Court File No. 272/14

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

SEELSTER FARMS INC., WINBAK FARM OF CANADA INC., STONEBRIDGE FARM, 774440 ONTARIO INC., NORTHFIELDS FARM INC., JOHN MCKNIGHT, TARA HILLS STUD LTD., TWINBROOK LTD., EMERALD RIDGE FARM, CENTURY SPRING FARMS, HARRY RUTHERFORD, DIANE INGHAM, BURGESS FARMS INC., ROBERT BURGESS, 453997 ONTARIO LTD., TERRY DEVOS, SONIA DEVOS, GLENN BECHTEL, GARTH BECHTEL, 496268 NEW YORK INC., HAMSTAN FARM INC., ESTATE OF JAMES CARR, deceased, by its executor Darlene Carr, ESTATE OF GUY POLILLO, deceased, by its executor Carolyn Polillo, DAVID GOODROW, TIMPANO GAMING INC., CRAIG TURNER, GLENGATE HOLDINGS INC., KENDAL HILLS STUD FARM LTD., ANDY KLEMENCIC, TIM KLEMENCIC, STAN KLEMENCIC, JEFF RUCH, BRETT ANDERSON, DR. BRETT C. ANDERSON PROFESSIONAL VETERINARY CORPORATION, KILLEAN ACRES INC., DECISION THEORY INC., 296268 ONTARIO LTD., ESTATE OF DOUGLAS MURRAY MCCONNELL, deceased, by its executor Pamela Sabourin, QUINTET FARMS INC., KARIN BURGESS, BLAIR BURGESS, ST. LAD'S LTD., WINDSUN FARM INC., SKYHAVEN FARMS, HIGH STAKES INC., 1806112 ONTARIO INC., GLASSFORD EQUI-CARE, JOHN GLASSFORD, GLORIA ROBINSON and KEITH ROBINSON

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and ONTARIO LOTTERY AND GAMING CORPORATION

Defendants

FACTUM OF THE PLAINTIFFS
(SUMMARY JUDGMENT)

August 17, 2018

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PART I – OVERVIEW

1. There are three summary judgment motions before the Court: two by the defendants and a cross-motion by the plaintiffs. They are concerned with liability and whether punitive damages at the subsequent damages phase is warranted.

2. At the heart of this case is the decision made on February 3, 2012 by the Finance Minister's Chief of Staff, Mr. Shortill, and Minister Duncan to terminate a 14-year revenue sharing agreement known as the Slots at Racetrack Program ("SARP"). This decision and the way it was implemented had catastrophic consequences for the plaintiffs.

3. The evidence is clear that the plaintiffs invested in their breeding farms in reliance on SARP and suffered harm as a direct consequence of its cancellation. In their defence, Ontario and OLG deny proximity and assert that cancellation was a pure policy decision.

4. As a general principle of law, there is a "narrow subset" of "true", "core", or "pure" policy decisions which if reasonably made and implemented, are immune from the harm they cause. On this record, this decision is not part of that subset. The decision was also a breach of the contractual duty of cooperation and good faith.

5. As this Court made clear in its August 4, 2017 ruling, the defences raise issues of mixed fact and law. Proximity, the true nature of the February 2012 decision and the manner in which it was implemented are fact-driven.

6. The plaintiffs ask this Court to make three findings, all grounded in the evidence. First, the parties were in a relationship of proximity. SARP was a negotiated commercial agreement with the horse racing industry including standardbred breeders. The agreement was a June 1998 Letter of Intent (amended by Addendum in 2000), implemented through subsequent Siteholder Agreements with individual racetracks. The evidence confirms SARP was designed to incentivize breeding. And, for 14 years, the defendants made direct representations to breeders encouraging

them to invest in their farms to ensure horse supply for SARP. The abrupt cancellation, and the way it was implemented, caused real and foreseeable harm and grounds a remedy in tort.

7. Second, the defendants have not discharged their evidentiary burden of proving a true policy decision. And, the evidence shows that the decision was irrational and made in bad faith. Witnesses including the former Premier, two former cabinet ministers and former Chair of the industry regulator testified the decision was made and implemented improperly. This is a finding these plaintiffs ask this Court to make with regret, for the evidence reflects a marked breakdown in orderly decision-making by government. But the extraordinary nature of this record, including retaliation for this action, compels its presentation to the Court.

8. Third, this record reflects an enforceable contractual relationship. Contract formation and interpretation, post *Sattva*, is fact-driven. The plaintiffs adduced evidence from those that negotiated the 1998 Letter of Intent and 2000 Addendum. The Letter of Intent imposed an express duty to cooperate to maximize the benefits of SARP for horse racing and breeding. The agreement is of indefinite duration, terminable on reasonable notice. The manner of its termination was a breach of the *Bhasin* duty of good faith and honesty as well as the express duty of cooperation.

9. In the unique circumstances of this record, the Court should allow the plaintiffs' motion so that fair compensation, to which they are justly entitled, can be adjudicated.

PART II – FACTS

The Parties

10. OLG, an agent of Ontario, is a government business enterprise ("GBE"). GBEs are separate legal entities with the power to contract in their own names. They have the financial and operating authority to carry on a business, are focused on the selling of goods and services to individuals, and maintain their operations and meet their obligations through revenues generated outside of the government. OLG's objectives included "[t]o develop, undertake, organize, conduct and manage"

gaming and lottery schemes on behalf of Ontario, enter into agreements in that regard, and "[t]o provide for the operation of gaming premises". This included slot machines located at racetracks.[1]

11. The plaintiffs are breeders of standardbred racehorses. The breeding cycle is 5 capital- and labour-intensive years.[2] Horse racing is the oldest form of gaming in Canada. It has deep, complex ties to the culture and economy of rural Ontario. Many livelihoods depend on it.[3]

12. Horse racing was regulated by the Ontario Racing Commission ("ORC"), also a Crown Agency of the Ministry of Finance. Its objective was to "govern, direct, control and regulate horse racing in Ontario". The ORC and the Minister of Finance signed a Memorandum of Understanding ("MOU") emphasizing the need for consultation about any decisions that would have an impact on the horse racing industry.[4]

Negotiation of Revenue Share from Slots in Racetracks; Contractual Relationship Created

13. In the late 1990s, OLG was trying to expand its gaming business. It wanted to locate its slot facilities in urban centres but municipalities resisted. It saw an opportunity in racetracks: a network of gaming sites with an established customer base and infrastructure. OLG was a gaming competitor and any agreement would have to protect horse racing's revenue base.[5]

14. Over two years, Ontario and OLG bargained the commercial terms of an agreement with the Ontario Horse Racing Industry Association ("OHRIA"), the association representing the industry, including standardbred breeders. Buy-in from tracks, breeders and owners was necessary.

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[1] *Ontario Lottery and Gaming Corporation Act, 1999* ("*OLG Act*"), S.O. 1999, c. 12, s. 3 (as at March 2012). (Plaintiffs' Compendium ("C"), p. 1).
[2] Parkinson aff. exs. 1 (C, p. 34), 2 (C, p. 35), 3 (C, p. 38), 4 (C, p. 40); Yeigh q. 258 (C, p. 58); Phillips qq. 269-270 (C, p. 53); Parkinson q. 288 (C, p. 288).
[3] Parkinson aff. paras. 13-50 (C, p. 45); Parkinson aff. ex. 61 (C, p. 62).
[4] *Racing Commission Act, 2000*, S.O. 2000, c. 20, s. 5 (as at March 2012) (C, p. 64); Seiling ex. 12 (C, p. 73).
[5] Willmot aff. paras. 21-23 (C, p. 93); Willmot qq. 123 (C, p. 96), 413 (C, p. 97); Snobelen qq. 316-19 (C, p. 70); Flynn aff. para. 8 (C, p. 102); Flynn qq. 134-135 (C, p. 134); Phillips qq. 154-166 (C. p. 106); McGuinty ex. 2 (C, p. 110); Yeigh aff. exs K (C, p. 111), M. (C, p. 113); Snobelen exs. 23 (C, p. 118) and 43 (C, p. 121).

All parties had to invest. David Willmot led negotiations for OHRIA. Ontario asked him to "deliver the horse racing industry" and to communicate with them about the deal.[6]

15. In June 1998, agreement was reached in a Letter of Intent ("LOI"). The Canadian Standardbred Horse Society signed for standardbred breeders. The LOI contains "the terms and conditions on which [slot] machines will be implemented into racetracks". It recites the "general agreement with the horse racing industry", including "total compensation" for the industry "shall be 20%", paid as a commission and allocated as per the "Slot Revenue Sharing Agreement" in Schedule 1 to the LOI: "industry revenue from the siteholder commission will be shared between the racetrack and its respective horsepeople on a 50/50 basis". Ontario, OLG and the industry agreed to "work in cooperation" so SARP benefits were "maximized to the horse racing industry".[7]

16. Ontario had pressed for a 10% commission. To prevent cannibalization, the industry wanted a "revenue-neutral" deal. The agreed 20% share was equal to the 'take out' from wagering. The industry share from $1 bet on a slot machine would be equal to $1 wagered on a horse race.[8]

17. The LOI was a bargained commercial deal, not the product of legislative discretion. It anticipated that OLG's new slot business would be operated in accordance with siteholder agreements ("SAs"). The SAs were drafted to implement the LOI.[9]

Siteholder Agreements Implement LOI; Industry Revenue a Commission, not a Subsidy

18. In 2012, and on this motion, the defendants colour the negotiated commission as a 'subsidy' from public funds. They do so to shoehorn the February 3, 2012 decision into that immune "narrow subset" of "pure" policy decisions. This characterization is not tenable. First, as

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[6] Willmot aff. paras. 7-11 (C, p. 123); Willmot qq. 166-167 (C, p. 126), 176-80 (C, p. 128); Snobelen qq. 357-361 (C, p. 130); Seiling q. 91-95 (C, p. 132).

[7] Snobelen ex. 11 (C, p. 133); Willmot paras. 12-15 (C, p. 139); Willmot qq. 166-167 (C, p. 142); Flynn q. 138-139 (C, p. 144); Snobelen q. 430-434 (C, p. 145); Rutherford, qq. 55-56 (C, p. 147), 378-380 (C, p. 378), 408 (C, p. 149); Yeigh aff. ex. C (C, p. 150).

[8] Snobelen ex. 43 (C, p. 152); Willmot aff. para. 24 (C, p. 154); Willmot qq. 177-178 (C, p. 156).

[9] Snobelen ex. 43 (C, p. 158); Willmot aff. paras. 14, 30 (C, p. 160); Snobelen qq. 376-77 (C, p. 163), 409 (C, p. 165), 576 (C, p. 576); Willmot q. 432 (C, p. 145).

OLG conceded, SARP was a "start-up". No one knew if it would succeed. The commission was 20% of nothing. Large capital investments had to be made by all stakeholders and no return had been generated. The 'subsidy' narrative is also contradicted by the terms of the LOI and the SAs, the *OLG Act*, the accounting records of OLG and Ontario and the *Financial Administration Act.*[10]

19. The LOI and SAs allocate commercial responsibility, risk, capital and return. The SAs implement the LOI. They do not grant public monies. In the SAs, OLG requests and the track agrees to "develop and license a portion of its facilities" and "provide related services" for OLG's "Prescribed Lottery Scheme". Tracks covenanted "to maximize interest in horse racing" with a view to "enhancing the success of the Prescribed Lottery Scheme". Horsepeople covenanted to "conduct their respective business and affairs to provide an entertaining recreational product to maximize interest in horse racing events", all "with a view to enhancing the success" of the slot business. For these "services", OLG agreed to pay a 20% commission from "net win" as a "Site Holder Payment" as bargained for in the LOI. The racetrack paid 50% of the Site Holder Payment to horsepeople, as agreed in the LOI – the "Respective Horsepeople's Entitlement".[11]

20. OLG recorded the commission as an operating expense. Operating expenses are incurred to run a business. KPMG audited OLG's financial statements, which formed part of the Public Accounts of Ontario and were themselves audited by Ontario's Auditor General. Every year the Legislature's Standing Committee on Public Accounts, which identifies every government subsidy, reviewed the Public Accounts. The 20% commission was never recorded as a subsidy.[12]

21. The contract and accounting reflects the priority in the *OLG Act* that requires it to make "payments out of the *revenue* that it receives from…slot machines" in sequence: first, "Payments of prizes"; then "Payments of the operating expenses"; then other delineated payments such as those under agreements with First Nations. Last, OLG "shall pay the remaining revenue from …

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[10] Flynn, qq. 204-206 (C, p. 169); *Financial Administration Act*, R.S.O. 1990, c. F.12 (as at Mar. 2012) (C, p. 171).
[11] Flynn aff. ex. E (Siteholder Agreement) (C, p. 206); Flynn qq. 227, 230 (C, p. 259).
[12] Flynn q. 157 (C, p. 261); Orsini qq. 114-116 (C, p. 262), 944 (C, p. 263), 1119 (C, p. 264); McGuinty ex. 8 (C, p. 268); McGuinty q. 228 (C, p. 273); Yeigh qq. 163-172 (C, p. 274); Orsini ex. 17 (C, p. 276); Orsini q. 943 (C, p. 278).

slot machine facilities into the Consolidated Revenue Fund … to be available for appropriation by the Legislature". Not one dollar was ever appropriated by the Legislature to pay the commission.[13]

22. As Mr. Phillips, OLG's CEO, testified, gaming revenue is not taxpayer money.[14]

23. When asked about the absence of any records recording the payment for 14 years of over $3 billion in 'public funds' as 'subsidies', the defendants advanced a new theory: any revenue that "could have otherwise gone back to the government" is "public funds". This extravagant definition of subsidy now includes rent paid by OLG to private tracks to lease space for their slot machines.[15]

A Proximate Relationship: Breeders Direct Participants in and Beneficiaries of SARP

24. The SARP "pilot" was "wildly successful". It "exceeded all estimates". OLG's 1999-2000 Annual Report trumpeted "a runaway success" …"host tracks have been able to offer more racing days, as well as significantly increased purses, resulting in better quality horses and more customers". Due to slots, "race purses are skyrocketing and yearling sales are booming which further revs up the declining breeding operation"; 'the phenomenal growth in purses has brought renewed optimism [and] demand for Ontario bred horses is growing". SARP was a "win-win" and "a cash cow for everybody involved".[16] The LOI was extended to tracks across Ontario.

