30% of the PDC work will need to be redone (and rebilled to the Ministry) as it is site-specific.⁶⁶ IO has confirmed this amounts to approximately \$449,886.23.⁶⁷

⁶² **Macey Affidavit**, MR, Tab 2, pp 15-16, para 13-14; **Macey Transcript**, MR, Tab 3, pp 88-99, qq 180-214; **Breakdown of PDC Costs, Undertakings**, undertaking #1, MR, Tab 4A, p 182.

⁶³ **Macey Affidavit**, MR, Tab 2, p 16, para 13(e); **Macey Transcript**, MR, Tab 3, p 98, qq 208-211.

⁶⁴ **Macey Affidavit**, MR, Tab 2, p 16, para 13(e); **Macey Transcript**, MR, Tab 3, p 98, qq 208-211.

⁶⁵ **Macey Affidavit**, MR, Tab 2, p 16, para 13(e); **Macey Transcript**, MR, Tab 3, pp 98, 167, qq 208-211, 431.

⁶⁶ **Macey Affidavit**, MR, Tab 2, p 16, paras 14-15; **Macey Transcript**, MR, Tab 3, p 87, q 177

⁶⁷ **Breakdown of PDC Costs, Undertakings**, undertaking #1, MR, Tab 4A, p 182.

20. The Ministry will also need to obtain new cost estimates for labour, materials and other costs, produced by the cost consultant.⁶⁸ The amount spent up to September 2022 is \$13,575.⁶⁹

II. Land Acquisition Challenges and Costs

21. Infrastructure Ontario, on behalf of the Ministry, began the original search for a site in 2018.⁷⁰

Locating a site that could meet project requirements was challenging and if a new site were needed, the search is anticipated to be even more difficult in current market conditions.⁷¹ It is not certain that another suitable site could be found.

22. There are several constraints that affected the selection of a site, including land availability, municipal servicing, adequate size and site configuration, the absence of natural heritage constraints, as well as program needs such as proximity to the highway for the purpose of accessing courts, police, fire and emergency medical services.⁷²

23. There was a limited supply of available land in the Eastern Ontario region that could meet even some of project requirements, in part due to competitive market conditions in the Ottawa area.⁷³ The Ministry considered over 38 sites, and ultimately shortlisted six.⁷⁴ None of the sites met all project requirements.⁷⁵

⁶⁸ **Macey Affidavit**, MR, Tab 2, p 16, para 16; **Macey Transcript**, MR, Tab 3, p 100, q 218.

⁶⁹ **Macey Affidavit**, MR, Tab 2, p 16, para 16; **Macey Transcript**, MR, Tab 3, p 100, q 218.

⁷⁰ **Macey Affidavit**, MR, Tab 2, p 13, para 4; **Macey Transcript**, MR, Tab 3, pp 143-144, q 361.

⁷¹ **Macey Affidavit**, MR, Tab 2, pp 14, 16, paras 6, 17; **Expression of Interest, Exhibit “A” to Macey Affidavit**, MR, Tab 2A, p 20; **Macey Transcript**, MR, Tab 3, pp 169-170, qq 436-437.

⁷² **Macey Affidavit**, MR, Tab 2, p 13, para 5; **Expression of Interest, Exhibit “A” to Macey Affidavit**, MR, Tab 2A, p 20; **Macey Transcript**, MR, Tab 3, pp 57-58, qq 82-85; **November 26, 2020 Presentation, Exhibit 3 to Cross-examination of Victor Lachance**, MR, Tab 7C, p 531 “Site Selection”.

⁷³ **Macey Affidavit**, MR, Tab 2, pp 14, 16, paras 6, 17; **Macey Transcript**, MR, Tab 3, pp 169-170, qq 436-437.

⁷⁴ **Release Package, Exhibit “C” to Affidavit of Lisa Gallant** affirmed December 15, 2022 [“Gallant Affidavit”], RMR, Tab 4C, p 188, paras 1-2; **Macey Affidavit**, MR, Tab 2, p 14, para 7; **Macey Transcript**, MR, Tab 3, pp 64-65, qq 106-108

⁷⁵ **Macey Transcript**, MR, Tab 4, p 75, q 141.

24. In late 2019, a portion of the land on which the former University of Guelph Agricultural College had operated was circulating for sale.⁷⁶ The college had closed in 2014 for financial reasons.⁷⁷ The site in question was owned by the Agricultural Research Institute of Ontario (“ARIO”), a provincial Crown corporation, but was not part of the Government Real Estate Portfolio (“GREP”), which is real estate that can be used for provincial government projects.⁷⁸
25. The Municipality of North Grenville purchased the vast majority of the College’s land in 2018 and turned it into a community hub.⁷⁹ The Municipality did not purchase the smaller portion still owned by ARIO.⁸⁰ The smaller site is directly adjacent to the town of Kemptville.⁸¹
26. On October 23, 2019, the Ministry submitted a formal expression of interest in this Kemptville site.⁸² This had the effect of placing a hold on the property so that it was not disposed of through a sale while the Ministry contemplated whether to acquire it.⁸³ The Ministry still needed to work with the Municipality to investigate and determine the feasibility of the site and rezone or redesignate the land, as required.⁸⁴
27. On January 20, 2021, the Municipality of North Grenville provided a letter to the province’s consultant confirming that a correctional facility was an acceptable use of the site.⁸⁵ While the

⁷⁶ **Expression of Interest, Exhibit “A” to Macey Affidavit**, MR, Tab 2A, p 20.

⁷⁷ **Albert Transcript**, MR, Tab 6, pp 344-345, qq 141-145.

⁷⁸ **Macey Affidavit**, MR, Tab 2, p 17, para 18; **Expression of Interest, Exhibit “A” to Macey Affidavit**, MR, Tab 2A, p 20.

⁷⁹ **Letter from the Minister of Agriculture, Exhibit “I” to Albert Affidavit**, RMR, p 112; **Albert Transcript**, MR, Tab 6, pp 382-384, qq 278-283.

⁸⁰ **Letter from the Minister of Agriculture, Exhibit “I” to Albert Affidavit**, RMR, p 112; **Albert Transcript**, MR, Tab 6, pp 383-384, qq 281-283; **Google Maps Images of Kemptville Campus, Exhibit 2 to the Albert Transcript**, MR, Tab 6B, p 423.

