Court File No. 177/14

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., ROBERT HAMATHER, JAMES CARR, GUY POLILLO, DAVID GOODROW, TIMPANO GAMING INC., CRAIG TURNER, ROBERT MCINTOSH STABLES INC., 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., DOUGLAS MURRAY MCCONNELL, QUINTET FARMS INC., KARIN BURGESS, BLAIR BURGESS, ST. LAD'S LTD., WINDSUN FARM INC., SKYHAVEN FARMS and HIGH STAKES INC.

Plaintiffs

- and -

ONTARIO LOTTERY AND GAMING CORPORATION

Defendant

REPLY

1. The Plaintiffs admit the allegations contained in the first and second sentences of paragraph 4, paragraphs 5, 6, 14, 25, the first sentence of paragraph 26, paragraphs 34, 42, the fact that the words quoted in paragraph 44 were in the 2012 Ontario budget, paragraphs 45 and 56 of the Statement of Defence.

2. The Plaintiffs deny the remainder of the allegations in the Statement of Defence.

3. For ease of reference, capitalized terms used herein have the same meaning as in the Statement of Claim.

Auditor General for Ontario Confirms Cancellation of SARP Wrongful

4. On April 28, 2014, the Auditor General for the Province of Ontario, following an extensive investigation into OLG's cancellation of the revenue-sharing aspect of SARP and its Modernization Plan, released a special report entitled "Ontario Lottery and Gaming Corporation's Modernization Plan" (the "AG Report").

5. The AG Report is based upon interviews with key OLG staff and Ministry of Finance senior staff and a review of OLG and Ontario documents, Cabinet submissions, and a meeting with OLG's internal auditors.

6. OLG and Ontario were given an opportunity to respond to the AG Report and did not deny any of the conclusions in the AG Report referred to in this Reply.

The Standardbred Breeders Had a Relationship of Proximity with OLG

7. Contrary to paragraphs 47-53 of the Statement of Defence, the Standardbred Breeders had a relationship of proximity with OLG. The AG Report confirms, among other things, that:

(a) "OLG and the government were fully aware that the decision to cancel the program would have a significant impact on the horse-racing industry in Ontario […] This would mean fewer race dates, less breeding, less employment and fewer economic benefits to the agricultural industry."

(b) Ontario and OLG were "fully aware" that the decision to cancel the SARP "would have a significant negative impact on the horse-racing industry."

(c) "[T]he impact has been especially significant for horse people. Horse people initially lost 53% of their total funding when they lost their share of slots revenue."

(d) "Rural communities where horse people (horse owners, trainers and breeders) live and work have been negatively impacted. This is especially true of communities where horse people involved in standardbred and quarter-horse racing live and work."

(e) "Hose people, particularly those involved in standardbred and quarter-horse racing, were hit hardest by the Slots at Racetracks Program's cancellation."

8. Contrary to paragraphs 58, 65-67 and elsewhere in the Statement of Defence, it was understood and agreed that Ontario and OLG would communicate with the Standardbred Breeders through the ORC, horse racing industry associations and by other means detailed in the Statement of Claim. OLG knew and intended that representations made through these channels would reach the Standardbred Breeders.

9. Even if the establishment of the SARP in 1998 and the representations made by OLG to the Standardbred Breeders over the years did not create a relationship of proximity between OLG, Ontario and the Standardbred Breeders, which is denied, the Standardbred Breeders plead that proximity was created with OLG through OLG's consultations with Standardbred Breeders and horse-racing industry associations as part of OLG's strategic review beginning in 2010.

Termination of SARP Revenue-Sharing Not a Core Policy Decision

10. Contrary to paragraphs 37, 47 and 75 of the Statement of Defence, the manner in which OLG and Ontario decided to terminate SARP revenue-sharing was not a core public policy decision. SARP was a commercial arrangement, the cancellation of which to pursue

OLG's commercial self-interest does not engage any legitimate policy exception or immunity.