25. By March 2000, OLG had slot machines in 12 tracks. In June 2000, Ontario, OLG and OHRIA amended the LOI to allocate a "portion" of slot revenue directly to the Horse Improvement Program ("HIP") "to ensure SARP revenue was directed, to an even greater extent, to breeders". HIP is a breeding incentive program administered by the ORC. It includes the Standardbred

[13] *OLG Act*, ss. 14(1), 14(3) (as at March 2012) (C, p. 280).
[14] Phillips qq. 629-630 (C, p. 284); Wilkinson qq. 1932-1945 (C, p. 285).
[15] Flynn, qq. 165-167 (C, p. 287), 195 (C, p. 288), 667-668 (C, p. 290), 727-729 (C, p. 291).
[16] Flynn exam. ex. 10 (C, p. 292); Yeigh q. 150 (C, p. 295); Phillips qq. 164-165 (C, p. 296); Snobelen qq. 664-666 (C, p. 297), Phillips q. 89 (C, p. 298); Flynn exam. ex. 9 (C, p. 299); Snobelen ex. 23 (C, p. 305); Snobelen q. 827 (C, p. 308); McMeekin q. 178 (C, p. 309).

Improvement Program ("SIP"), which incentivizes breeding of standardbred horses through initiatives such as the Ontario Sires Stakes program and the Ontario Resident Mare program.[17]

26. The defendants now distance themselves from the deal they made with breeders when they needed them. They say they are "not included in the definition of 'Respective Horsepeople'" in the SAs and are "indirect beneficiaries of a Crown policy to subsidize horseracing".

27. This denial is contradicted by the LOI signed by and on behalf of standardbred breeders, and which directs the commission payment to horsepeople. It is contradicted by the evidentiary record including the testimony of defence witnesses, internal government records describing SARP's purpose and intent and the 14-year commercial reality of the deal.

28. Breeding has always been directly tied to the value of purses.[18] Government documents confirm a core purpose of SARP was enhancement of purses to incentivize breeding. To implement that purpose, the SAs impressed the horsepeople's share of slot revenue with a trust and kept it in a segregated purse account to be used only for purses at live races. Ontario's documents describe the segregated purse accounts and the trust monies in them as the "motor" for breeding growth.[19]

29. Ontario knew breeders made "decisions to invest in breeding more horses based upon the increased level of purses ... from slot machine revenues" and "slot revenues directed toward purses [are] the motor for horse racing and breeding industry growth". Finance documents identify SARP as an important racing and breeding program.[20] Ontario's witnesses testified to the "direct line"

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[17] Flynn exam. ex. 10 (C, p. 315); Yeigh ex. S (C, p. 317); Willmot aff. paras. 33, 36 (C, p. 323); Seiling ex. 4 (C, p. 325); McMeekin ex. 6 (C, p. 326); DeMarchi aff. para. 10 (C, p. 327), 54-60 (C, p. 329); McNiven aff. paras. 16-34 (C, p. 335); Seiling qq. 77-87 (C, p. 341).

[18] Willmot qq. 254-261 (C, p. 343); Snobelen qq. 457-464 (C, p. 345), 480-481, 485-486 (C, p. 346), 1662-1665 (C, p. 348); McMeekin ex. 9 (C, p. 350); McMeekin ex. 8 (C, p. 360); Willmot q. 342 (C, p. 361); Snobelen qq. 1675-77 (C, p. 363); Seiling qq. 123-127, 135-136 (C, p. 365); Stransky qq. 346-347 (C, p. 367); Seiling qq. 347-349 (C, p. 368); Bullock q. 337-339 (C, p. 370); Flynn exam. ex. 7 (C, p. 372); Flynn qq. 257-263 (C, p. 374); Yeigh qq. 82 (C, p. 376), 92 (C, p. 378), 433 (C, p. 380); Snobelen q. 1242 (C, p. 381); McMeekin qq. 319 (C, p. 382), 426 (C, p. 383).

[19] McMeekin ex. 2 (C, p. 385); McMeekin q. 111 (C, p. 388); Yeigh exam. ex. 3 (C, p. 389); Yeigh exam. ex. 6 (C, p. 393); Yeigh exam. ex. 4 (C, p. 395); Snobelen qq. 825-827 (C, p. 397); McMeekin qq. 148-151 (C, p. 398); Yeigh qq. 145-146 (C, p. 400), 158-161 (C, p. 401); McMeekin ex. 4 (C, p. 402); Yeigh qq. 222, 231, 238-240 (C, p. 404), 335 (C, p. 406); Flynn aff. ex. E, s. 5.2 (C, p. 407); Yeigh Exam. ex. 12 (C, p. 410).

[20] Yeigh q. 333 (C, p. 444); Duncan ex. 13 (C, p. 445); Stransky ex. 11 (C, p. 448); Snobelen qq. 1662-1665 (C, p. 455); Flynn, q. 263 (C, p. 457); McMeekin exs. 2 (C, p. 458), 3 (C, p. 461), 4 (C, p. 465); Yeigh exam exs. 4 (C, p. 467) and 6 (C, p. 469);

between slot-enhanced purses and breeding. OLG's affiant said there was a "direct line" between slot-enhanced purses and breeding investment. Ontario and OLG records state "*industry revenues* … will be re-invested back into breeding, ownership and racing" and "the share of the slot revenues directed toward purses is the motor for horse racing and breeding industry growth". Many government records identify breeders as "horsepeople". And, as set out in paragraphs 90-91 below, breeders suffered the most direct and immediate harm upon the decision's announcement.

Proximity Created by Specific Assurances to Breeders in Government Documents

30. Right up to its abrupt termination the defendants communicated a long-term commitment to SARP revenue sharing:

- "[SARP] ensures the continued viability of the horse racing industry through improved facilities, increased purses, which lead to more race days, more horses of better quality"
- "Industry revenues from slot machines will be *invested back into horse breeding*"
- "[SARP] has revived the industry. Host tracks have been able to offer *significantly increased purses that in turn result in better quality horses, bigger purses,* and more customers. This means *more horse breeders* are attracted here. … This public/private gaming partnership is one where everyone wins"
- "The government is committed to supporting the horse racing industry through the *Slots at Racetracks program*"
- "[SARP] has been a success for all parties, including *the horse racing and breeding industry,* local host municipalities and the people of Ontario"[21]

31. Mr. Parkinson's affidavit list many of these assurances. He was not challenged on them.[22]

32. These assurances encouraged breeders to make long-term decisions to increase horse quality and quantity. John Snobelen – a Cabinet minister when SARP was introduced – confirmed

Flynn exam. exs. 9 (C, p. 471) and 10 (C, p. 477); Yeigh exam ex. 12 (C, p. 480); Orsini ex. 16 (C, p. 493); Keegan exs. 13 (C, p. 496), 21 (C, p. 500), 38 (C, p. 502); Iannacito aff. ex. 41 (C, p. 506).

[21] Snobelen ex. 13 (C, p. 508); McMeekin ex. 9 (C, p. 510); Duncan ex. 8 (C, p. 520); Duncan ex. 13 (C, p. 522).

[22] Parkinson aff. paras. 81-90 (C, p. 525).

the intention was for the industry's share of revenues from SARP to be reinvested back into breeding, ownership and racing.[23] Both defendants knew breeders relied on this revenue stream.[24]

Proximity Created by Assurances from Industry Regulator

33. ORC was the industry's regulator charged with economic oversight of horse racing. It was the "decision making body responsible for ensuring that the significant economic benefits provided to the provincial economy and rural areas of the province were protected."[25]

34. ORC administered the breeding programs breeders relied on. It set and regulated live race dates. It communicated with the industry and specifically with breeders through newsletters, HIP financial statements and projections, Notices to Industry, publications on its website including its Business Plans, all reviewed and approved by Finance.[26] ORC messaging included:

- "Government initiatives coupled with *purse increases* have provided a level of confidence in the growth of the industry. The number of race dates in the Province has increased every year for the last five years…"
- There must be "[a] climate where customers and participants can invest and conduct their horse racing activities with trust and confidence"
- Racing in Ontario must "[p]rovide a fair return on investment over the short term … industry participants who make rational business decisions should expect a reasonable rate of return"
- A new framework for horse racing approved by the ORC in 2010 "represents a commitment to live horse racing and accountability ... it is a firm commitment from our provincial government that it wants live racing and the jobs and growth that racing represents for rural Ontario"
- The ORC will "work to do all we can to ensure that the maximum return [from SARP] goes back to the industry; not just racetracks, but horse people and the *breeding industry*, because we recognize the chain that feeds the whole agriculture community"
- There must be a "phased implementation and long term planning strategy for the HIP, to *ensure adequate horse supply* for the intended Program participation and *sufficient time for breeders to adjust their business models and breeding decisions*"

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[23] Willmot aff. exs. E (C, p. 541) and F (C, p. 544); Parkinson aff. paras. 81-90 (C, p. 525); Snobelen qq. 480-481 (C, p. 480); Willmot aff. paras. 39-40 (C, p. 550).
[24] Seiling qq. 265-268 (C, p. 552), 436-437 (C, p. 554); Parkinson aff. para. 91 (C, p. 555); Flynn qq. 444-449, 454, 457 (C, p. 557); Stransky ex. 11 (C, p. 559); McGuinty qq. 1365 (C, p. 562); Orsini ex. 16 (C, p. 563).
[25] Seiling ex. 12 (C, p. 567); Willmot para. 41 (C, p. 570); Parkinson ex. 61 (C, p. 572).
[26] Seiling qq. 265 (C, p. 574), 268-272 (C, p. 575), 300 (C, p. 577), 310 (C, p. 578), 436 (C, p. 579), 479-481 (C, p. 580), 490 (C, p. 582), 503-511 (C, p. 583-585), 529-533 (C, p. 586); Yeigh, qq. 274-280 (C, p. 588).

- *The SIP "includes a five year industry consultation and planning cycle"* to "create a stabilized environment for business decision-making by Program participants"
- Financial projections presented by the ORC to the HIP's Standardbred Advisory Group, which set out the availability of slots revenue for the SIP through 2015
- The ORC's October 24, 2011 Financial Plan for the HIP, which noted a 3% reduction in slots revenues for 2012, but states that slot revenues would "remain flat from 2013-2016"[27]

35. Without these assurances, the plaintiffs would not have made long-term investments in their breeding operations. John Snobelen and John Wilkinson agreed that the breeders behaved "entirely properly" under SARP and were "not doing anything the system did not incent them to do". Premier McGuinty acknowledged that breeders were making "business investments".[28]

Specific Assurances from Ontario and OLG; Long-Term Renewal of Siteholder Agreements

36. In 2009, some SAs were expiring and being renewed by OLG for six months. This was inconsistent with the long-term nature of the breeding cycle. OHRIA struck a committee, chaired by standardbred breeder Jim Bullock, to meet with government. If revenue sharing was going to end, breeders needed to manage their investments in their foal crops accordingly.[29]

37. On July 20, 2009, Mr. Bullock met with Minister Duncan. Mr. Duncan assured him he understood breeders' need for long-term commitment and stability and the short-term SA renewals would be addressed. Breeders were told of Mr. Duncan's assurance.[30] Mr. Bullock was not challenged on this evidence. Mr. Duncan had no recollection but said he had no reason to doubt it.

38. In July 2010, all SAs were renewed for 5 years or longer. Ontario and OLG documents confirm their awareness that renewal would bring confidence and stability to the industry.[31]

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[27] Parkinson aff. exs. 40 (C, p. 594), 41 (C, p. 598), 44 (C, p. 602), 45 (C, p. 606), 62 (C, p. 610), 63 (C, p. 591), 64 (C, p. 612), 76 (C, p. 614) and 78 (C, p. 619).

[28] Parkinson aff. para. 60 (C, p. 624); Seiling q. 136 (C, p. 626); Snobelen qq. 893-897 (C, p. 628); Wilkinson qq. 1036-1038 (C, p. 1032); McGuinty q. 339 (C, p 632).

[29] DeMarchi (Meyers) exam. ex. 2 (C, p. 634); Seiling qq. 499, 509-510 (C, p. 636); O'Donnell q. 409-412 (C, p. 637).

[30] Bullock aff. paras. 24-25, 27-30, 46 (C, p. 638); Parkinson exam. exs. 6 (C, p. 644) and 11 (C, p. 646); Duncan qq. 365, 368 and 375 (C, p. 647); Parkinson aff. para. 89(3)(i) (C, p. 650); AG Report (Snobelen ex. 24) pp. 16, 46-47 (C, p. 653).

[31] Duncan ex. 7 (C, p. 656); Bullock aff. para. 46 (C, p. 658); Duncan qq. 443-451 (C, p. 660); Stransky ex. 4 (C, p. 661); Orsini exs. 2 (C, p. 665) and 16 (C, p. 671); Phillips exs. 13 (C, p. 674) and 14 (C, p. 677); Duncan ex. 2 (C, p. 679); Flynn qq. 398-404 (C, p. 680).