⁸¹ **Google Maps Images of Kemptville Campus, Exhibit 2 to the Albert Transcript**, MR, Tab 6B, p 423.

⁸² **Macey Affidavit**, MR, Tab 2, p 14, para 8; **Expression of Interest, Exhibit “A” to Macey Affidavit**, MR, Tab 2A, p 20; **Macey Transcript**, MR, Tab 4, pp 69, q 122.

⁸³ **Macey Affidavit**, MR, Tab 2, p 14, para 8; **Macey Transcript**, MR, Tab 4, pp 166-167, qq 425-428.

⁸⁴ **Expression of Interest, Exhibit “A” to Macey Affidavit**, MR, Tab 2A, p 20.

⁸⁵ **Letter of North Grenville, Undertakings**, undertaking #2, MR, Tab 4B, p 184.

Municipality designated the land “Agriculture” in its Official Plan, the letter stated that it has zoned the site Institutional and a correctional facility was in conformance with the zoning by-law.⁸⁶ This is consistent with the Mayor, Deputy Mayor and Chief Administrative Officer’s statements to Mr. Lachance on November 11, 2020 that the “municipal zoning of the property could be interpreted as allowing for a jail...”⁸⁷

28. After announcing the plan to build the facility on a government-owned site in Kemptville on August 27, 2020, the Ministry purchased the property from ARIO on March 15, 2022 for \$2,463,910.02.⁸⁸ The funds used to purchase the site were transferred out of the Ministry’s budget, and otherwise could have been used for a different land acquisition or other purpose.⁸⁹
29. The land was transferred based on its book value, not fair market value.⁹⁰ ARIO subsequently reimbursed the Ministry for a portion of the price that related to watermain work that the Ministry had already paid for during the holding period. This means that the Ministry ultimately had a net purchase price of approximately \$1,435,758.41.⁹¹ Acquiring a suitable

⁸⁶ **Letter of North Grenville, Undertakings**, undertaking #2, MR, Tab 4B, p 184.

⁸⁷ **Lachance Affidavit**, RMR, Tab 3, pp 129-130, para 16; **Lachance Transcript**, Tab 7, pp 437-442, 469-471, 489-490, 492, qq 40, 43-44, 50-56, 58-59, 176-180, 252-257, 263; **Albert Transcript**, MR, Tab 6, pp 320-324, 340-343, qq 54-67, 124-138.

⁸⁸ **Macey Affidavit**, MR, Tab 2, p 17, para 18; **Land Transfer Invoice, Exhibit “C” to Macey Affidavit**, MR, Tab 2C, p 28.

⁸⁹ A: “[T]hose funds were reserved for the acquisition of the property versus whatever other priorities there may have been, given that there’s finite funding in any given fiscal year.”, **Macey Transcript**, MR, Tab 4, pp 113-114, q 259.

⁹⁰ **Land Transfer Invoice, Exhibit “C” to Macey Affidavit**, MR, Tab 2C, p 28 showing “book value” and cost breakdown of assets; **Macey Transcript**, MR, Tab 4, p 103, q 229.

⁹¹ **Land Transfer Invoice, Exhibit “C” to Macey Affidavit**, MR, Tab 2C, p 28 showing showing watermain cost of \$1,082,263.89 as part of purchase price, and chart below showing subsequent ARIO payment to Ministry for depreciated value of watermain in the amount of \$1,028,151.61. In the year before the purchase, the Ministry paid separately for the watermain work as a holding cost as described in para 31 below. The reimbursement after the purchase was to ensure the Ministry did not pay twice for the same work, but the Ministry only recouped the depreciated value of that watermain work from ARIO.

site on the open market (if it were even available) is anticipated to be much more expensive.⁹² Infrastructure Ontario's real estate service provider, CBRE, has advised that market values have generally continued to rise since 2019-2020 and it is expected that there is a limited availability of land that could satisfy the project requirements, creating challenging conditions in which to secure a suitable alternative site.⁹³

30. Assuming an appropriate alternative site could be found, the Ministry would have to allocate new funds to purchase the property, likely on the open market.⁹⁴ Short-listed privately-owned properties at the time of the initial search included parcels in the 4 million to 18 million dollar range.⁹⁵ While uncertain, at the very least, acquiring a new site is anticipated to be in the millions of dollars.⁹⁶ In addition to the purchase price, the Ministry would have to expend transactional costs for a new acquisition.⁹⁷
31. In addition, the holding costs for the Kemptville site are \$500,000 a year, including for each year of the Applicants' two-year delay.⁹⁸ During the fiscal year 2020-2021, the Ministry also paid \$1,082,263.89 for necessary watermain work at the Kemptville site.⁹⁹ This over two

⁹² A: "We know that the market continues to be challenging and especially in consideration of this type of facility and we know that market values have continued to increase.", **Macey Transcript**, MR, Tab 4, pp 113-114, q 259; **Macey Affidavit**, MR, Tab 2, p 17, para 18; **Land Transfer Invoice, Exhibit "C" to Macey Affidavit**, MR, Tab 2C, p 28 showing "book value" and cost breakdown of assets.

⁹³ **Macey Affidavit**, MR, Tab 2, p 14, para 6; **Macey Transcript**, MR, Tab 3, pp 169-170, qq 436-437.

⁹⁴ **Macey Affidavit**, MR, Tab 2, pp 16-17, para 17.

⁹⁵ **Release Package, Exhibit "F" to Gallant Affidavit**, RMR, Tab 4F, p 233.

⁹⁶ **Macey Affidavit**, MR, Tab 2, pp 16-17, para 17; **Macey Transcript**, MR, Tab 3, pp 169-170, qq 436-437; **Release Package, Exhibit "F" to Gallant Affidavit**, RMR, Tab 4F, p 233.

⁹⁷ Q: "Then, aside from the purchase price of a new property, assuming you were able to find one, those – you would also have those additional, sort of, transaction costs to acquire that new property?", A: "You'd have the transaction costs as well as the costs of staff time spent trying to acquire the site.", **Macey Transcript**, MR, Tab 4, p 172, q 441.

⁹⁸ **Land Transfer Invoice, Exhibit "C" to Macey Affidavit**, MR, Tab 2C, p 28; **Macey Transcript**, MR, Tab 4, pp 172-173, q 442; **Release Package, Exhibit "C" to Gallant Affidavit**, RMR, Tab 4C, p 188.