11. Even if matters of policy may be engaged by the cancellation of slots revenue sharing, which is denied, the cancellation itself was purely an operational implementation of a policy decision and is therefore actionable.

12. In addition, and in the alternative, if the manner in which the SARP revenue-sharing partnership was cancelled is a matter of government policy, such policy decision was taken in bad faith and is irrational.

13. The AG Report confirms that:

(a) The province and OLG did not "properly consult or consult various industries, businesses and municipalities impacted by the cancellation of the Slots at Racetracks Program."

(b) "The decision to terminate the Slots at Racetracks Program can hardly be considered to have been open and transparent."

(c) "OLG employees confirmed" that "at no time" during the consultations it held with standardbred breeders and others "was cancelling the program discussed."

(d) "Stakeholders conveyed to [the Auditor General's office] that at no time was cancelling the Slots at Racetracks Program discussed at these meetings. We were advised by stakeholder groups that, rather, the focus of these consultations was on improvements to gaming at racetracks, new accountability measures for program funding and the importance of the program for the continued success of the industry."

(e) "OLG was not transparent about the importance of a GTA-based casino to its Modernization Plan and about the impact Modernization was expected to have on total jobs in each affected municipality. For instance, OLG's claim in March 2012 that 2,300 net new jobs would be created did not publicly disclose that this depended on a GTA casino creating 3,300 new jobs while 1,000 gaming industry jobs would be lost in the rest of the province. […] OLG also did not factor into its assessment of employment impacts the Ministry of Finance's projection of a loss of 3,500 to 5,800 jobs in the horse-racing industry as a result of the cancellation of the Slots at Racetracks Program."

(f) "OLG was not transparent with the public about the importance of a new GTA casino to its job projections."

(g) "OLG's job projections did not include the non-gaming horse-racing industry job losses expected from the decision to end the Slots at Racetracks Program."

14. The Standardbred Breeders plead that the aforementioned excerpts from the AG Report, which are not denied by OLG, are indicative of bad faith and/or irrationality by the OLG and/or negligence in the operationalization of a policy decision.

15. The Standardbred Breeders further plead that the decision to terminate SARP revenue-sharing before Cabinet was fully briefed on the ramifications of OLG's Modernization plan also demonstrates bad faith. In a video posted to www.youtube.com entitled "Minister of Agriculture 8-16-12," Ontario's former Minister of Agriculture, Ted McMeekin, admitted on or about August 16, 2012 that "We, like you, learned about this decision [to cancel SARP revenue-sharing] when it was made."

16. The AG Report also confirms that OLG's Modernization Plan – the basis on which the decision to terminate the SARP revenue-sharing partnership was made – was based on outcomes, estimates and assumptions that were not achievable and/or based on fundamentally flawed data. Consequently, the basis for the OLG recommendation and/or decision to terminate SARP revenue-sharing was irrational. For example, the AG Report confirms that:

(a) Ontario and OLG "did not do enough preparation and planning before launching an ambitious, 'best-case scenario' Modernization Plan for Ontario's gaming industry."

(b) "OLG made commitments and projections that it could not deliver on time and as envisioned."

(c) The Modernization Plan "[d]epended on and [a]ssumed [m]unicipal [s]takeholder [a]greement, [e]specially in the [c]ase of [h]aving a [c]asino in the Greater Toronto Area."

(d) The Modernization Plan "depended heavily on the location of gaming facilities in several large municipalities."

(e) "[M]ore consultation with municipalities was needed to assess the practicalities of getting municipal approval for OLG plans."

(f) "[P]rior to the release of the Modernization Plan, neither the province nor OLG formally consulted municipalities to ascertain whether they would accept new or relocated casinos in their communities […] We would have expected OLG and the province to have held more extensive consultations and conducted more due diligence before finalizing the Modernization Plan and making it official."