The Ontario Racing Program; ORC Assurance of Stability for the Long-Term

39. As SAs were renewed, ORC was completing a yearlong consultative process with the industry, including standardbred breeders, for a new system of race date allocation to lay the "ground work for the future prosperity of the industry". According to Ontario, an "updated race date model will better support coordinated horse supply management across the province which will help to improve racing quality and competitiveness, and better meet customer demand".[32]

40. In September 2010, the ORC approved a race date model: the Ontario Racing Program ("ORP"). It was announced by press release drafted by Ontario and ORC, a Notice to the Industry and posted on ORC's website. It was extensively promoted to the industry. The ORC told stakeholders that the ORP "confirms a commitment to the sport of live horse racing in Ontario", a "commitment to live racing and accountability", and a "firm commitment from our provincial government that it wants live racing and the jobs and growth that racing represents for rural Ontario." Finance noted the ORP would "guide the future of the industry in Ontario.[33]

41. The ORP was designed to give breeders confidence to continue to make investments in their horses and farms. It was phased in for the standardbred sector for the 2011 racing season and was closely monitored by the ORC through contact with industry representatives and experts. ORC continued to release HIP financial forecasts recording funding from slot revenue out to 2015-16.[34]

OLG's Strategic Business Review; Misleads Breeders and ORC, Breaches LOI

42. After renewal of the SAs in 2010, Ontario directed OLG to review its operations to bring "coherence to the business." The focus of the strategic business review ("SBR") was "re-calibrating supply to demand, identifying .. appropriate mix of games and amenities; and exploring new gaming facility models that address unmet demand across the province."[35] It was operational.

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[32] McGuinty ex. 17 (C, p. 681); Seiling qq. 312-326 (C, p. 683); Seiling ex. 41 (C, p. 685); McGuinty ex. 15 (C, p. 688).
[33] McGuinty ex. 17 (C, p. 692); Seiling qq. 214-215 (C, p. 695), 271-272 (C, p. 696), 306-334 (C, p. 698); McGuinty qq. 422, 431 (C, p. 701), 507 (C, p. 703); Seiling ex. 18 (C, p. 704); Stransky ex. 10 (C, p. 708).
[34] Seiling qq. 1820-1821 (C, p. 712); Duncan ex. 13 (C, p. 714); McGuinty ex. 19 (C, p. 717).
[35] MacDougall Sadava ex. 7 (C, p. 721).

43. The SBR was premised on "ways to decouple" programs that encumbered OLG's "business/operational decisions." This included SARP but Ontario and OLG kept that secret. It contradicted the commitment in the LOI for Ontario, OLG and the industry to "work in cooperation" to "ensur[e] that [SARP] benefits are maximized to the horse racing industry".[36]

44. OLG recognized its consultations had to allow "meaningful involvement in any decision that may impact/alter how their business operates today and any financial or other benefits [stakeholders] receive." Its pursuit of decoupling was a breach of the LOI. This change was highly material to the racing and breeding industry and required disclosure to and consultation with the ORC and the industry. As of 2010, OLG was no longer cooperating as required by the LOI to maximize benefits to the industry. It did not correct prior messages or change its ongoing ones.

45. In its consultations in 2011, OLG met with standardbred racing and breeding associations. It did not disclose its plans for SARP. In fact, the consultations only addressed how SARP could be expanded and improved. Standardbred representatives appreciated the assured commitment. The Auditor General in 2014 criticized OLG's lack of transparency and openness.[37]

46. OLG also met with the ORC. ORC told OLG that its SBR "has to take the broader horseracing industry into account". ORC emphasized the new ORP. OLG "assured" ORC it "would not take anything to its board or government without first meeting with ORC again".[38]

47. By March 2011, OLG decided casinos in the GTA were "the largest and most obvious opportunity". It recognized horsepeople would oppose because this would result in "either erosion or total loss of their revenue". From June 2011 on, OLG was planning to "break the gridlock that currently locks OLG into slots at racetracks".[39] This required breaching the LOI.

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[36] MacDougall Sadava ex. 7 (C, p. 721); Snobelen ex. 11 (C, p. 739).
[37] O'Donnell aff. paras. 13-18 (C, p. 743); O'Donnell aff. ex. A (C, p. 746); McNiven aff. paras. 40-48 (C, p. 748); McNiven aff. ex. J (C, p. 752); DeMarchi aff. paras. 61-67 (C, p. 759); DeMarchi aff. ex. E (C, p. 762); AG Report, p. 16 (C, p. 765).
[38] MacDougall Sadava ex. 6 (C, p. 770); Seiling qq. 582-588 (C, p. 773).
[39] Phillips ex. 16 (C, p. 774), Phillips ex. 17 (C, p. 777).

48. In July and August 2011, the Minister of Finance and ORC signed a MOU confirming ORC's responsibility to provide economic oversight and to set the policy framework to support horse racing and its long term sustainability. The MOU required consultation and timely exchange of information by each party to ensure the other knew in advance of significant public issues.[40]

OLG and Finance Decide to Terminate SARP Agreement by Multi-Year Phase-Out

49. In October and November 2011, OLG recommended to Finance that "OLG relocate slots away from racetracks, and build new casinos in the GTA and elsewhere". The *OLG Act* required a municipal referendum, a specific designated site and a business case in support of it. OLG had not approached any municipalities, identified any sites or developed a business case. It had no idea if its 'largest and most obvious opportunity' was possible and as events demonstrated, it was not.[41]

50. OLG proposed to Finance that horse racing "funding" be "revised" by pooling a percentage of its total gaming revenue. It said that "horseracing benefits will remain intact, and could grow" to $410 million per year. OLG told Finance its SBR was the result of "extensive stakeholder consultation and market intelligence."[42] There had not been any consultation about this plan.

51. Finance rejected OLG's "funding" model. Instead, Finance's Gaming Policy Branch developed an approach on December 8, 2011 that saw SARP "phased out over a 5 year period."[43] This was kept secret. There was no consultation with industry, experts or the ORC. ORC continued its positive messaging. Breeding under the second year of the ORP was about to begin.

52. Finance staff responsible for the "phase out" emailed each other that "99% of Ontarians don't care about horse racing" and the "only thing that keeps me going is the thought I might still

[40] Seiling ex. 12 (C, p. 783).
[41] Phillips ex. 21 (C, p. 788); Shortill ex. 2 (C, p. 800); McGuinty ex. 27 (C, p. 814); *Requirements for Establishing a Casino or Charity Casino*, O. Reg. 347/00 (revoked June 1, 2012), ss. 4-7 (as at Mar. 2012) (C, p. 828); Phillips qq. 759-770 (C, p. 835); Phillips ex. 16 (C, p. 839); Flynn q. 35 (C, p. 841).
[42] Phillips ex. 21 (C, p. 788); Shortill ex. 2 (C, p. 800); McGuinty ex. 27 (C, p. 814).
[43] Phillips qq. 882-884 (C, p. 842); Shortill ex. A (C, p. 843); McGuinty ex. 29 (C, p. 851).

be here when the entire *Slots at Racetracks* program is either slashed brutally, [or changed in a way] that gets rid of the notion that horsemen have of slot money being 'their' money."[44]

Decision to Terminate Concealed; Positive Assurances Maintained

53. While planning the demise of SARP, Ontario maintained its positive messages. In 2011, Minister Duncan wrote industry participants emphasizing the importance of SARP and the government's commitment to it. He continued to tell the Estimates Committee SARP was an important long-term racing and breeding program. Premier McGuinty wrote to a standardbred industry association in September 2011 saying his government "value[s] the positive impact that the horse racing industry has on the agricultural sector … and we believe in working closely with the industry to ensure it remains strong and prosperous in the future." This email was published online and promoted. On December 20, Blair Stransky, Duncan's senior policy advisor, told Rod Seiling that the SBR was almost done and there was "not anything hard coming down for racing". Mr. Seiling "reiterated" an offer to "supply info to gov't". Mr. Stransky told him "don't need it."[45]

54. In late 2011, Don Drummond was completing his Report which was to be released mid-February 2012. In December, Finance staff began feeding language to him that SARP should be "review[ed]" and "rationalize[d]", "in a phased manner". OLG's CEO received a "fleshed-out narrative designed to be parachuted [*sic*] into the Drummond Report, reflecting [Phillips'] discussions with senior folks at [Finance] … The purpose is to pre-condition for change."[46]

55. The narrative OLG and Finance created was that "horseracing … receives $340 million … in public funding" and this "subsidy" was "corporate welfare". OLG told Mr. Drummond there were "no benchmarks or performance metrics for the funding" despite such benchmarks in the SAs that it never enforced. It told him to say Ontario should "[r]eview the current horseracing funding

[44] Yeigh qq. 274-280 (C, p. 860); McGuinty ex. 59 (C, p. 862).
[45] Yeigh qq. 261 (C, p. 863), 347-348 (C, p. 864); Duncan ex. 8 (C, p. 866), Duncan ex. 13 (C, p. 868); Yeigh qq. 379-388 (C, p. 871); McGuinty ex. 25 (C, p. 874); Parkinson aff. para. 83(f) (C, p. 875); Parkinson aff. ex. 37 (C, p. 877); Parkinson aff. ex. 38 (C, p. 878); Dec 2011 Handwritten Notes from Seiling (Seiling ex. 34) (C, p. 880); Seiling qq. 626-630 (C, p. 882).
[46] Drummond ex. 7 (C, p. 884); Orsini ex. 21 (C, p. 885); Drummond ex. 9 (C, p. 886).

model" and "[d]e-link funding from OLG gaming sites." Mr. Drummond testified he knew nothing about SARP, never reviewed it, and his knowledge came from what OLG and Finance told him.[47]

56. By December 22, Finance changed its 5-year plan. SAs would be terminated and the commission replaced with an annual transfer payment from the Consolidated Revenue Fund that reduced to $100 million over 3 years: $250M in year 1, $150M in year 2, and $100M in year 3 and beyond (the "3-year plan"). Finance pasted its 3-year plan onto an OLG presentation slide and labelled it OLG's "recommended approach" for Premier McGuinty, and presented it as the result of "[e]xtensive stakeholder consultation" "validated" by external experts.[48] OLG went along.

Ontario Decides to Take SBR to Cabinet; Briefs Ministers on 3-Year Plan

57. There was a two-and-a-half hour Cabinet meeting set for February 8, 2012. Two-and-a-half hours was shorter than usual. OLG's SBR was the 5th of 5 agenda items, preceded by Orders in Council, five Annual Reports (Chiropody Review Committee, Dentistry Review Committee, etc.), discussion of "Cabinet Decisions" from February 1 and 2, and "Concussion Prevention – School Athlete Protection Legislation". Staff were rushing to compose the Minister's speaking notes, the Cabinet submission and 'minute'. Between late January and February 1, staff briefed Cabinet ministers on the SBR and its 3-year plan, which it presented as OLG's recommendation.[49]

58. OMAFRA was briefed on January 25 about the SBR and 3-year plan. On February 2, OMAFRA staff sent Finance a memorandum informing them that the impact of the 3-year plan could not be predicted because "no design currently exists for the proposed transfer payment program". OMAFRA told Finance that "coordinated communications planning" would be warranted. Breeding to ensure horse supply for the new ORP was well underway.[50]

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[47] Drummond ex. 9 (C, p. 886); Yeigh qq. 488-501 (C, p. 891); Drummond qq. 45, 47-53 (C, p. 893), 200 (C, p. 894), 381-382 (C, p. 895).
[48] Stransky ex. G (C, p. 897); McGuinty ex. 30 (C, p. 899); McGuinty ex. 31 (C, p. 901).
[49] McGuinty q. 785-788 (C, p. 910); Bardeesy q. 66-68 (C, p. 911); Bardeesy ex. 17 (C, p. 912); McGuinty ex. 32 (C, p. 914); Shortill exs. 7 (C, p. 925); Yeigh, q. 397 (C, p. 927); McGuinty q. 1251 (C, p. 928); Wynne q. 61-63 (C, p. 929).
[50] McMeekin ex. 20 (C, p. 931); McGuinty ex. 37 (C, p. 932).

Decision to "go to $0": Not Considered Policy, Based on False Characterization of Revenue

59. By February 3, briefings were concluded. The 3-year plan was finalized in the Cabinet material and 'minute'. The Cabinet package was ready. Then, "on the eve of cabinet" within the space of a little more than *one hour* "something magical happened".[51]

60. Mid-morning Friday February 3, Tim Shortill, Minister Duncan's Chief of Staff, decided without any new information, analysis or study to discard the 3-year plan and advise Minister Duncan to cancel the revenue share effective March 31, 2013. A two line email at 11:34 a.m. decreed the "position was changing" to a "complete exit … just the notice period and out". Staff scrambled through the weekend to scrub the material and minute and make 120 copies. The change was not communicated to any of the ministers and staff who had been briefed on the 3-year plan.[52]

61. Mr. Shortill acknowledged telling Minister Duncan and the Premier's Office to "go to $0" and that his decision was based "solely" on his "general knowledge" of the government's "priorities for funding healthcare and education, not subsidizing the horse racing industry". He knew "very little" about the standardbred breeding industry. He did not know the breeding cycle of a racehorse. He had never seen the LOI, its Addendum, or a SA. He had no study or analysis of the impact of his advice. His knowledge of SARP was that "a percentage of revenue generated from the slots was directed towards the horse racing industry."[53]

62. Mr. Duncan had no recollection of February 2-3.[54] But his evidence about SARP revenue sharing is critical: he testified the decision was made on the basis that SARP funds were "money out of the government's consolidated revenue fund that could be used for other purposes [and this

[51] Phillips qq. 972-978 (C, p. 939); Shortill q. 776-777 (C, p. 941); McGuinty q. 1091 (C, p. 942); McMeekin q. 638 (C, p. 943).
[52] McGuinty ex. 43 (C, p. 945); McGuinty ex. 41 (C, p. 951); McMeekin qq. 695-697 (C, p. 955); Keegan qq. 136 (C, p. 956), 441 (C, p. 958).
[53] Shortill, qq. 98-105 (C, p. 959), 115-118 (C, p. 961), 527-556 (C, p. 963).
[54] Duncan qq. 1200-1203 (C, p. 969), 1060-1064 (C, p. 971); McGuinty qq. 1026-1053 (C, p. 974), 1068-69 (C, p. 977), 1195-1200 (C, p. 978).

was] the policy perspective [from which] this was being looked at." The *OLG Act* makes clear that the commission is an operating expense and is not 'out of' the Consolidated Revenue Fund.

63. Premier McGuinty did not remember the events of February 2-3. He was told SARP was public funds. When shown the basis for the decision on his examination, he testified he expected there would have been more analysis of the impacts of the decision than there was.