⁹⁹ **Land Transfer Invoice, Exhibit "C" to Macey Affidavit**, MR, Tab 2C, p 28 showing showing watermain cost of \$1,082,263.89 as part of purchase price, and chart below showing subsequent ARIO payment to Ministry for depreciated value of watermain in the amount of \$1,028,151.61. In the year before the purchase, the Ministry paid

million dollars total cannot be recouped.¹⁰⁰ It is unknown what impact the watermain costs would have on the value of the Kemptville site if the Ministry were forced to sell it.

III. Due Diligence Costs

32. Site-specific real estate due diligence costs incurred by the Ministry for the project during the period of the Applicants' delay amount to approximately \$1,056,234 and cannot be recouped if a new site is needed.¹⁰¹ Due diligence is a required step before the Ministry can award a contract to build on the site.¹⁰² To date, this work has included the following studies and assessments:

1. Stage 1-2 Archaeological Assessment;
2. Stage 3 Archaeological Assessment;
3. Soil Analytical Results Summary;
4. Geotechnical Investigation (including a Geophysical Survey);
5. Geomorphic Hazard Assessment;
6. Phase 1 Environmental Site Assessment;
7. Phase 2 Environmental Site Assessment;
8. Preliminary Hydrogeological Assessment;
9. Designated Substances and Hazardous Materials Survey;
10. Development Feasibility Study;
11. Functional Servicing Report;
12. Traffic Impact Study and Parking Needs Assessment;
13. Natural Heritage Assessment;

separately for the watermain work as a holding cost as described in para 31 below. The reimbursement after the purchase was to ensure the Ministry did not pay twice for the same work, but the Ministry only recouped the depreciated value of that watermain work from ARIO.

¹⁰⁰ **Macey Transcript**, MR, Tab 4, pp 172-173, qq 442-445; **Release Package, Exhibit "C" to Gallant Affidavit**, RMR, Tab 4C, p 188; **Land Transfer Invoice, Exhibit "C" to Macey Affidavit**, MR, Tab 2C, p 28; **Necessary Watermain Work, Undertakings**, undertaking #3, MR, Tab 4, p 178.

¹⁰¹ **Macey Affidavit**, MR, Tab 2, p 17, para 19; **Due Diligence During Delay, Undertakings**, undertaking #5, MR, Tab 4, p 179; **Macey Transcript**, MR, Tab 3, p 116-117, q 269.

¹⁰² **Macey Affidavit**, MR, Tab 2, p 15, para 21.

14. Headwater Drainage Features Assessment;
15. Topographic Plan of Survey; and
16. Subsurface Utility Engineering Services Assessment.¹⁰³

33. Due diligence would be required for any new site and while uncertain can be anticipated to be in the same order of magnitude of approximately 1 million dollars.¹⁰⁴

IV. Staff Time and Resources

34. Staff at both Infrastructure Ontario and the Ministry worked extensively on the planning for the Kemptville facility during the Applicants' two-year delay.¹⁰⁵ If the site were to change, much of this work will be wasted.¹⁰⁶

35. Infrastructure Ontario's staff costs billed to the Ministry for the period of September 26, 2020 to August 16, 2022 are approximately \$1,861,924.¹⁰⁷ This does not reflect the amount of time Ministry staff spent on site-specific work, which is a significant investment of public resources.¹⁰⁸

36. Had this application been brought in a timely way, the Ministry would have paused its site-specific expenditures until it had certainty about the site. This is because the Ministry *cannot* enter into a contract until this legal case is complete.¹⁰⁹ As it is, the Ministry cannot currently move the project forward to a Request for Qualifications ("RFQ") or Request for Proposal

¹⁰³ **Macey Affidavit**, MR, Tab 2, pp 16-17, para 17; **Due Diligence Work, Undertakings**, undertaking #5, MR, Tab 4, p 179; **Macey Transcript**, RMR, Tab 3, pp 117-133, qq 270-337.

¹⁰⁴ **Macey Affidavit**, MR, Tab 2, pp 16-17, paras 17, 19; **Macey Transcript**, RMR, Tab 3, pp 116-117, q 269.

¹⁰⁵ **Macey Affidavit**, MR, Tab 2, p 18, para 20; **Macey Transcript**, MR, Tab 3, p 136-138, q 343-345; **IO Staff Time, Undertakings**, undertaking #4, MR, Tab 4, p 179

¹⁰⁶ **Macey Affidavit**, MR, Tab 2, p 18, para 20; **IO Staff Time, Undertakings**, undertaking #4, MR, Tab 4, p 179.

¹⁰⁷ **Macey Affidavit**, MR, Tab 2, p 18, para 20; **IO Staff Time, Undertakings**, undertaking #4, MR, Tab 4, p 179.

¹⁰⁸ **Macey Affidavit**, MR, Tab 2, p 18, para 20; **IO Staff Time, Undertakings**, undertaking #4, MR, Tab 4, p 179.

¹⁰⁹ David Macey explains that no contract can be entered for the construction of the facility until there is certainty about the site: **Macey Transcript**, MR, Tab 3, pp 168-169, qq 433-435.

(“RFP”) process because of this case.¹¹⁰ If the Ministry did so and a decision of this Court required a new site, the contractor who tendered and/or won the contract could then sue the Ministry for breach of contract.¹¹¹

37. This late application has thrown the project site into uncertainty, risking the investment of millions of dollars in site-specific public funds and resources in the current site during the period of the Applicants’ delay. Allowing this application will result in those funds and resources being wasted and creates uncertainty that the project can even proceed if a new site must be found. This is substantial prejudice to the Ministry arising from the Applicants’ delay.

PART III– QUESTIONS IN ISSUE

38. The Respondents’ position on the issues before the Court for determination are as follows:

1. The application should be dismissed as it was brought almost 2 years after the expiry of the 30-day limited period in s. 5(1) of the *JRPA*, which expired on September 26, 2020. Factors the Court considers in addressing delay all support dismissal, including the excessive length of time and the absence of a reasonable explanation for the delay.
2. Subsection 5(2) of the *JRPA* provides that an extension of time can only be granted if the Court is satisfied that no substantial prejudice will arise to any person affected by reason of the delay. The Respondents will incur substantial prejudice if this

¹¹⁰ David Macey explains that no contract can be entered for the construction of the facility until there is certainty about the site: **Macey Transcript**, MR, Tab 3, pp 168-169, qq 433-435.

¹¹¹ **Macey Transcript**, MR, Tab 4, pp 168-169, q 435.

application is allowed several years after it ought to have been commenced, so no extension should be granted.

3. The Applicants have identified the August 27, 2020 press release as ‘the decision’. Even if some earlier decision is at issue, the application should be dismissed based on the Court’s approach that preceded s. 5 of the *JRPA*. The Court did not countenance late applications beyond 6 months, especially where there was no reasonable explanation for the delay and substantial prejudice to the Respondents.

PART IV: SUBMISSIONS

A. Late Application Should Be Dismissed

39. The Applicants identify the August 27, 2020 announcement as the basis for their judicial review.¹¹² The Notice of Application for judicial review was issued on August 16, 2022, nearly two years after the 30-day statutory limit set out in s. 5(1) of the *JRPA* expired on September 26, 2020.¹¹³
40. Subsection 5(2) of the *JRPA* confirms that an extension can only be granted if the Court is satisfied there are apparent grounds for relief and no substantial prejudice arises to any person by reason of the delay.¹¹⁴ The Respondents do not admit that there are apparent grounds for relief, given the Municipality’s confirmation that zoning permits the facility.¹¹⁵ However, even if such grounds are found to exist at this stage, the Respondents submit that

¹¹² **Notice of Application**, RMR, Tab 1, p 10, para 8.

¹¹³ *JRPA*, s 5(1); *Walia v College of Veterinarians of Ontario*, 2020 ONSC 8057, para 36 [“*Walia*”].

¹¹⁴ *JRPA*, s 5(2).

¹¹⁵ **Letter of North Grenville, Undertakings**, undertaking #2, MR, Tab 4B, p 184.

the prerequisite that there be no substantial prejudice by reason of the delay is not met. The Ministry faces substantial prejudice if this application is allowed.

41. Applicants are under an obligation to commence their judicial review application in a timely manner.¹¹⁶ Judicial review is an extraordinary and discretionary remedy that can be denied on the basis of excessive delay, regardless of the merits of the case.¹¹⁷
42. In determining whether to dismiss a late application for judicial review for delay, this Court has considered the length of the delay, the reasonableness of the explanation offered for the delay, and any prejudice suffered by the respondent as a result of that delay.¹¹⁸ This Court has continued to consider these factors since the coming into force of s. 5 of the *JRPA*.¹¹⁹ All of these factors support dismissal of this excessively late application.

B. Length of the Delay

43. Before the 30-day period in s. 5(1) of the *JRPA* came into force, this Court confirmed on many occasions that a delay of more than six months in commencing a judicial review

¹¹⁶ *Belyavsky*, 2022 ONSC 3135, para 8; *Ransom*, paras 23-25, 29-31, aff'd 2011 ONSC 5594 (Div Ct), RBOA, Tab 4, para 12; *Wauzhushk Onigum Nation v Minister of Finance (Ontario)*, 2019 ONSC 3491 (Div Ct), para 183 ["Wauzhushk"]; *Gigliotti c Collège des Grands Lacs (Conseil d'administration)*, 2005 CanLII 23326 (Div Ct), para 29 ["Gigliotti"].

¹¹⁷ *Belyavsky*, 2022 ONSC 3135, para 8. *Walia*, 2020 ONSC 8057 (Div Ct), para 36; *Ransom*, paras 23-25, 29-31, aff'd 2011 ONSC 5594 (Div Ct), RBOA, Tab 4, para 12; *International Union of Bricklayers and Allied Craftworkers v Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers* (2000), 132 OAC 87 (Div Ct), para 18 ["Bricklayers"]; *Jeremiah v Ontario Human Rights Commission*, [2008] OJ No 3013 (Div Ct), paras 45, 53 ["Jeremiah"]; *Canadian Chiropractic Association v McLellan*, 2011 ONSC 6014, para 14 ["Chiropractic"].

¹¹⁸ *Belyavsky*, 2022 ONSC 3135, para 9; *Know Your City Inc. v The Corporation of the City of Brantford*, 2021 ONSC 154 (Div Ct), para 46 ["Know"]; *Knot v State Farm Automobile Insurance Company*, 2020 ONSC 7672 (Div Ct), para 17 ["Knot"]; *Taylor v Pivotal Integrated HR Solutions*, 2020 ONSC 6108, para 33 ["Taylor"]; *Allen v Bricklayers Masons Independent Union of Canada Local 1*, 2020 ONSC 3369, para 33 ["Allen"]; *1736095 Ontario Ltd. v Waterloo (City)*, 2015 ONSC 6541 (Div Ct), paras 29-30 ["1736095"]; *Chiropractic*, 2011 ONSC 6014, paras 15-16.

¹¹⁹ *Belyavsky*, 2022 ONSC 3135, para 9; *Adams v Aamjiwnaang First Nation*, 2022 ONSC 6831, para 12 ["Adams"]; *Unifor and its Local 303 v Scepter Canada Inc.*, 2022 ONSC 5683, paras 16-19 ["Unifor"].

application is excessive and grounds to justify dismissal.¹²⁰ Subsection 5(1) shortened this period and confirms that anything beyond 30 days is outside the acceptable time in which to bring an application.

44. The legislative intent underlying this provision is that applications for judicial review need to be brought promptly, providing certainty and finality in the arrangement of public affairs and the allocation of public resources.¹²¹ As this Court has stated, there is an institutional interest in the finality of decisions.¹²²
45. This Court has considered the length of the delay in determining whether an extension should be granted under s. 5(2) of the *JRPA*.¹²³ In *Shearer v Oz*, Justice Corbett found that it was “far too late to seek judicial review” of decisions of the Landlord and Tenant Board rendered 9 months and a year before the application was issued.¹²⁴ Justice Nishikawa refused an extension under s. 5(2) for an application that sought to challenge a Ministry of Labour decision rendered over 10 months earlier, which she found was a “lengthy” delay.¹²⁵
46. In the present case, 689 days or almost 2 years passed between the expiry of the 30-day period on September 26, 2020 and the issuance of the Notice of Application on August 16, 2022. Such excessive delay justifies dismissal.