The February 8, 2012 Cabinet Meeting: A Serious Breakdown in Orderly Decision Making

64. Ontario denies that the decision was made by Messrs. Shortill and Duncan. It produced the entire submission for the Cabinet meeting but refused to permit examination of any witness on the Cabinet meeting[55] and it led no evidence that the decision was made at the meeting. There is no evidence or law that this decision *had* to be made by Cabinet. Karim Bardeesy testified he didn't recall "whether Cabinet's approval was actually required on that specific element." There is no evidence that the "go to $0" decision was even discussed at Cabinet. There is a compelling body of evidence it wasn't. Certainly it was not understood. Key ministers didn't know it was made.[56]

65. Minister McMeekin said he learned of the decision when the public did: "[t]he little bit of consultation that we had seemed to be heading in a different direction and then suddenly it was jettisoned" and "something magical happened". He testified the decision was "sprung on Cabinet". He said the 3-year plan would not have caused the harm that the "go to $0" decision did.[57]

66. Premier Wynne was briefed on the 3-year plan. She testified that she "had no involvement in or exposure to" the "go to $0" decision. She only understood what was decided well after the Cabinet meeting. Both said the decision was not made properly or "thoughtfully" or with "due consideration" for its impacts. John Snobelen testified that the decision was not "Cabinet ready"

[55] Wynne, q. 65 (C, p. 980); Stransky, q. 821 (C, p. 981); Shortill, qq. 68 (C, p. 982), 810, 819, 820, 823, 824, 843, 854 (C, p. 984); McMeekin qq. 1090 (C, p. 989), 1369, 1372 (C, p. 990), 1551 (C, p. 991); Duncan q. 201 (C, p. 992), 335, 337, 352 (C, . 993), 1183 (C, p. 995), 1226-1227, 1242 (C, p. 996), 1411 (C, p. 998); Bardeesy qq. 919-920 (C, p. 999).
[56] Bardeesy qq. 697-698 (C, p. 1000).
[57] McMeekin qq. 225 (C, p. 1002), 1064-1065 (C, p. 1003), 638-639 (C, p. 1004), 711-716 (C, p. 1006), 657-659 (C, p. 1008).

and there was an "entirely incomplete understanding" of its catastrophic consequences.[58] None of this is surprising as ministers and their staff had only been briefed on the 3-year plan.

67. Mr. McMeekin composed two emails about the decision. The first, to himself, his Chief of Staff and his Director of Communications on October 29, 2012 says "[t]o be clear the decision to end the SAR program was made by the Ministry of Finance not [OMAFRA]." The second, to an industry participant on March 31, 2013, says he called for a "review [of] the decision the Finance Minister had made". He confirmed they accurately express his views. Despite extensive cross-examination of their own witnesses, neither OLG nor Ontario cross-examined Mr. McMeekin on these emails and he never resiled from them.[59] In April 2014, the Auditor General confirmed that the decision to "go to $0" was made by the Minister of Finance's Chief of Staff.[60]

68. The Court should give weight to the evidence of Mr. McMeekin and Ms. Wynne on these issues. They recognize a serious breakdown in orderly decision making when they see it. Mr. McMeekin acknowledged that this was one of the only times he thought about quitting. He didn't because he felt he had to fight to correct the catastrophic consequences the decision caused.[61]

69. If, as Ontario insists, the decision was considered and decided at Cabinet, the only evidence of a record for the decision shows it rested on four serious misrepresentations. First, the Minister's speaking notes introducing the decision state that the elimination of SARP was recommended by Don Drummond. Mr. Drummond made no such recommendation, didn't know anything about SARP and never reviewed it. This representation was repeated by Mr. Duncan in the Legislature and in an Order in Council a year later.[62] Second, Cabinet was told there was extensive consultation

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[58] Wynne, qq. 59 (C, p. 1009), 76-79 (C, p. 1010), 87 (C, p. 1012), 327 (C, p. 1013), 336-337 (C, p. 1014), 394-396 (C, p. 1016), 623 (C, p. 1018), 986 (C, p. 1019); Amended Statement of Claim paras. 163-166 (C, p. 1020); HMQ Statement of Defence, para. 1 (C, p. 1023); Parkinson aff. ex. 114 (C, p. 1025); Iannacito aff. para. 206 (C, p 1027); Snobelen, qq. 802-808 (C, p. 1029), 853-857 (C, p. 1030).

[59] McMeekin ex. 32 (C, p. 1032); McMeekin ex. 37 (C, p. 1033); McMeekin qq. 1008-1012 (C, p. 1036); McMeekin qq. 1148-1150 (C, p. 1037).

[60] AG Report, p. 53 (C, p. 1039).

[61] McMeekin, qq. 454-464 (C, p. 1041).

[62] McGuinty ex. 46 (C, p. 1045); Drummond qq. 45, 47-53 (C, p. 1049), 200 (C, p. 1050), 381-382 (C, p. 1051); Duncan ex. 25 (C, p. 1052); Yeigh aff. ex. II (C, p. 1054).

with the industry and experts. There was no such consultation as Mr. Philips and Mr. Shortill confirmed. This representation was repeated in the Legislature by Mr. Duncan when the decision was challenged.[63] Third, the material stated that the decision was supported by the OLG Board. It was not. OLG's Board was only told of the decision after it was made.[64] Fourth, Cabinet was told that Ontario was subsidizing horse racing with $345 million dollars every year. Cabinet was not told the funds were an operating expense of OLG, a negotiated commission for services provided.[65]

70. The "go to $0" decision eviscerated the benefits of the LOI for the horse racing industry, including breeders. Instead of maximizing the benefits of SARP, it eliminated them in a manner that had no regard for the legitimate interests of breeders.

Not a 'Considered', True Policy Decision

71. Premier McGuinty testified that government decisions with serious consequences, particularly in tough economic times, must be based on the best information available and there is a "responsibility to access the best information." He said government must act responsibly, carefully, and fairly, "taking all information that it has or can have into account."[66]

72. Premier Wynne said government must "make and implement decisions" in a "fully considered way" and with "compassion" when there is "expected to be harmful consequences". Here, "there wasn't enough background, people didn't have enough information. … There was *no thought* about the whole industry, and by that I mean the supply chain", "there was not due consideration of the impacts". Mr. McMeekin said true policy decisions are "rational", "based on consultation", "feasible", "and always in the public interest." This was not such a decision.[67]

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[63] Phillips qq. 734-735 (C, p. 1055), 971-979 (C, p. 1056); McGuinty ex. 32 (C, p. 1059); Shortill qq. 532-550 (C, p. 1069), 775-777 (C, p. 1075); Duncan ex. 26 (C, p. 1076).
[64] McGuinty ex. 46 (C, p. 1078); McMeekin qq. 1023, 1026-1027, 1033-1034 (C, p. 1082); Phillips qq. 883-886 (C, p. 1084), answer to undertaking on Q. 614 of L. Flynn exam (C, p. 1085).
[65] McGuinty ex. 46 (C, p. 1087).
[66] McGuinty qq. 531-35 (C, p. 1090), 632-635 (C, p. 1094).
[67] Wynne qq. 184-187 (C, p. 1094); Iannacito aff. para. 206 (C, p. 1096); Keegan ex. 29 (C, p. 1098); Keegan ex. 52 (C, p. 1101); Wynne ex. 26 (C, p. 1104); Parkinson aff. ex. 114 (C, p. 1106); Snobelen ex. 32 (C, p. 1108); McMeekin qq. 889-891 (C, p. 1109).

Ontario Attacks Horse Racing

73. OMAFRA had told Finance on February 2 there needed to be a careful communication plan in rural Ontario for the 3-year plan. It asked to help. The Cabinet material promised a careful and collaborative inter-ministry communication plan to manage stakeholders.[68]

74. Finance's communication plan began with a February 13, 2012 speech by Minister Duncan at the Economic Club of Canada. There, he revealed the new narrative that "[s]ince 1998, Ontario taxpayers have been subsidizing horse racing in Ontario to the tune of $345 million a year".[69]

75. As planned, the speech attracted a lot of attention. It reversed a 14-year narrative of SARP as a valuable partnership with racing and breeding that supported 60,000 agricultural jobs in rural Ontario. John Snobelen recorded a video directed at Minister Duncan reminding him that SARP "allowed a percentage of slot revenue to go to the horseman so that the racehorse industry would not be affected by the imposition of slot machines at their tracks". He warned ending SARP would "kill" the industry. He specifically said that the revenue share was not a subsidy.[70]

76. On February 16, alarmed standardbred stakeholders attended an event at which the Minister was speaking. The President and CEO of Standardbred Canada, John Gallinger, spoke with Minister Duncan, who promised him "the opportunity to meet with Paul Godfrey and the OLG board as part of the consultation process and before any final decisions are made".[71]

77. Minister McMeekin was trying to find out if a proper economic impact analysis had been done. Finance staff acknowledged between themselves "frankly we do not have a detailed study of the sort he was hoping we had". Their emails say "Mtg with Minister McM not so good". Minister McMeekin testified that "there was a very serious problem with very serious consequences". On February 19, Deputy Minister of Finance Steve Orsini directed Finance's

[68] McGuinty ex. 37 (C, p. 1111); Shortill ex. 11 (C, p. 1118).
[69] Duncan ex. 22 (C, p. 1122).
[70] Snobelen ex. 4 (C, p. 1130).
[71] O'Donnell aff. para. 21 (C, p. 1136); McNiven aff. paras. 51-55 (C, p. 1139); McNiven ex. L (C, p. 1143).

Office of Economic Policy to show "the net impact of cutting horseracing subsidies and investing in healthcare and education". This "study" was not completed until March 14: two days *after* the public announcement that SARP was terminated.[72] And it was wrong.

78. On February 26, as fear spread through the industry in the midst of the breeding season, the Liberal party released radio attack ads:

> Did you know that Tim Hudak's PCs started a secret subsidy for a few, very wealthy racetrack owners? And now in these times of restraint, Tim Hudak says these rich payouts should be protected. He'd cancel full day kindergarten, leaving 50,000 four and five year olds stranded. Are we really going to spend more on horse racing than full day kindergarten? The PCs should do what's right. Tell Tim Hudak his priorities aren't your priorities.[73]

79. David Willmot said the ads were "the most despicable behaviour by a government I have ever seen in my life."[74] John Snobelen said they were "inaccurate … to an unacceptable level, even in a political ad" and "absolutely not true". He was "offended" by them. He testified, as did Premier Wynne, that the ads would cause breeders to have "deep concern about their livelihoods and the viability of their breeding operations and farms".[75] Rod Phillips was "surprised" agreed they were inaccurate and served no gaming policy. Minister McMeekin said the ads "blew me away". [76]

80. Premier McGuinty testified the ads were "stretchy" with the truth, "liquid" with the truth and "truthy". He agreed standardbred breeders were "unfairly characterized", and that the industry was an "incidental casualt[y]", "[u]nfair ... and not something I would support." Premier McGuinty testified: "You know, I don't want to defend the wording in this. [*Q. Why not?*] Because that's not how I would govern myself. It's not how I would represent these circumstances or these facts."[77]

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[72] McMeekin qq. 476-481 (C, p. 1146), 882 (C, p. 1148); Orsini ex. 32 (C, p. 1149), Orsini qq. 1597 (C, p. 1152), Orsini ex. 33 (C, p. 1144); Shortill qq. 746-747 (C, p. 1158); Yeigh aff. para. 73 (C, p. 1159).
[73] McGuinty ex. 52 (C, p. 1161).
[74] Willmot q. 436 (C, p. 1162).
[75] Snobelen qq. 260, 270-271, 281-282 (C, p. 1163); Wynne q. 278 (C, p. 1165).
[76] Phillips qq. 125, 127-129, 137 (C, p. 1166), 960-962 (C, p. 1169); McMeekin qq. 798, 801-814 (C, p. 1171).
[77] McGuinty qq. 1354-1356, 1362-1363 (C, p. 1173), 1414 (C, p. 1174), 1431 (C, p. 1176), 1928 (C, p. 1178).

81. While it may not have been how Mr. McGuinty would have governed, it is, in fact how his party did govern. It worked to increase the dissemination of radio ads by having a Cabinet minister disseminate them by email. In her email, Laurel Broten, the Minister of Education, stated:

> This week, our government made more of the thoughtful choices that will see us eliminate the deficit by 2017-18. … We simply can't afford to support the $345 million-a-year horse-racing subsidies started by the Hudak PCs. … That's why starting today, we're spreading the word. Listen to our new radio ads here [link to ad #1] and here [link to ad #2], and share these important messages with your friends and family."[78]

82. The ads worked well. They were picked up by the media[79] and panicked the industry.

83. The only witness who refused to acknowledge the impropriety of the ads was Mr. Duncan. His evidence should be carefully reviewed, in particular qq. 184-323, 1375-1407. He initially refused to answer questions about the email unless the French boilerplate template was translated. He said that Minister Broten sent the email in her personal capacity even though it was signed in her official capacity. He suggested that the ads were not noticed or picked up by any media when in fact they were extensively covered. He said he knew nothing about them. But when Minister Broten was asked about the "disgraceful" ads in the Legislature, he took "responsibility" for the question and repeated the representations about consultation and subsidy with public funds.[80]

The March 12, 2012 Announcement

84. At a televised event on March 12, 2012, Minister Duncan and OLG's Chair, Paul Godfrey, announced the results of OLG's SBR, including the end of SARP revenue sharing effective March 31, 2013. It was the middle of breeding season.[81]

85. OLG's final SBR report – also known as the Modernization Report – was released, styled on its cover page as "Advice to Government". OLG's 'advice' included that SARP:

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[78] McGuinty ex. 51 (C, p. 1179).
[79] McGuinty ex. B (C, p. 1181).
[80] Duncan ex. 24 (C, p. 1192).
[81] O'Donnell aff. para. 27 (C, p. 1196); Parkinson aff. para. 92 (C, p. 1198); McGuinty ex. 53 (C, p. 1200).