¹²⁰ *Unifor*, 2022 ONSC 5683, para 18; *Know*, 2021 ONSC 154 (Div Ct), para 45; *Knot*, 2020 ONSC 7672 (Div Ct), para 20; *Taylor*, 2020 ONSC 6108, para 35; *Allen*, 2020 ONSC 3369, para 34; *Walia*, 2020 ONSC 8057 (Div Ct), para 36; 1736095, 2015 ONSC 6541 (Div Ct), paras 29-30; *Kaur v The National Dental Examining Board of Canada*, 2019 ONSC 5882, para 4 [“*Kaur*”]; *Nahirny*, 2019 ONSC 5501, para 5; *De Pelham v Human Rights Tribunal of Ontario*, 2011 ONSC 7006, para 14 [“*De Pelham*”]; *Chiropractic*, 2011 ONSC 6014, paras 21, 25; *Bricklayers*, 132 OAC 87 (Div Ct), para 18; *Jeremiah*, [2008] OJ No 3013 (Div Ct), paras 45, 53; *Gigliotti*, 2005 CanLII 23326 (Div Ct), para 30.

¹²¹ *Taylor*, 2020 ONSC 6108, paras 43-45; *Ratman v Workplace Safety and Insurance Appeals Tribunal*, 2022 ONSC 3923, paras 6-8 [“*Ratman*”]; *Unifor*, 2022 ONSC 5683, para 17.

¹²² *Taylor*, 2020 ONSC 6108, paras 43-45; *Ratman*, 2022 ONSC 3923, paras 6-8.

¹²³ *Adams*, 2022 ONSC 6831, paras 12 and 16; *Unifor*, 2022 ONSC 5683, paras 17-18.

¹²⁴ *Shearer v Oz*, 2021 ONSC 7844, para 5.

¹²⁵ *Belyavsky*, 2022 ONSC 3135, paras 1, 10.

C. No Reasonable Explanation

47. There is no reasonable explanation for the Applicants' failure to bring a timely application. The Applicants were aware of the August 27, 2020 announcement within days of it being made.¹²⁶ They "immediately" began organizing to publicly oppose the proposed site, forming JOG and CAPP.¹²⁷
48. The Applicants say they chose to engage in public and political advocacy instead of bringing this application. This Court has confirmed that "an applicant's decision to pursue alternative avenues of redress is not an acceptable explanation for delay."¹²⁸ In any event, the Applicants were not required to choose one over the other. Public advocacy and legal applications are not an 'either/or' scenario. At a time when JOG was partnered with CAPP, Kirk Albert recorded in JOG's meeting minutes from December 3, 2020 that its members planned to pursue what he described as a "parallel path" involving both public advocacy and legal advice and options.¹²⁹
49. At that time, JOG was actively seeking legal advice from local lawyers, pro bono sources and graduate law students on their legal options as revealed in the December 3, 2020 meeting minutes and on cross-examination.¹³⁰ Despite identifying and recording a number of planning

¹²⁶ **Albert Affidavit**, RMR, Tab 2, p 20, para 6; **Lachance Affidavit**, RMR, Tab 3, p 126, paras 3-4; **Lachance Transcript**, MR, Tab 7, p 443, q 63; Early knowledge supported dismissal in *Wauzhushk*, 2019 ONSC 3491, paras 176-177.

¹²⁷ **Albert Affidavit**, RMR, Tab 2, pp 20-21, paras 6, 10; **Lachance Affidavit**, RMR, Tab 3, p 126, paras 3-4, 8.

¹²⁸ *Wauzhushk*, 2019 ONSC 3491, paras 176-179; *Major Partner Wind Energy Corp. v Ontario Power Authority*, 2015 ONSC 6902 (Div Ct), para 14.

¹²⁹ **Minutes of JOG Meeting, Exhibit "J" to Albert Affidavit**, RMR, Tab 3J, p 118 recording the need to take a "parallel path" for legal options and political advocacy; **Albert Transcript**, MR, Tab 6, pp 331-333, 359-373, qq 98-103, 190-237.

¹³⁰ JOG's December 3, 2020 meeting minutes state: "**ACTION: Seek local legal counsel** pro bono assistance – **municipal process, environmental, land claims**. Connie Lamble, Tom Byrne, Janson...", "Justin Pirche has access to law grad students who need volunteer hours, pro bono – Jess says students are the best route. **Kirk asks Jim to**

issues to be explored through legal advice, including zoning, permits, municipal and environmental issues, and land claims, and despite assigning a member of JOG to follow up with local lawyers, the Applicants did not bring their application until over a year and a half later.¹³¹

50. Applicants have a duty to put their best foot forward, seek legal advice and initiate legal applications in a timely way, lest their delay cause precisely the kind of waste and prejudice arising here.¹³² There was nothing preventing the Applicants from bringing this application in a timely way. Political advocacy is not a reasonable explanation for ignoring limitation periods.
51. The Applicants suggest that they did not have enough information about the decision to challenge it.¹³³ Yet by their own admissions, after learning of the announcement, both Applicants promptly did just that. Both Applicants considered the site farmland and the facility to be inconsistent with Kemptville’s “small-town charm” when they heard about it.¹³⁴ This ultimately formed the basis for their Notice of Application almost 2 years later.¹³⁵ Like

find local help.”, “Erika: students vs. lawyers – ask lawyers first what we should get students to do”, “Securing expertise within our group...we have to be strategic and run a **parallel path. LEGAL**”, “8a/ Law school access exists through Justin. Law students to volunteer and explore viability and other aspects of the proposed correctional facility, **due diligence, permits & zoning. We also need to seek local legal support and attempt to get some pro-bono help.**”, “...it will get increasingly more complex and possibly require fundraising, **legal consultation...**”, **Minutes of JOG Meeting, Exhibit “J” to Albert Affidavit**, RMR, Tab 3J, p 118-121; Mr. Albert admitted that Connie Lamble, Tom Byrne and Janson Law Firm are all lawyers in Kemptville, **Albert Transcript**, MR, Tab 6, pp 331-333, 359-373, qq 98-103 and 190-237; **Lachance Transcript**, pp 481-486, qq 214-221, 226-230; **Albert Affidavit**, RMR, Tab 2, p 37, para 61.

¹³¹ **Albert Transcript**, MR, Tab 6, pp 359-373, qq 199-237.

¹³² *Nahirny*, 2019 ONSC 5501, paras 7-8; *Belyavsky*, 2022 ONSC 3135, para 8; *Ransom*, paras 23-25, 29-31, aff’d 2011 ONSC 5594 (Div Ct), RBOA, Tab 4, para 12.

¹³³ **Albert Affidavit**, RMR, Tab 2, p.37, para 61; **Albert Transcript**, MR, Tab 6, pp 326-328, 404-405, qq 79-86, 341; **Lachance Transcript**, MR, Tab 7, pp 482, 501-502, qq 218, 305-309.

¹³⁴ **Albert Affidavit**, RMR, Tab 2, pp 20-21, 23, paras 5, 10, 16; **Albert Transcript**, MR, Tab 6, pp 328-331, qq 87-96; **Lachance Affidavit**, RMR, Tab 3, pp 126, 129, paras 3, 15; **Lachance Transcript**, pp 454-455, 463-464, qq 121-126, 148.

¹³⁵ **Notice of Application**, RMR, Tab 1, pp.8, paras 1-3 and 5.

any other litigant, it was incumbent upon the Applicants to seek legal advice regarding limitation periods for a legal challenge.

52. The Applicants learned the factors that led to the Ministry's site selection at sessions on October 30, 2020 and November 26, 2020.¹³⁶ By November 2020, they were being advised by an "expert" in opposing correctional facilities, Professor Piché, who also had access to law students.¹³⁷ They were also being advised by an "expert" in agriculture/agrology, Marie-Therese Voutsinos, who later described the Kemptville site in a April 8, 2022 letter to the Minister of Agriculture as "prime agricultural land",¹³⁸ which is the legal ground pleaded in the Notice of Application.¹³⁹ By December 3, 2020, JOG, which was partnered with CAPP, was actively seeking legal advice regarding planning matters involving the site selection including zoning, permits, municipal and environmental issues and land claims.¹⁴⁰ Nevertheless, the Notice of Application was not issued until years later, on August 16, 2022. There is no reasonable explanation for this delay.

53. While the Applicants rely on *Freedom of Information and Privacy Act* requests they made, when the Applicants issued their application on August 16, 2022, many of these requests were

¹³⁶ **Albert Affidavit**, RMR, Tab 2, pp 24-25, paras 22-23; **October 30, 2020 Presentation, Exhibit "C" to Albert Affidavit**, RMR, Tab 2C, p 53; **Albert Transcript**, MR, Tab 6, pp 345-348, qq 147-158; **Lachance Affidavit**, RMR, Tab 3, pp 127, 130, paras 9, 18 (Lachance listened to an audio recording of the October 30, 2020 shortly after); **Lachance Transcript**, pp 446-450, 453, 456-461, qq 78-88, 96, 111-112, 130-142;.

¹³⁷ JOG's December 20, 2020 meeting minutes state: "Justin Piché has access to law grad students who need volunteer hours, pro bono – Jess says students are the best route. **Kirk asks Jim to find local help.**", **Minutes of JOG Meeting, Exhibit "J" to Albert Affidavit**, RMR, Tab 3J, p 118-119; **Albert Transcript**, MR, Tab 6, pp 331-333, 362-363, 365-366, 374-378, qq 98-103, 201-204, 212-214, 246-259; **Lachance Transcript**, MR, Tab 7, p 486, qq 231-235.

¹³⁸ **Letter from the Minister of Agriculture, Exhibit "I" to Albert Affidavit**, RMR, Tab 2, p 112; **Albert Transcript**, MR, Tab 6, pp 375-378, qq 246-259; **Lachance Affidavit**, RMR, Tab 3, pp 129, para 14; **Lachance Transcript**, MR, Tab 7, pp 486-489, qq 231-251.

¹³⁹ **Notice of Application**, RMR, Tab 1.

¹⁴⁰ **Albert Affidavit**, RMR, Tab 2, p 37, para 61; **Minutes of JOG Meeting, Exhibit "J" to Albert Affidavit**, RMR, Tab 2J, pp 118-121; **Albert Transcript**, MR, Tab 6, pp 331-333, 359-373, qq 98-103 and 190-237; **Lachance Transcript**, pp 481-485, qq 214-221 and 226-230.

(and continue to be) ongoing.¹⁴¹ Production of additional records was not necessary to file this application in a timely way. The requests are subject to a different legislative regime and the decision of the Information and Privacy Commissioner can be separately challenged on a judicial review to this court.¹⁴² They are not the subject of this application.

D. Prerequisite to Extension Not Met: Substantial Prejudice

54. Subsection 5(2) of the *JRPA* prevents the granting of an extension of the 30-day limit to bring an application unless the Court is satisfied that substantial prejudice will not result to any person by reason of the delay.¹⁴³ This Court’s jurisprudence confirms that where substantial prejudice arises by reason of delay in bringing an application, extensions of time will not be granted.¹⁴⁴
55. Where delay is egregious, this Court has presumed prejudice.¹⁴⁵ In this case, there is almost 2 years of delay and based on this Court’s finding that this length of time is “excessive”, the Respondents submit that prejudice can be presumed.¹⁴⁶
56. In any event, the Respondents have also provided evidence expressing the specific and substantial prejudice that will arise if this application is allowed. The Applicants seek an order prohibiting construction of a correctional facility at the Kemptville site.¹⁴⁷ If the application

¹⁴¹ **Gallant Affidavit**, RMR, Tab 4, p 171, para 7; **FOI Requests, Exhibit “C” to the Affidavit of Lisette Major** affirmed December 15, 2022 [“Major Affidavit”], RMR, Tab 5C, pp 317-323.

¹⁴² *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F 31; *JRPA*, s. 2(1).

¹⁴³ *JRPA*, s 5(2).

¹⁴⁴ *Unifor*, 2022 ONSC 5683, paras 17-18; *Sobczyk v Ontario*, 2022 ONSC 88; *Adams*, 2022 ONSC 6831, para 14.

¹⁴⁵ *Wauzhushk*, 2019 ONSC 3491, para 183; *Nahirny*, 2019 ONSC 5501, para 9.

¹⁴⁶ *Wauzhushk*, 2019 ONSC 3491, para 183; *Kaur*, 2019 ONSC 5882, para 10; *Allen*, 2020 ONSC 3369, para 39.