> … limits OLG's flexibility to locate gaming facilities near OLG customers. Furthermore, the formula restricts OLG's ability to maximize revenues for key government priorities. As such, [SARP] should be drawn to a close.[82]

86. This 'advice' was in fact dictated by Minister Duncan's senior policy advisor, Blair Stransky to Rod Phillips on March 8, 2012.[83] Mr. Phillips conceded the "advice" was the "direction" of Finance.[84]

87. Rod Seiling confirmed there was "no effort" by Finance or OLG to seek ORC input. This was a breach of the MOU and OLG's March 2011 undertaking to consult with the ORC before going to its Board or government with any big ideas that would affect SARP.[85]

88. Mr. Seiling said that, with the decision, there was "no question" "there would be no racing" next year and "there would be no breeding." He and his Board "immediately" knew the decision would be "catastrophic". He had "great trouble trying to manage the Board who were distraught to the nth degree." He said the "confidence the government had in ending [SARP] and their presumptions – based on what, I can't tell you – were so far off the mark that it was laughable." He took the unusual step of writing to OLG informing it that the decision had put the industry and its breeding sector into a "tailspin". Immediately after the decision, OLG was informed. It was not ready "operationally" to cope with the consequences and it had to defer communications.[86]

89. By March 29, 2012, OLG delivered notices of termination of all SAs to racetrack owners, terminating three as of April 30, 2012 and the remaining tracks effective as of March 31, 2013.[87]

Harm Caused by the SARP Announcement

90. The impact on breeders was immediate and catastrophic. Panicked owners of broodmares cancelled stallion bookings *en masse*. Owners moved stallions out of Ontario. Because the decision

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[82] Yeigh aff. ex. CC (C, p. 1202).
[83] Shortill ex. 12 (C, p. 1233); Duncan q. 1351 (C, p. 1235).
[84] Phillips qq. 992-1005 (C, p. 1236).
[85] Seiling qq. 161 (C, p. 1240), 580-588 (C, p. 1242), 724 (C, p. 1243), 743 (C, p. 1245).
[86] Seiling qq. 168 (C, p. 1246), 201 (C, p. 1248), 720-722 (C, p. 1250); Seiling ex. 29 (C, p. 1252); McNeill ex. 7 (C, p. 1255).
[87] McGuinty ex. 58 (C, p. 1257); Flynn aff. paras. 63-64 (C, p. 1258).

would devalue purses and other breeding incentives, the value of yearlings immediately collapsed. The drop in values extended beyond yearlings put up for sale in fall 2012: it included foals born in 2012 that would be sold as yearlings in 2013, and pregnant mares that would produce foals in 2013 that would be offered for sale as yearlings in the fall of 2014.[88]

91. Slot revenue was a "significant portion" of HIP. The auditor reported that without this revenue there was a "material uncertainty regarding [HIP's] ability to continue as a going concern.[89] Rod Seiling said the impact on breeding industry was "catastrophic", there was "utter despair… Bitter despair, the whole across. … there was huge turmoil, that's almost an understatement. Everyone was panicked." Breeders' activities dropped by about 60%.[90]

Events Following the March 12, 2012 Announcement

A. Misrepresentations to the Legislature

92. Ontario pressed its campaign. It continued its attack in the Legislature and the press.

93. Minister Duncan told the Legislature that Mr. Drummond "said not to subsidize horse racing" and that the horse racing industry "was consulted extensively" as part of OLG's SBR. On cross-examination, Mr. Duncan said he "misspoke" when he said Mr. Drummond recommended elimination. When asked by reporters what should be done with standardbred racehorses rendered surplus, Mr. Duncan responded that "they should probably stop breeding them".[91]

94. This conduct was so divorced from policy making, Mr. McMeekin's Chief of Staff emailed a colleague in the Premier's office that it was to "wedge the opposition in the short term." Horsepeople were an easy casualty. "99% of Ontarians [didn't] care about horse racing." As Mr.

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[88] Willmot aff. paras. 53-62 (C, p. 1260); Parkinson aff. paras. 107-13 (C, p. 1264); O'Donnell aff. para. 38-45 (C, p. 1267), Bullock aff. paras. 51-57 (C, p. 1270); McNiven aff. paras. 59-63 (C, p. 1274); DeMarchi aff. paras. 6-7, 86-92 (C, p. 1277); Keegan q. 1310 (C, p. 1283).

[89] Willmot aff. para. 56 (C, p. 1284); Seiling ex. 32 (C, p. 1286).

[90] Seiling qq. 201-202 (C, p. 1288); Willmot aff. para. 62 (C, p. 1289); Snobelen ex. 46 (C, p. 1291); Wynne ex. 9 (C, p. 1293); AG Report p. 47 (C, p. 1297).

[91] Duncan exs. 23 (C, p. 1299), 24 (C, p. 1303), 25 (C, p. 1306), 26 (C, p. 1309); Duncan qq. 1469 (C, p. 1311), 1637 (C, p. 1312).

McGuinty said, if "I polled 13 million Ontarians", "very few people" would know about SARP. Messrs. McGuinty and Duncan denied trying to "wedge" the opposition. McGuinty did concede that was "an interpretation". Mr. McMeekin said there was "anecdotal evidence" it was.[92]

95. Whatever Ontario and OLG were up to, it cannot be considered to be the narrow subset of good faith, "pure" policy making for which our Supreme Court created an immunity.

B. Establishment of the Horse Racing Industry Transition Panel

96. Minister McMeekin, "very unhappy" with the absence of "a proper consideration of the impact on the rural economy, including breeding", "fought" to establish a Horse Racing Industry Transition Panel (the "Panel") to try and "fix" things. Finance and the Premier's senior advisors resisted. Minister McMeekin knew that Mr. Duncan was "not moving". Staffers didn't want to "walk back decisions" as this could seen as embarrassing to Mr. Duncan and a "capitulation".[93]

97. In late May 2012, the Panel – three former Cabinet ministers from different political parties: John Snobelen (PC), John Wilkinson (Liberal) and Elmer Buchanan (NDP) – was struck, something that was "quite unique". The Panel was announced in a June 7 news release, which said Ontario would provide "up to $50 million over three years in transition support". Rod Seiling immediately advised Finance that this amount was not enough.[94]

98. The panellists contracted to give "non-partisan guidance" to Ontario. The Panel did not have a mandate to evaluate the decision. John Snobelen knew there was "no way that the McGuinty government was going to reverse its decision." All the Panel could do was "make the best of a very bad situation". And the effort was obstructed by Finance. [95]

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[92] McGuinty ex. 59 (C, p. 1313); McGuinty qq. 1359-1360 (C, p. 1314), 1412-1424 (C, p. 1315); Duncan qq. 1421-1426 (C, p. 1316); McMeekin qq. 1100-1105 (C, p. 1317).
[93] McMeekin qq. 217-219 (C, p. 1319), 464-471 (C, p. 1320), 758-761 (C, p. 1322); Keegan qq. 485-487 (C, p. 1324); Wilkinson q. 249 (C, p. 1325); McGuinty ex. 55 (C, p. 1327).
[94] Wilkinson q. 239 (C, p. 1329); Yeigh aff. ex. EE (C, p. 1331); Seiling q. 891 (C, p. 1333).
[95] Wilkinson ex. 2 (C, p. 1334); Snobelen qq. 960-962 (C, p. 1336); Shortill qq. 919-924 (C, p. 1337).

99. Briefings started in mid-June 2012. One month after "a cold start" and based on existing information, the Panel knew that the industry would collapse and the information the decision was based on was wrong. It did not know how Messrs. Shortill and Duncan had actually made the decision. It knew that $50 million was "completely inadequate" and told Minister McMeekin.[96]

C. Urgency Arising From Catastrophic Harm to Breeders Ignored

100. Although the Panel's work was to be non-partisan and confidential, on August 3, 2012, Mr. Wilkinson emailed David Gene – a political "fixer" in the Premier's office – to give him a preview of its coming August 17 report. Mr. Wilkinson told Mr. Gene the report could be leveraged to "give us an advantage in the by-elections by wedging both tim [Hudak] and andrea [Horvath]".[97] Mr. Gene was assured that, despite not having a mandate to inquire into the SARP decision, "[p]olitically, our report will say the gov't was right to cancel the status quo".

101. Mr. Wilkinson warned Mr. Gene of what lay ahead for the industry: "[c]ollapse (which we think is what will actually happen) is 23,000 job losses and 27,000 dead horses [and the] lawsuits coming our way will add up to $500 million and you will be lucky to settle for $250 million".

102. Mr. Gene immediately emailed Mr. Shortill: "[w]e need to slow [the Panel] down."[98]

103. Premier's Office and Finance resisted with knowledge of the harm being caused to breeders. On August 8, the Panel briefed Finance and OMAFRA that "[t]iming is urgent", the "industry faces imminent collapse" and the "breeding industry has been severely impacted by the announcement of the cancellation of SARP." The ORC warned the "breeding sector is in a tailspin". Yearling sales were coming in September. The Panel emphasized the "[i]ndustry needs a clear signal from government about what the future of the industry will look like prior to September 1." The Premier's office concern was avoiding an outcome that would be "reported as

[96] Wilkinson ex. 13 (C, p. 1339); McMeekin qq. 842-845 (C, p. 1340); Wilkinson qq. 735-738 (C, p. 1342), 756-66 (C, p. 1343), 1301 (C, p. 1345).
[97] Wilkinson ex. 2 (C, p. 1334); McGuinty ex. 47 (C, p. 1346); McMeekin qq. 847-848 (C, pp. 847); Wilkinson q. 983 (C, p. 1350).
[98] McGuinty ex. 47 (C, p. 1346).

an aboutface or capitulation, especially after all [the] messaging about choosing children over horses." Minister McMeekin described the resistance to the Panel and OMAFRA as "turf war".[99]

104. No statement was made by September 1, 2012. In October, the Premier's office was told the "[s]tandard-bred auction was cancelled because there are no buyers ... [and] there won't be a soft landing". The Panel told Minister McMeekin the industry was "beginning to rapidly unravel". By February 2013, OMAFRA still couldn't get the horse racing issue "on a decision agenda quickly".[100] The Panel was being 'slowed down' to the profound detriment of breeders.

105. In a February 13, 2013 email to a colleague in Premier's Office asking for help advancing emergency funding, Mr. Keegan said the cancellation "was based on an analysis by finance (based on assumptions that have not been realized) and a desire to wedge the opposition in the short term". Further, "[d]espite finance paying Consulting firm McKinsey to prove otherwise, the OMAFRA [Panel's] analysis was confirmed, at great cost". Mr. Keegan implored the Premier's office to get the horse racing file "sorted out" before April 1. Finance actively worked against OMAFRA and the Panel. It commissioned Deloitte to "reinvent the wheel" and released reports from McKinsey to the press to undermine the work of the Panel. OLG, according to Premier Wynne, engaged in the turf war. She fired Mr. Godfrey. In response, the entire OLG board resigned *en masse*.[101]

106. Ontario completed short-term transition funding arrangements with 12 racetracks by June 2013. It was not until October 11, 2013, when Ontario announced a "five year plan" that provided "up to $400 million over five years", that some modicum of stability returned to the industry".[102]

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[99] McGuinty ex. 54 (C, p. 1351); Seiling ex. 29 (C, p. 1407); McGuinty ex. 55 (C, p. 1410); Bardeesy ex. 22 (C, p. 1412); McMeekin qq. 885-887 (C, p. 1416).
[100] McMeekin qq. 823-831 (C, p. 1418); Keegan ex. 14 (C, p. 1421), Keegan ex. 15 (C, p. 1422), Keegan ex. 6 (C, p. 1424).
[101] Keegan ex. 6 (C, p. 1426), Keegan ex. 10 (C, p. 1428), Keegan ex. 27 (C, p. 1431), Keegan qq. 547-558 (C, p. 1433); Wynne qq. 849-855 (C, p. 1436); Phillips qq. 1114-1120 (C, p. 1438).
[102] Keegan ex. 41 (C, p. 1440); AG Report pp. 54-55 (C, p. 1446); Yeigh aff. ex. JJ (C, p. 1449).

D. OLG's Slot Machine Plan Had No Basis in Reality

107. OLG's statute restricted its ability to locate casinos in municipalities. It required a favourable municipal referendum, notification from the municipality that it was supportive, and demonstration by OLG of the cost and viability of the proposed casino. As of March 2012, OLG had not taken any steps to comply with these requirements. It had no idea whether it could locate its slot machines in urban centres – the core premise of its plan and the ostensible reason SARP was ended. When it later took the necessary steps its plan was rejected by cities, most notably Toronto by a 40-4 margin. Now it had nowhere to put its slot machines because it had terminated the SAs effective March 31, 2013, putting a billion dollars of revenue a year at risk.[103]

108. Suddenly racetracks had enormous leverage. OLG rushed to negotiate leases at between 250% and 1800% above the market rate identified by its appraisers. It had to pay $80.6 million in settlements even though no compensation to tracks was due on termination. OLG's planned 'alternative' was to put its displaced fleet of slot machines somewhere in tents, a plan Mr. Wilkinson found silly especially in winter.[104] But even temporary 'slot tents' needed municipal permission and none of the necessary steps had been taken to get it.[105]

109. The Auditor General released a special report in April 2014. She confirmed the role of Mr. Shortill in the decision, that there was not proper consultation and standardbred breeders were hit the hardest. She was highly critical of OLG's SBR as being "far too optimistic" with lack of a comprehensive underlying business case and objective data. OLG's promised $1.1 to 1.3 billion in additional revenue to Ontario was not and still hasn't been achieved. [106]

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[103] *Requirements for Establishing a Casino or Charity Casino*, O. Reg. 347/00 (revoked June 1, 2012), ss. 4-7 (as at Mar. 2012) (C, p. 1451); Phillips qq. 758-770 (C, p. 1458).
[104] Phillips qq. 781-784 (C, p. 1462); Flynn qq. 712-726 (C, p. 1464); Keegan ex. 38 (C, p. 1467); Flynn q. 736 (C, p. 1472); AG Report, pp. 36, 56 (C, p. 1474); Wilkinson qq. 584-589 (C, p. 1482).
[105] *Requirements for Establishing a Casino or Charity Casino*, O. Reg. 347/00 (revoked June 1, 2012), ss. 4-7 (as at Mar. 2012) (C, p. 1484).
[106] AG Report, p. 15 (C, p. 1491); Flynn q. 24 (C, p. 1493).

E. Retaliation by Ontario

110. In early 2014, with breeders reeling, Ontario set aside $30 million to enhance HIP for all breeds: thoroughbred, standardbred and quarterhorses. John Snobelen was the point person. Mr. Snobelen and Ontario knew that standardbred breeders had to commence an action before March 12, 2014. Ontario understood that the HIP funding was badly needed by breeders.[107]

111. On March 11, 2014, the day before they knew the plaintiffs action had to be commenced, Ontario announced that $12 million of HIP enhancements would be available for thoroughbreds and $6 million for quarterhorses. It excluded standardbreds. Mr. Snobelen testified he was not authorized to fund standardbreds. An email sent on February 14, 2014, records Mr. Snobelen informing OLG that he was "as happy as [OLG was] that [standardbreds] have taken themselves out of the play by sending notice of litigation".[108]

112. The day after announcing HIP enhancements for thoroughbreds and quarterhorses, Mr. Snobelen said that standardbreds were excluded because of the plaintiffs' lawsuit.[109]

113. On April 4, Premier Wynne wrote the plaintiffs that enhancements for standardbred *were* available. When Mr. Snobelen was asked if standardbred enhancements were being withheld, he refused to answer, saying the matter was "before the courts". When Crown counsel was asked they responded "these issues do not form part of the litigation."[110] But, paragraph 152 of the Claim pleads the issue. Mr. Snobelen agreed the plaintiffs were being given the run around.

114. Mr. Snobelen said the decision to withhold was made "several pay grades above [him]". Many witnesses were asked about this. None had any knowledge.[111] On cross-examination Premier Wynne did not deny that she directed the withholding of standardbred HIP enhancements.

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[107] Snobelen qq. 977-1140, 1175-1192 (C, p. 1494), 1192 (C, p. 1508); Snobelen ex. 27 (C, p. 1509), 28 (C, p. 1512), 29 (C, p. 1513), 30 (C, p. 1514); Wilkinson ex. 31 (C, p. 1515), Wilkinson ex. 32 (C, p. 1516).
[108] Snobelen ex. 33 (C, p. 1518); Snobelen qq. 1092-1097 (C, p. 1519); Keegan ex. 59 (C, p. 1521).
[109] Snobelen ex. 34 (C, p. 1523).
[110] Snobelen exs. 35 (C, p. 1524), 36 (C, p. 1526), 37 (C, p. 1527), 38 (C, p. 1529), 39 (C, p. 1530), 40 (C, p. 1532); Wilkinson ex. 35 (C, p. 1533); Amended Statement of Claim para. 152 (C, p. 1534); Snobelen qq. 1188-1190 (C, p. 1536).
[111] Snobelen qq. 1120-1124 (C, p. 1539); Keegan qq. 793 and 805 (C, p. 1541).

She testified that she did not "have a recollection of that so I cannot say one way or the other". She said that she didn't "know who instructed [Snobelen] to do that … But I'm not denying that. I'm not denying that. I don't have any recollection of giving that direct instruction. Whether he was given that direct instruction by someone else, I can't tell you."[112]

115. In September 2014, plaintiffs were summoned to a meeting with the ORC and told standardbred HIP enhancements would be released if the lawsuit was discontinued.[113]

PART III – ISSUES, LAW & ANALYSIS

Summary on Negligence and Negligent Misrepresentation

116. The Crown is "in general" liable for its negligent conduct. Exempting all government action from liability would be "intolerable".[114] Once proximity is established, the defendants bear the evidentiary burden of demonstrating their decision is one of a "narrow subset" of true policy decisions. These are fact-driven inquiries and the defendants have not met their burden.

A. Ontario and OLG Owed a Prima Facie Duty of Care

117. A *prima facie* duty of care arises from a relationship of "proximity", such that the failure to take reasonable care "might foreseeably cause loss or harm". For negligent misrepresentation, proximity arises from a "special relationship" if the defendants ought reasonably to foresee that, in all the circumstances, the plaintiffs will reasonably rely on their representations.[115]

118. The threshold for establishing proximity is "relatively low".[116] It is a "broad concept". Is it "just and fair" in all the circumstances to require one party to act carefully towards the other? Expectations, representations and reliance are relevant. Proximity arises from "interactions

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[112] Wynne q. 1059, 1071-1075 (C, p. 1544).
[113] Parkinson aff. para. 144 (C, p. 1546).
[114] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 [*Imperial Tobacco*], para. 76 **(Plaintiffs' Brief of Authorities ("PBOA"), Tab 1)**.
[115] *Ibid.*, para. 39, 42.
[116] *Cooper v. Hobart*, 2001 SCC 79, paras. 32-35 **(PBOA, Tab 2)**.

between the claimant and the government" where, as here, those interactions are "distinct from and more direct than" the interactions between the government and the public as a whole.[117]

119. Hallmarks of proximity include participation in "commercial relationships" with an industry, direct interactions between the government and private individuals, and contractual agreements between the government and businesses.[118] Courts recognize proximity where the plaintiff is a member of a discrete group that is known to be particularly vulnerable to harm, and the government's actions have "the potential of seriously damaging" the plaintiff.[119]

120. This record demonstrates that SARP was designed and intended to incentivize breeding, breeders were a direct participant and beneficiary, and they relied on and were dependant on SARP (paragraphs 24-35). SARP-enhanced purses were designed to and did directly incentivize breeding. Minister Duncan gave direct assurances to breeders in 2009 and SAs were extended in 2010 for the purpose of giving stability to racing and breeding. The industry's regulator, especially through the ORP and the HIP, encouraged breeders to make long-term investments.

121. Breeders were particularly vulnerable to changes in SARP revenue sharing because of the time horizon of their breeding decisions, which the evidence demonstrates was known to the defendants. The defendants knew breeders required confidence in the stability of the SARP revenue stream. This vulnerability was particularly acute for the standardbred sector.[120] The defendants knew and intended that breeders would rely on the consistent representations described in paragraphs 30-35, 37 and 40-41 that encouraged them to breed with trust and confidence.

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[117] *Imperial Tobacco*, para. 43; *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, para. 80; *Williams v. Toronto (City)*, 2016 ONCA 666 [*Williams*], para. 17; *Ryan v. Victoria (City)*, 1999 CarswellBC 79 (S.C.C.) [*Ryan*], para. 23 **(PBOA, Tabs 1, 3, 4, 5)**.

[118] *Imperial Tobacco*, paras. 53-54; *Rausch v. Pickering (City)*, 2013 ONCA 740 [*Rausch*], para. 58; *Grand River Enterprises Six Nations Ltd. v. Attorney General*, 2017 ONCA 526, paras. 116-16, 122; *Paradis Honey Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2015 FCA 89, paras. 90-91; *Apotex v. R.*, 2014 FC 1087 (rev'd on other grounds), para. 123; *Granitile Inc. v. Canada*, 1998 CarswellOnt 4689 (Ont. Gen. Div.) (set aside on other grounds), para. 186 **(PBOA, Tabs 1, 6, 7, 8, 9, 10)**.

[119] *Rausch*, para. 59; see also *Williams*, paras. 49-51 **(PBOA, Tabs 6, 4)**.

[120] Snobelen q. 1740 (C, p. 1548).

122. Proximity was amplified after February 26 and the March 12 termination announcement. The attack ad campaign heightened proximity. This was direct, targeted interaction. With the March 12 announcement, the defendants were told by the Regulator and others that the industry would collapse, that acute harm of a catastrophic nature was being suffered and timing was urgent. There was the ability to immediately rectify the harm. Ontario chose to compound it.

B. Policy Considerations Do Not Negate the Prima Facie Duty of Care

123. A "narrow subset of decisions"– "true", "core" or "pure" policy– are "immune from review" if they are "a reasonable exercise of bona fide discretion" and not "irrational nor taken in bad faith". The defendants have an "evidentiary burden" of proving a core policy decision.[121]

124. The Court must focus on whether the "degree of 'policy' involved" in the "go to $0" decision reflects true policy. This is because, as confirmed by Premier Wynne, "everything the government does" is "within the context of a government policy" or a "policy framework". Mr. Snobelen said even the decisions about the "business of government" are made "inside the context of set policy" and some business decisions are considered by Cabinet.[122] This is why the Supreme Court makes clear that immunity beyond a "narrow subset" of pure policy would be "intolerable".

125. The focus is the "nature of the decision" not the decision maker. True policy involves "weighing" multi-faceted considerations to arrive on a "course or principle of action". These involve "decision-making of a generality and complexity" that a court is ill-equipped to evaluate or replicate because they depend on a "whole host of considerations" and a "complex judgment" by government. Pure policy must be "considered" and relate to "peculiarly governmental activity".[123] As a matter of evidence there was no core policy in the "go to $0" decision.

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[121] *Imperial Tobacco*, paras. 71-72, 76, 88, 90; *Just v. British Columbia*, 1989 CarswellBC 234 (S.C.C.) [*Just*], paras. 15, 22, 28; *Childs v. Desormeaux*, 2006 SCC 18, para. 13 **(PBOA, Tabs 1, 11, 12).**

[122] *Imperial Tobacco*, para. 90 **(PBOA, Tab 1)**; Wynne qq. 958-961, Snobelen qq. 667-678.

[123] *Imperial Tobacco*, paras. 87, 90; *Just*, para. 29; Peter Hogg and Patrick Monahan, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011), p. 222; Peter Hogg and Patrick Monahan, *Liability of the Crown*, 3rd ed (Toronto: Carswell, 2000), pp. 163-164 **(PBOA, Tabs 1, 11, 13, 14).**

126. The origin and context of the "go to $0" decision was an operational decision: to relocate one class of existing assets from one business line in OLG's suite of gaming businesses to different locations to better meet perceived customer demand. And OLG, unlike ORC, is not a policy maker. It is a business. Its SBR, was, in pith and substance, an operational review of its business. A review of business assets to maximize their value and reduce operating expenses is not unique to government, does not raise or weigh general societal issues, and is not a basis for immunity.

127. And, if the Court is satisfied that the decision to relocate slots machines could be in the nature of a true policy decision, on this record, there is no evidence of a "true" weighing of a host of considerations to arrive at a decision of generality and complexity on the morning of February 3, 2012. That was an impulsive decision made in one hour by people who knew nothing of the context and consequences. It disregarded a plan that had been formulated by Gaming Policy Branch officials, shared with OMAFRA and briefed to Cabinet ministers. The "go to $0" decision was not "considered": its impacts were not studied, evaluated or known by anyone before or after. Mr. Shortill, when asked what his advice was based on, said:

> It was based on our government's priorities for funding healthcare and education, not subsidizing the horse racing industry … That is it … I just had general knowledge of our government's policy priorities … I made no study. I simply prioritized our government's priorities. … Again, I made no study. It was based solely on our government's priorities.[124]

128. There is no evidence anyone from health or education had involvement in the decision. There is no evidence that the 20% commission taken by OLG was even appropriated by the Legislature pursuant to the *OLG Act* for any purpose. The Ministers of Education and Health were silent in the Legislature. When the Minister of Education was asked about SARP being a "secret subsidy", she directed the question to Minister Duncan. There is a complete absence of evidence, as this Court noted in its August 4, 2017 decision at paragraph 81, of any protected policy making.

[124] Shortill qq. 528-535 (C, p. 1549).

129. This was not about the allocation of scarce governmental resources. As described in paragraphs 18-23, SARP funds were not public funds available for allocation by government. The 'subsidy' spin falsely conveys that SARP revenues were 'government funds' to be 'spent' by it.

C. The Decision was Unreasonable, Irrational and Made in Bad Faith

130. The "go to $0" decision was made and implemented irrationally and in bad faith.

131. Bad faith is a "flexible" concept that can encompass "acts committed deliberately with intent to harm" or acts that are "so markedly inconsistent" with the relevant context that a court "cannot reasonably conclude that they were performed in good faith". It includes reckless behaviour, which "implies a fundamental breakdown in the orderly exercise of authority." Bad faith can also connote a "lack of candour, frankness and impartiality". Irrationality includes arbitrary or plainly unreasonable decision-making that fails to "consider the appropriate factors" or an available course of action.[125]

132. The evidence of bad faith and irrational decision-making is strong. The decision was at odds with the promotion of live horse racing agreed in the LOI and 14 years of messaging. The decision was seismic, but there had been no consultation about it and the consultations that did occur were misleading. There had been no study or analysis of the impact of abruptly ending revenue sharing. The lack of investigation of the consequences was compounded by the exclusion of the ORC from the process in breach of an MOU and ORC's statutory mandate.

133. The campaign of dishonest attack ads, against a vulnerable industry, supports a finding of irrationality and bad faith. That not a single witness could answer who authorized the ads and why they were promulgated heightens this concern. There is either a troubling lack of candour or there

[125] *Entreprises Sibeca inc. c. Frelighsburg (Municipalité)*, 2004 SCC 61, paras. 25-26; *McCullock Finney c. Barreau (Québec)*, 2004 SCC 36, para. 39; *Grosvenor v. East Luther Grand Valley (Township)*, 2007 ONCA 55, para. 45; *Suresh v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1, paras. 29, 41; *Nielsen v. Kamloops (City)*, 1984 CarswellBC 476 (S.C.C.), paras. 67-68 **(PBOA, Tabs 15, 16, 17, 18, 19).**

was a serious breakdown of government discipline, which was then leveraged to the detriment of the plaintiffs. Finally, retaliation for this action is cause for serious concern and caused real harm.

134. It is respectfully submitted that this record reveals a marked departure from Ontarians' legitimate expectations of governmental conduct. This much was acknowledged by two Premiers and former Cabinet ministers. The evidence justifies the discomfort of these witnesses. This evidence is not atmospheric. It caused real harm. Equally to the point, it is markedly inconsistent with how a partner in a commercial revenue sharing arrangement should conduct itself. Simply put, these facts are inconsistent with standards of fair play, be they commercial or political.