¹⁴⁷ **Notice of Application**, RMR, Tab 1, pp 8-9, para 5.

is allowed on the ground set out in the Notice of Application, the Ministry would be required to find a new site. This will result in substantial prejudice as follows:

1. At least 4 million dollars in public funds and resources on work specific to the Kemptville site will be wasted if the application is granted.¹⁴⁸ This includes PDC costs (including PSOS), due diligence, holding costs and Infrastructure Ontario staff time billed to the Ministry during the period of the delay that cannot be recouped.¹⁴⁹
2. There is a serious risk that another appropriate site cannot be located given increasingly difficult market conditions and the challenges in finding a site that met project constraints the first time around.¹⁵⁰
3. A search for a new site and the need to re-do work will cause significant delay in building this needed facility.¹⁵¹
4. The Ministry was fortunate to have found the government-owned ARIO site with value for money and faces the likelihood of a much higher price for a privately-

¹⁴⁸ This includes unrecoverable PDC costs, due diligence costs, site holding costs for 2 years and Infrastructure Ontario staff costs; **Macey Affidavit**, MR, Tab 2, pp 15-18, paras. 11-20; **Macey Transcript**, MR, Tab 3, pp 86-87, 100-101, 105-107, 116, 136-138, 171-173, qq 176-177, 218-219, 235-239, 269, 282, 343-347, 440-445; **Breakdown of PDC Costs, Undertakings**, undertaking #1, MR, Tab 4A, p 182; **Necessary Watermain Work, Undertakings**, undertaking #3, MR, Tab 4, p 178; **IO Staff Costs, Undertakings**, undertaking #4, MR, Tab 4, p 179; **Due Diligence Work, Undertakings**, undertaking #5, MR, Tab 4, p 179.

¹⁴⁹ **Macey Affidavit**, MR, Tab 2, pp 15-18, paras. 11-20; **Macey Transcript**, MR, Tab 3, pp 87, 100-101, 105-107, 116, 136-138, 171-173, qq 177, 218-219, 235-239, 269, 282, 343-347, 440-445; **Breakdown of PDC Costs, Undertakings**, undertaking #1, MR, Tab 4A, p 182; **Necessary Watermain Work, Undertakings**, undertaking #3, MR, Tab 4, p 178; **IO Staff Costs, Undertakings**, undertaking #4, MR, Tab 4, p 179; **Due Diligence Work, Undertakings**, undertaking #5, MR, Tab 4, p 179.

¹⁵⁰ **Macey Affidavit**, MR, Tab 2, pp 14, 16, paras 6, 17; **Macey Transcript**, MR, Tab 3, pp 169-170, qq 436-437.

¹⁵¹ David Macey explains that no contract can be entered for the construction of the facility until there is certainty about the site: **Macey Transcript**, MR, Tab 3, pp 168-169, qq 433-435.

owned site to replace it, in the millions of dollars.¹⁵² This is compared to the approximately \$1,435,758.41 in net book cost paid for the Kemptville site.¹⁵³

5. Two years of Ministry staff's time and resources spent planning for the Kemptville site will be wasted.¹⁵⁴

57. In *Wauzhushk Onigum Nation v Minister of Finance (Ontario)*, this Court found that similar forms of prejudice - the waste of funds relating to the design and running of public procurement processes, negative impacts on settled economic arrangements, and potential project delays - justified dismissal.¹⁵⁵ Similarly, this Court found prejudice to a municipality where during the period of delay, it entered into an agreement to sell property that had to be put on hold because of the late application challenging the sale as inconsistent with a by-law.¹⁵⁶ This case is on all fours with these decisions.¹⁵⁷

58. The Applicants have filed evidence from Professor Piché, an active opponent of correctional facilities, in which he suggests that the wasted funds are not significant compared to the 30-year long total costs of the design, building, maintenance and financing of correctional

¹⁵² A: "We know that the market continues to be challenging and especially in consideration of this type of facility and we know that market values have continued to increase.", **Macey Transcript**, MR, Tab 3, pp 113-114, q 259; **Land Transfer Invoice, Exhibit "C" to Macey Affidavit**, MR, Tab 2C, p 28.

¹⁵³ **Land Transfer Invoice, Exhibit "C" to Macey Affidavit**, MR, Tab 2C, p 28 showing showing watermain cost of \$1,082,263.89 as part of purchase price, and chart below showing subsequent ARIO payment to Ministry for depreciated value of watermain in the amount of \$1,028,151.61. In the year before the purchase, the Ministry paid separately for the watermain work as a holding cost as described in para 31 below. The reimbursement after the purchase was to ensure the Ministry did not pay twice for the same work, but the Ministry only recouped the depreciated value of that watermain work from ARIO.

¹⁵⁴ **Macey Affidavit**, MR, Tab 2, p 18, para 20; **IO Staff Time, Undertakings**, undertaking #4, MR, Tab 4, p 179.

¹⁵⁵ *Wauzhushk*, 2019 ONSC 3491, paras 184-188.

¹⁵⁶ *Know*, 2021 ONSC 154 (Div Ct), para 49.

¹⁵⁷ *Wauzhushk*, 2019 ONSC 3491, paras 184-188; *Know*, 2021 ONSC 154 (Div Ct), para 49; See also *Kaur*, 2019 ONSC 5882, paras 11-12 where prejudice was found from the potential need to reconstitute a committee that would be "costly and time consuming" and preservation costs; *Allen*, 2020 ONSC 3369, para 39 where the Union had "spent time and money trying to enforce" the award under challenge which constituted prejudice; *Gigliotti*, 2005 CanLII 23326 (Div Ct), paras 32-37 where there was evidence of millions that would be required to re-open a shuttered college at a late stage where other settled economic arrangements had been made.

facilities.¹⁵⁸ He has also suggested that delay is a common feature of building correctional facilities.¹⁵⁹ Neither of these suggestions presents a reasonable baseline to measure prejudice, nor do they show respect for public expenditures or resources. They should not form part of the Court's assessment of whether substantial prejudice will be incurred through the loss of millions of dollars in public money, extensive public resources and delay in the project.

59. Had the application been brought in a timely way, the Ministry would have paused investments in site-specific work until the case was adjudicated.¹⁶⁰ This is because the project, including the issuance of an RFQ or RFP, cannot move forward until there is certainty about where the facility will be built.¹⁶¹ Otherwise, if the Ministry entered into a contract to build the facility and the site were required to change, the bidder or contractor could pursue a claim for breach of contract.¹⁶²

60. Subsection 5(2) of the *JRPA* is clear that an extension of the 30-day time period will not be granted unless the Court is satisfied that no substantial prejudice will result to any person affected by reason of the delay.¹⁶³ This prerequisite is not met in light of the substantial prejudice the Ministry faces from the Applicants' delay.