135. And, if the "go to $0" decision could be considered true policy, for all of the reasons which support a finding of irrationality and bad faith, the decision was also operationalized negligently.

D. Ontario and OLG Breached their Duties of Care

136. Conduct that creates an "objectively unreasonable risk of harm" is negligent. Government decision-makers must be properly informed of the subject matter and consider the "implications" of their decisions. Bad faith is "highly probative" of breach of the standard of care.[126]

137. Premier McGuinty said government has a "responsibility to access the best information" and must decide responsibly, carefully, and fairly, "taking all information that it has or can have into account." Premier Wynne said government must "make and implement decisions in a fully considered way" and act with "compassion" in implementing decisions with expected harmful consequences. She said government must decide "thoughtfully and with due consideration of the relevant information about the consequences of those decisions".[127]

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[126] *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, para. 73; *Wu v. Vancouver (City)*, 2017 BCSC 2072, paras. 140, 224; *Ryan*, para. 28; *Rausch v. The Corporation of the City of Pickering*, 2017 ONSC 2634, paras. 47-48 **(PBOA, Tabs 20, 21, 5, 22).**

[127] McGuinty, qq. 531-534 (C, p. 1551), 632-635 (C, p. 1553); Wynne, qq. 184-188 (C, p. 1555), 532 (C. p. 1557).

138. The indicia of irrationality and bad faith here reflect a breach of the standard. The testimony and statements of Ministers Wynne and McMeekin are admissions of a breach of the standard.

139. John Snobelen said the decision was not Cabinet ready. He warned that it would "kill" the industry. Rod Seiling warned Blair Stransky and offered the ORC's input. The Panel knew quickly that the horse racing industry would collapse and the decision was flawed. The evidence of the lack of care is overwhelming. The harm could have been avoided. Ontario chose to compound it.

140. Even after the March 12 SARP announcement, with the catastrophic consequences apparent to Ontario, the government engaged in a "turf war" that further compounded the harm.

141. Turning to the representations made to the horse racing industry, parties are under an obligation to ensure that representations are not so incomplete as to be misleading. Representors must correct prior representations when they become untrue. Government entities are required to exercise reasonable care in making statements about their decisions or plans.[128]

142. OLG's SBR that was premised on "ways to decouple" SARP from its slot machines. This was a fundamental change to the deal with foreseeable consequences, particularly given the 2010 long-term renewals of the SAs and development of the ORP. OLG was misleading at best, dishonest at worst during the consultations. These were representations by omission to standardbred breeders. In view of the "meaningful" consultation standard to which OLG held itself, these representations were negligent.

143. That OLG had settled on decoupling as of 2010 has implications for representations made by Ontario and its agents about SARP from that time forward. Ontario, the principal of both OLG and ORC, knew what its agents were doing and saying about SARP.

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[128] *Queen v. Cognos Inc.*, 1993 CarswellOnt 801 (S.C.C.), paras. 56, 76; *Al-Omani v. Bird*, 2016 ONSC 5779 (Ont. Div. Ct.), paras. 39-40; *Moin v. Blue Mountains (Town)*, 2000 CarswellOnt 2892 (Ont. C.A.), para. 28 **(PBOA, Tabs 23, 24, 25).**

144. Throughout the fall of 2010 and into 2011, Ontario through the ORC continued positive messaging to the horse racing industry. This included the rollout of the ORP and the continued presentation of financial projections of SARP-funded HIP revenues for breeders, including an October 24, 2011 Financial Plan projecting the availability of SARP revenue for HIP out to 2016. These representations were misleading or false when made, and careless given the "decoupling" that OLG was going to – and did – suggest as part of the SBR.

E. Harm Caused by the Breach of the Duty of Care

145. There is no doubt that the "go to $0" decision caused standardbred breeders to suffer serious harm. Seelster Farms' average yearling prices of $30,000 dropped to around $14,000 for 2012-14. It sold off 25 broodmares at a loss, a 100-acre parcel of land to raise capital, it suffered a dramatic drop in revenue from its horse boarding operation that never recovered to 2011 levels, and it lost 'stud fee' revenue from cancellations of booking of stallions standing at the farm. Although Seelster Farms survived, other plaintiffs did not.

Ontario and OLG Liable in Contract and in Equity

146. The LOI, as amended in 2000, is an enforceable agreement. It expresses a "general agreement with the horse racing industry" and states that OHRIA, a signatory, is "representing all segments of the Ontario horse racing industry." This includes standardbred breeders who are parties to the LOI.[129] The LOI must be construed sensibly in its "factual matrix", which includes the context and the market.[130] The evidence is that SARP was intended to incentivize breeding.

147. Letters of intent are enforceable if essential terms of the agreement are certain. That a letter of intent anticipates the execution of further agreements does not defeat its enforceability.[131] The

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[129] In the alternative, breeders are third party beneficiaries of the LOI. Breeders acted within the scope of the LOI by providing services at the encouragement of Ontario and OLG – *i.e.*, a steady stream of high quality standardbred horses – that were necessary to achieve one of the stated aims of the LOI: the "promot[ion of] live horse racing in the Province". Breeders ought to be entitled to enforce the benefits of the LOI: see *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, 1999 CarswellBC 1927 (S.C.C.), paras. 28-29, 32; *Brown v. Belleville (City)*, 2013 ONCA 148, paras. 100, 110-111 **(PBOA, Tabs 26, 27).**

[130] *Kentucky Fried Chicken Canada v. Scotts Food Services Inc.*, 1998 CanLII 4427 (Ont. C.A.), paras. 25-27 **(PBOA, Tab 28).**

[131] *Atlas Corp. v. Emmerson Group Ltd.*, 2011 ONSC 8304 (Ont. Div. Ct.), para. 29-43 **(PBOA, Tab 29).**

LOI does not state that it is non-binding. The parties used "the language of contract" reflecting an intention to be bound.[132] The amendment by Addendum, after many SAs were in place, confirms the parties intended the LOI to be binding and distinct from the SAs.

148. The LOI has the essential "terms and conditions" for the installation of slot machines in tracks. It says racetracks and horsepeople will receive compensation of "20% of the total gross slot machine revenues at racetracks across the province". Compensation of "industry revenue" in the nature of a "siteholder commission will be shared" between a track and its respective horsepeople "on a 50/50 basis." Ontario and OHRIA agreed to "work in cooperation with [OLG] in ensuring that program benefits are maximized to the horse racing industry."

149. The subsequent SAs must be interpreted having regard to the LOI. The Court of Appeal has made it clear that inter-linked agreements are to be construed as a "composite whole".[133]

150. The LOI was negotiated with the *industry* – including breeders. The commission is identified as "*industry revenue*" and "industry revenue" was to be reinvested in breeding. The SAs did not amend the LOI. "Respective Horsepeople", defined in part in the SAs to include "those who are entitled to receive the [SARP funds] from the Prescribed Lottery Scheme pursuant to the LOI…" must, on the evidence, be understood to include breeders.

151. The LOI does not contain a termination provision. This Court should imply a provision of termination on reasonable notice having regard to all the circumstances.[134] Given the known 5-year breeding cycle, Ontario and OLG's sustained promotion of SARP and encouragement of breeders to breed, and the publicized 5-year renewal of SAs in 2010, 5 years' notice is reasonable.

152. Ontario and OLG never terminated the LOI. Instead, they unilaterally terminated all of the SAs and asserted that they "effectively" ended SARP. But the defendants maintained slot machines

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[132] *Wallace v. Allen*, 2009 ONCA 36, paras. 27-30 **(PBOA, Tab 30).**
[133] *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, para. 16 **(PBOA, Tab 31).**
[134] *1397868 Ontario Ltd. v. Nordic Gaming Corp.*, 2010 ONCA 101, paras. 13, 24, 26-27 **(PBOA, Tab 32).**

at racetracks and, in breach of the LOI, they did not pay 20% of the total gross slot machine revenues to the horse racing industry. The defendants are liable to the plaintiffs for this breach.

153. Parties must cooperate to achieve a contract's objectives. It is a breach to act in a way that "eviscerates the very purpose and objective of the agreement".[135] In *Bhasin*, the Supreme Court emphasized the duty of good faith in contractual performance, articulating a "minimum standard of honesty" in performing a contract "as a reassurance that if the contract does not work out, [parties] will have a fair opportunity to protect their interests".[136]

154. Ontario and OLG unilaterally withdrew their cooperation in maximizing SARP benefits for the industry under the LOI. They misled breeders in the consultation process and dishonestly characterized the underpinning of the agreement as a 'subsidy'. They undertook a campaign that eviscerated the LOI's benefits. A contracting party must have "appropriate regard" for its counterparty's "legitimate contractual interests", not undermine those interests in bad faith.

155. Alternatively, the defendants are liable for the loss in value of the plaintiffs' committed contributions to SARP that were impaired in value after March 12, 2012. Restitution on a *quantum meruit* basis is fair when services "were furnished at the request, or with the encouragement or acquiescence, of the opposing party in circumstances that render it unjust for the opposing party to retain the benefit conferred by the provision of the services."[137]

156. In conclusion, the defences of proximity and core policy fail as a matter of evidence. These plaintiffs, who did nothing but what was asked of them, have suffered real harm, have endured the unjustified characterization of their hard work as a government 'subsidy' and retaliation for

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[135] *CivicLife.com Inc. v. Canada (Attorney General)*, 2006 CarswellOnt 3769 (Ont. C.A.), para. 24; *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, 1978 CarswellAlta 62 (S.C.C.), para. 25; *Nareerux Import Co. v. Canadian Imperial Bank of Commerce*, 2009 ONCA 764, para. 69; *Transamerica Life Canada Inc. v. ING Canada Inc.*, 2003 CarswellOnt 4834 (Ont. C.A.), para. 53 **(PBOA, Tabs 33, 34, 35, 36).**

[136] *Bhasin v. Hrynew*, 2014 SCC 71, para. 86 **(PBOA, Tab 37).**

[137] *Prolink Broker Network Inc. v. Jaitley*, 2013 ONSC 4497, paras. 56-59; *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc.*, 2007 ONCA 324, para. 99 **(PBOA, Tabs 38, 39).**

seeking an adjudication of their rights. They ask this Court to permit them to begin the next phase of their effort to receive the compensation they deserve and which they alone have been denied.

PART IV – ORDER REQUESTED

157. The plaintiffs request an order dismissing the defendants' motions for summary judgment and granting the plaintiffs' cross-motion for judgment, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of August, 2018.

Jonathan C. Lisus
Ian C. Matthews
Vivien E. Milat

SCHEDULE "A"
LIST OF AUTHORITIES

1. *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42
2. *Cooper v. Hobart*, 2001 SCC 79
3. *Taylor v. Canada (Attorney General)*, 2012 ONCA 479
4. *Williams v. Toronto (City)*, 2016 ONCA 666
5. *Ryan v. Victoria (City)*, 1999 CarswellBC 79 (S.C.C.)
6. *Rausch v. Pickering (City)*, 2013 ONCA 74
7. *Grand River Enterprises Six Nations Ltd. v. Attorney General*, 2017 ONCA 526
8. *Paradis Honey Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2015 FCA 89
9. *Apotex v. R.*, 2014 FC 1087 (rev'd on other grounds)
10. *Granitile Inc. v. Canada*, 1998 CarswellOnt 4689 (Ont. Gen. Div.) (set aside on other grounds)
11. *Just v. British Columbia*, 1989 CarswellBC 234 (S.C.C.)
12. *Childs v. Desormeaux*, 2006 SCC 18
13. Peter Hogg and Patrick Monahan, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011)
14. Peter Hogg and Patrick Monahan, *Liability of the Crown*, 3rd ed (Toronto: Carswell, 2000)
15. *Entreprises Sibeca inc. c. Frelighsburg (Municipalité)*, 2004 SCC 61
16. *McCullock Finney c. Barreau (Québec)*, 2004 SCC 36
17. *Grosvenor v. East Luther Grand Valley (Township)*, 2007 ONCA 55
18. *Suresh v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1
19. *Nielsen v. Kamloops (City)*, 1984 CarswellBC 476 (S.C.C.)
20. *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41
21. *Wu v. Vancouver (City)*, 2017 BCSC 2072
22. *Rausch v. The Corporation of the City of Pickering*, 2017 ONSC 2634
23. *Queen v. Cognos Inc.*, 1993 CarswellOnt 801 (S.C.C.)
24. *Al-Omani v. Bird*, 2016 ONSC 5779 (Ont. Div. Ct.)
25. *Moin v. Blue Mountains (Town)*, 2000 CarswellOnt 2892 (Ont. C.A.)
26. *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, 1999 CarswellBC 1927 (S.C.C.)
27. *Brown v. Belleville (City)*, 2013 ONCA 148

28. *Kentucky Fried Chicken Canada v. Scotts Food Services Inc.*, 1998 CanLII 4427 (Ont. C.A.) paras. 25-27
29. *Atlas Corp. v. Emmerson Group Ltd.*, 2011 ONSC 8304 (Ont. Div. Ct.)
30. *Wallace v. Allen*, 2009 ONCA 36
31. *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673
32. *1397868 Ontario Ltd. v. Nordic Gaming Corp.*, 2010 ONCA 101
33. *CivicLife.com Inc. v. Canada (Attorney General)*, 2006 CarswellOnt 3769 (Ont. C.A.)
34. *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, 1978 CarswellAlta 62 (S.C.C.)
35. *Nareerux Import Co. v. Canadian Imperial Bank of Commerce*, 2009 ONCA 764
36. *Transamerica Life Canada Inc. v. ING Canada Inc.*, 2003 CarswellOnt 4834 (Ont. C.A.)
37. *Bhasin v. Hrynew*, 2014 SCC 71
38. *Prolink Broker Network Inc. v. Jaitley*, 2013 ONSC 4497
39. *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc.*, 2007 ONCA 324

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY – LAWS

***Ontario Lottery and Gaming Corporation Act, 1999*, S.O. 1999, c. 12 (as at March 2012)**

Objects of the Corporation

3.The following are the objects of the Corporation:

1. To develop, undertake, organize, conduct and manage lottery schemes on behalf of Her Majesty in right of Ontario.
2. To provide for the operation of gaming premises.
3. To ensure that gaming premises are operated and managed in accordance with this Act and the *Gaming Control Act, 1992* and the regulations made under the Acts.
4. To provide for the operation of any business that the Corporation considers to be reasonably related to operating a gaming premises, including any business that offers goods and services to persons who play games of chance in a gaming premises.
5. If authorized by the Lieutenant Governor in Council, to enter into agreements to develop, undertake, organize, conduct and manage lottery schemes on behalf of, or in conjunction with, the government of one or more provinces of Canada.
6. To do such other things as the Lieutenant Governor in Council may by order direct.