E. If Court's Prior Approach Applies, Application Should Be Dismissed

¹⁵⁸ **Affidavit of Justin Piché** affirmed [“Piché Affidavit”], RMR, Tab 6, p , para 20; **Piché Transcript**, MR, Tab 5, pp 267-286, qq 267-347.

¹⁵⁹ **Piché Affidavit**, RMR, Tab 6, p , para 23; **Piché Transcript**, MR, Tab 5, pp 265-266, qq 262-263.

¹⁶⁰ David Macey explains that no contract can be entered for the construction of the facility until there is certainty about the site: **Macey Transcript**, MR, Tab 3, pp 168-169, qq 433-435.

¹⁶¹ David Macey explains that no contract can be entered for the construction of the facility until there is certainty about the site: **Macey Transcript**, MR, Tab 3, pp 168-169, qq 433-435.

¹⁶² **Macey Transcript**, MR, Tab 3, p 169, q 435.

¹⁶³ *JRPA*, s 5(2).

61. Pursuant to s. 5(4) of the *JRPA*, the 30-day time limit applies to decisions made on or after July 8, 2020.¹⁶⁴ The Applicants have identified the announcement of the Kemptville site in the August 27, 2020 press release as the basis for their challenge.¹⁶⁵
62. Even if the Court determines that some earlier decision is under challenge that precedes the July 8, 2020 coming into force of s. 5 of the *JRPA*, the application should be dismissed.¹⁶⁶ This Court's approach that preceded s. 5 equally did not permit applications to be brought after a two year delay, in the absence of a reasonable explanation, and in the face of substantial prejudice to respondents.¹⁶⁷

F. Conclusion: Application Should Be Dismissed

63. In the absence of any reasonable explanation for the nearly 2-year delay in bringing this application, and in the face of the substantial prejudice it will engender if allowed, this application should be dismissed. This is justified not only on the basis of ss. 5(1) and (2) of the *JRPA* and this Court's jurisprudence regarding delay, but also on respect for finality in public decisions and for the preservation of public funds and resources.

PART IV – ORDER REQUESTED

64. The Respondents respectfully request an Order dismissing the within application for judicial review for delay.

¹⁶⁴ *JRPA*, s 5(4).

¹⁶⁵ **Notice of Application**, RMR, Tab 1, pp 10, 15, paras 8, 10, 39.

¹⁶⁶ The amendments to s. 5, including the 30-day time limit, came into force on July 8, 2020 as part of the *Smarter and Stronger Justice Act*.

¹⁶⁷ *Ransom*, paras paras 23-25, 29-31, aff'd 2011 ONSC 5594 (Div Ct), RBOA, Tab 4, para 12; *Bricklayers*, 132 OAC 87 (Div Ct), para 18; *Jeremiah*, [2008] OJ No 3013 (Div Ct), paras 45, 53; *Chiropractic*, 2011 ONSC 6014, para 14. *De Pelham*, 2011 ONSC 7006, para 14.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

February 17, 2023

Handwritten signatures of Susan Keenan and Shayna Levine-Poch in black ink.

ATTORNEY GENERAL FOR ONTARIO
Crown Law Office – Civil Law

Susan Keenan, LSO #50784Q /
Shayna Levine-Poch #815150

Lawyers for the Respondents/Moving Parties

SCHEDULE “A”

Authorities Relied Upon

1. *Adams v Aamjiwnaang First Nation*, 2022 ONSC 6831
2. *Allen v Bricklayers Masons Independent Union of Canada Local 1*, 2020 ONSC 3369
3. *Belyavsky v Walsh*, 2022 ONSC 3135
4. *Canadian Chiropractic Association v McLellan*, 2011 ONSC 6014
5. *De Pelham v Human Rights Tribunal of Ontario*, 2011 ONSC 7006
6. *Gigliotti c Collège des Grands Lacs (Conseil d'administration)*, 2005 CanLII 23326 (Div Ct)
7. *International Union of Bricklayers and Allied Craftworkers v Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers* (2000), 132 OAC 87 (Div Ct), para 18
8. *Jeremiah v Ontario Human Rights Commission*, [2008] OJ No 3013 (Div Ct)
9. *Kaur v The National Dental Examining Board of Canada*, 2019 ONSC 5882
10. *Knot v State Farm Automobile Insurance Company*, 2020 ONSC 7672 (Div Ct)
11. *Know Your City Inc. v The Corporation of the City of Brantford*, 2021 ONSC 154 (Div Ct)
12. *Major Partner Wind Energy Corp. v Ontario Power Authority*, 2015 ONSC 6902 (Div Ct)
13. *Nahirny v Human Rights Tribunal of Ontario*, 2019 ONSC 5501
14. *Ransom v Ontario*, 2010 ONSC 3156 (Div Ct)
15. *Ransom v. Ontario*, 2011 ONSC 5594 (Div Ct) (full panel), RBOA, Tab 4
16. *Ratman v Workplace Safety and Insurance Appeals Tribunal*, 2022 ONSC 3923

17. *Sobczyk v Ontario*, 2022 ONSC 88
18. *Taylor v Pivotal Integrated HR Solutions*, 2020 ONSC 6108
19. *Unifor and its Local 303 v Scepter Canada Inc.*, 2022 ONSC 5683
20. *Walia v College of Veterinarians of Ontario*, 2020 ONSC 8057
21. *Wauzhushk Onigum Nation v Minister of Finance (Ontario)*, 2019 ONSC 3491 (Div Ct)
22. *1736095 Ontario Ltd. v Waterloo (City)*, 2015 ONSC 6541 (Div Ct)

SCHEDULE “B”

Judicial Review Procedure Act, RSO 1990, c J 1

Applications for judicial review

2 (1) On an application by way of originating notice, which may be styled “Notice of Application for Judicial Review”, the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.
2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

Time for bringing application

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

Extension

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

...

Transition

(4) Subsection (1) applies with respect to the judicial review of a decision that is made or of a matter that occurs on or after the day subsection 2 of Schedule 10 to the *Smarter and Stronger Justice Act, 2020* comes into force.

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

VICTOR LACHANCE AND KIRK ALBERT

v

SOLICITOR GENERAL OF ONTARIO AND ATTORNEY
GENERAL OF ONTARIO

Applicants/Responding Parties

Respondents/Moving Parties

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

PROCEEDING COMMENCED AT OTTAWA

FACTUM OF THE MOVING PARTIES
(motion to dismiss)

MINISTRY OF THE ATTORNEY GENERAL

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