[…]

Payments from certain revenue

14. (1) The Corporation shall make the following payments out of the revenue that it receives from lottery tickets, charity casinos and slot machine facilities:

1. Payment of prizes.
2. Payment of the operating expenses of the Corporation.
3. Payments made under agreements approved by the Minister of Finance for the distribution by the Corporation of the proceeds of lottery schemes for the support of activities and programs for the benefit of the people of Ontario.
4. Payments required to be made by the Corporation under an agreement relating to the distribution of a portion of the Corporation's revenues to First Nations of Ontario that is,
   i. entered into by the Province of Ontario and representatives of First Nations of Ontario, and
   ii. approved by the Lieutenant Governor in Council on the recommendation of the Minister and the Minister of Finance.

Payments from net revenue

(2) After making the payments required by subsection (1), the Corporation shall pay the remaining revenue from lottery tickets, charity casinos and slot machine facilities into the

Consolidated Revenue Fund at such times and in such manner as the Minister of Finance may direct, to be available for appropriation by the Legislature,

(a) for the promotion and development of physical fitness, sports, recreational and cultural activities and facilities therefor;

(b) for the activities of the Ontario Trillium Foundation;

(c) for the protection of the environment;

(d) for the provision of health care, including the operation of hospitals and the provision of programs for problem gambling;

(e) for the activities and objectives of charitable organizations and non-profit corporations; and

(f) for the funding of community activities and programs.

Unappropriated amounts

(3) The net profits of the Corporation paid into the Consolidated Revenue Fund in a fiscal year of Ontario under subsection (2) and not appropriated in that fiscal year for one or more of the purposes set out in that subsection shall be applied to the operation of hospitals, and shall be accounted for in the Public Accounts of Ontario as part of the money appropriated by the Legislature in the fiscal year for the operation of hospitals.

***Racing Commission Act, 2000*, S.O. 2000, c. 20 (as at March 2012)**

Objects

5. The objects of the Commission are to govern, direct, control and regulate horse racing in Ontario in any or all of its forms.

***Financial Administration Act*, R.S.O. 1990, c. F.12 (as at Mar. 2012)**

Definitions

1. (1) In this Act,

"appropriation" means an authority to pay money out of the Consolidated Revenue Fund or to recognize a non-cash expense or a non-cash investment; ("affectation de crédits")

"Consolidated Revenue Fund" means the aggregate of all public money that is on deposit at the credit of the Minister of Finance or in the name of any agency of the Crown approved by the Lieutenant Governor in Council; ("Trésor")

[…]

"money paid to Ontario for a special purpose" includes money that is paid to a public officer under or pursuant to a statute, trust, undertaking, agreement or contract and that is to be

disbursed for a purpose specified in or pursuant to such statute, trust, undertaking, agreement or contract; (“somme d’argent versée à l’Ontario à des fins particulières”)

[…]

“public money” means money that is determined under subsection (3), (4) or (5) to be public money; (“deniers publics”)

“public officer” includes a minister and a person employed in a ministry or public entity; (“agent public”)

[…]

Public money

1(3) Money is public money if it belongs to Ontario and is received or collected by the Minister of Finance or by any other public officer or by any person authorized to receive and collect such money.

Same

(4) Without limiting the generality of subsection (3), public money includes,

(a) special funds of Ontario and the income and revenue therefrom;

(b) revenues of Ontario; and

(c) money raised by way of loan by Ontario or received by Ontario through the issue and sale of securities.

Same, paid for a special purpose

(5) Money is also public money if it is paid to Ontario for a special purpose, unless another Act provides otherwise.

[…]

PART I
PUBLIC MONEY

[…]

Public money to be credited to Minister of Finance

2. (1) Subject to this Part, all public money shall be deposited to the credit of the Minister of Finance.

[…]

Duty of person collecting public money

(3) Every person who collects or receives public money shall pay all money coming into the person’s hands to the credit of the Minister of Finance through such officers, banks or persons and in such manner as the Minister of Finance may direct, and shall keep a record of receipts and deposits thereof in such form and manner as the Minister of Finance may direct.

Exception

(4) Despite subsection (3), the Minister of Finance, on any conditions he or she considers appropriate, may in writing authorize a person who receives or collects public money to retain out of such public money all or any part of any amount owed by the Crown in right of Ontario to the person and payable from the Consolidated Revenue Fund.

Same

(5) An amount properly retained pursuant to an authorization under subsection (4) shall be deemed to have been received by and paid from the Consolidated Revenue Fund in respect of the person to whom the authorization under subsection (4) was given.

***Requirements for Establishing a Casino or Charity Casino*, O. Reg. 347/00 (as at Mar. 2012)**

DESIGNATION OF ELIGIBLE MUNICIPALITIES AND ELIGIBLE RESERVES

4. (1) The Corporation shall designate municipalities and reserves that are eligible to be considered as possible locations for the establishment of a casino or charity casino.

(2) The Corporation shall make its designations of eligibility based upon the Corporation's economic analysis of the market potential for additional casinos or charity casinos in Ontario.

(3) The Corporation shall notify the applicable council of the Corporation's designation of an eligible municipality or eligible reserve and shall publish notice of all designations in *The Ontario Gazette*.

(4) The designations apply for the period beginning on July 1, 2000 and ending on March 31, 2003.

(5) No designation shall be made under this section after March 31, 2003.

PRESCRIBED CONDITIONS

5. (1) The Corporation shall not authorize the establishment of a casino or a charity casino, as the case may be, in an eligible municipality or on an eligible reserve unless the following conditions are met:

1. The council of the municipality or the council of the band submits the authorized referendum question specified in section 10 to the electors or members of the band in accordance with section 9.
2. A majority of electors or members of the band who vote on the referendum question cast their ballots in favour of the proposal described in the referendum question.
3. Within 60 days after the vote on the referendum question or within such longer period as the Corporation may permit, the council notifies the Corporation that it wishes to establish a casino or charity casino.

(2) The Corporation shall not authorize the establishment of a casino or a charity casino in an eligible municipality or on an eligible reserve unless, within 60 days after the vote on the referendum question or within such longer period as the Corporation may permit, the council agrees to the revenue sharing plan proposed by the Corporation for the revenues generated by the proposed casino or charity casino.

6. (1) The Corporation shall not authorize the establishment of a casino or charity casino in an eligible municipality or on an eligible reserve unless, in the opinion of the Corporation, the municipality or reserve is a suitable location for a casino or charity casino.

(2) The Corporation shall consider the following factors and may consider such other factors as it considers appropriate when determining whether a municipality or a reserve is a suitable location for a casino or charity casino:

1. The cost of establishing the proposed casino or charity casino.

2. The viability of the proposed casino or charity casino.

(3) Before deciding whether a municipality or a reserve is a suitable location for a casino or charity casino, the Corporation shall give the Chair of Management Board such information as he or she may request and shall inquire whether, in his or her opinion, the municipality or reserve is a suitable location for a casino or charity casino.

(4) The Corporation shall consider the opinion of the Chair of Management Board of Cabinet in deciding whether a municipality or reserve is a suitable location for a casino or charity casino.

7. (1) The site of the casino or charity casino within the eligible municipality or eligible reserve must be approved by the Corporation.

(2) The Corporation shall not give its approval for the site of the casino or charity casino unless, within 60 days after the vote on the referendum question or within such longer period as the Corporation may permit, the council agrees that it will initiate any necessary rezoning of the site.

SCHEDULE "C"
CAST OF CHARACTERS

- Karim **Bardeesy** – Director of Policy for Premier McGuinty and subsequently for Premier Wynne from December 2011 – June 2014. Rule 39.03 witness.
- Elmer **Buchanan** – Member of the Horse Racing Industry Transition Panel in 2012 – 2013. Former NDP Minister of Agriculture in Ontario. Appointed Chair of the Ontario Racing Commission in October 2013.
- Jim **Bullock** – Associated with Plaintiff Glengate Holdings Inc. Director of the Standardbred Breeders of Ontario Association from 2000 – 2011 and its President from 2004 – 2010. Rule 39.02 affiant for the Plaintiffs.
- Josh **Cogan** – Communications Advisor in the Ministry of Finance from October 2008 – September 2012. Rule 39.03 witness.
- Anna **DeMarchi (Meyers)** – Associated with Plaintiff Emerald Ridge Farm. Director of the Standardbred Breeders of Ontario Association since 2003 and its President from 2010 – 2013. Rule 39.02 affiant for the Plaintiffs.
- Don **Drummond** –Lead author of a 2012 report known as the Drummond Report. Rule 39.03 witness.
- Dwight **Duncan** – Ontario Minister of Finance from October 2005 – May 2006 and 2008 – February 13, 2013. Rule 39.03 witness.
- Larry **Flynn** – OLG's Senior Vice President of Gaming from April 2004 – March 2015. Rule 39.02 affiant for OLG.
- Barry **Goodwin** –Assistant Deputy Minister (ADM) in the Ontario Ministry of Finance in late 2011 and 2012.
- David **Gene** – Senior political advisor to Premier McGuinty in late 2011 and 2012.
- Paul **Godfrey** – Chair of OLG from February 18, 2010 – May 16, 2013.
- Chris **Hodgson** – Chair of the Management Board of Cabinet in 1998. Signed the Letter of Intent in 1998.
- Michael **Keegan** – Chief of Staff to Agriculture Minister Ted McMeekin from November 2011 – February 14, 2013 and Agriculture Minister Kathleen Wynne from February 14, 2013 – February 2014. Rule 39.03 witness.
- Claire **MacDougall Sadava** – OLG's Senior Manager of Government and Stakeholder Relations beginning in mid-March 2011 and subsequently became OLG's Director of Strategy and Standards. Rule 39.03 witness.

- Dalton **McGuinty** – Leader of the Ontario Liberal party from December 1, 1996 – January 23, 2013. Premier of Ontario from 2003 – January 2013. Leader of the Opposition from 1996 – 2003. Rule 39.03 witness.

- Ted **McMeekin** – Liberal MPP from September 2002 until June 2018. Minister of Agriculture from October 2011 – February 2013. Mayor of Flamborough from 1994 – 2000. Rule 39.03 witness.

- Darcy **McNeill** – Director of Communications for Minister of Finance Dwight Duncan from 2008 – February 2013. Rule 39.03 witness.

- Tammy **McNiven** – Associated with Plaintiff Twinbrook Ltd. Director of the Standardbred Breeders of Ontario Association since 1997 and its President from 2004 – 2006. Rule 39.02 affiant for the Plaintiffs.

- Bill **O'Donnell** – President of the Central Ontario Standardbred Association from 2009 onwards. Rule 39.02 affiant for the Plaintiffs.

- Steve **Orsini** – Deputy Minister of Finance and Secretary of the Treasury Board from December 2011 – July 2014. Rule 39.03 witness.

- Walter **Parkinson** – Associated with Plaintiff Seelster Farms Inc. Director of the Standardbred Breeders of Ontario Association since 2006 and its President since 2013. Rule 39.02 affiant for the Plaintiffs.

- Rod **Phillips** – CEO of OLG from June 10, 2011 – January 22, 2014. Rule 39.03 witness.

- Harry **Rutherford** – a Plaintiff. Signed the Letter of Intent in 1998 as the representative of standardbred breeders on the Ontario Horse Racing Industry Association board.

- Rod **Seiling** – Chair of the Ontario Racing Commission from 2006 and October 2013. Rule 39.03 witness.

- Tim **Shortill** – Chief of Staff for Finance Minister Dwight Duncan from January 2010 – February 2013. Rule 39.03 witness.

- John **Snobelen** – PC MPP from 1995 – 2002 and a Cabinet minister (Education 1995-97; Natural Resources 1997-2002). Member of the Horse Racing Industry Transition Panel in 2012 – 2013. Advisor to the Ontario Racing Commission in late 2013 and 2014. Rule 39.03 witness.

- Blair **Stransky** – Senior Policy Advisor in the Minister of Finance's office from 2010 – 2013. Rule 39.03 witness.

- Tanya **Watkins** – Acting manager of Finance's Gaming Policy Branch in 2011 and into 2012. Rule 39.03 witness; ultimately did not testify.

- John **Wilkinson** – Liberal MPP from 2003 – October 2011. Member of the Horse Racing Industry Transition Panel in 2012 – 2013. Rule 39.03 witness.

- David **Willmot** – Former Chairman, President and CEO of Woodbine Entertainment Group (President and CEO 1995 – 2010; Chairman from 2001 – August 1, 2012). Ontario Horse Racing Industry Association board member from 1995 – 2010. Rule 39.02 affiant for the Plaintiffs.

- Kathleen **Wynne** – Head of the Ontario Liberal party and Premier of Ontario from February 2013 – June 2018. Also Minister of Agriculture and Food from February 2013 – June 2014. Rule 39.03 witness.

- Elizabeth **Yeigh** – Senior manager of Finance's Gaming Policy Branch from October 2009 – October 2011, then Director of the Gaming Policy Branch from October 2011 – September 2016. Rule 39.02 affiant for Ontario.

SEELSTER FARMS INC. et al.
Plaintiffs

-and-

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO et al.
Defendants

Court File No. 272/14

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
GUELPH

FACTUM OF THE PLAINTIFFS

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