(g) "Although [a significant amount of the net profits envisioned in the Modernization Plan] required that municipal councils approve gaming facility locations, there were no prior communications or formal consultations with municipalities by OLG or any ministry regarding potential new or relocated casinos."

(h) "OLG underestimated its rent payments [to racetracks], settlement costs and the impact of delays in when property taxes will be paid."

(i) "[R]ent rates negotiated in 2012 and 2013 are almost three times more than OLG projected; add to this OLG revising its plans to keep slots at racetracks that were originally to be relocated."

SARP was a Revenue-Sharing Partnership, Not a Subsidy

17. Contrary to the allegations at paragraphs 24, 28, 29, 48, 78 and 92 of OLG's Statement of Defence, the revenue-sharing arrangement was a partnership not a "subsidy." Prior to the announcement of the cancellation of the revenue-sharing arrangement on March 12, 2012, with knowledge of the harm that would ensue, OLG never referred to the SARP as a "subsidy." In all of its official documentation including its annual reports and financial statements, OLG correctly identified SARP revenue-sharing as an important

revenue stream to incentivize continued investment in Ontario's agricultural economy. OLG's after-the-fact characterization of the partnership as a subsidy, for the purpose of these proceedings, is made in bad faith and to disparage the Standardbred Breeders.

18. Even after the March 12, 2012 announcement, OLG President and Chief Executive Rod Phillips described SARP as a revenue-sharing program, responding to a question by John Tory on the Global News program "Focus Ontario" on March 16, 2012 as follows:

> John Tory: Let's start with the horse racing business. I'm mean, they're saying you're putting the horse racing business out of business by withdrawing a deal that was revenue-sharing – other people say it's a subsidy – what's going on here?
>
> Rod Phillips: You know, the government announced this week that the program that has shared revenue between the slots and the racetracks or, the uh, the uh, owners, will be terminated March 31 of 2013 . . .

19. Ontario, which negotiated the SARP revenue-sharing partnership with the horse racing industry in 1998 and for whom OLG acts as an agent at all material times, admits that SARP was a revenue-sharing partnership in its Statement of Defence in the companion action, bearing Court File No. 272/14.

20. Ontario's representatives have confirmed that the SARP revenue-sharing partnership is not a subsidy. John Snobelen, head of Ontario Live Racing (a newly-formed operational division of the ORC), a member of the Horse Racing Industry Transition Panel appointed by Premier Wynne following the cancellation of SARP revenue-sharing, and who was a Cabinet Minister at the time the SARP was established, publicly reminded Ontario and OLG on March 3, 2012 that the SARP was not a subsidy.

21. In a March 3, 2012 column entitled "Ontario Liberals are the sultans of spin" published in the Toronto Sun, Mr. Snobelen wrote:

> When Liberals enter the spin zone the results can be breathtaking. They are unencumbered by truth and oblivious to any objective other than managing the story.
>
> Check out the transcript of a Liberal radio ad that aired last week;
>
> > "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 payout 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."
>
> Brilliant! In the first line the Liberals invent a "secret subsidy."
>
> In truth, **the revenue-sharing agreement** isn't secret. Finance Minister Dwight Duncan has included details of the contract in every one of his budgets.
>
> And **it isn't a subsidy. Unless you consider rent to be paying a subsidy**.
>
> But truth is not a constraint for the Liberal spin-doctors.

22. The Standardbred Breeders therefore categorically deny OLG's assertion in paragraph 20 of OLG's Statement of Defence that "SARP was never a 'revenue-sharing partnership' with the Standardbred Breeders or with anyone else."

The Slots at Racetracks Program is Different than Site Holder Agreements

23. The SARP is not a series of Site Holder agreements, as OLG suggests between paragraphs 19-24, 37-45 and elsewhere in its Statement of Defence. The Site Holder agreements were one of the mechanisms by which SARP and sharing slots revenue was

implemented and a means by which Ontario and OLG were able to place their slot machines at racetracks across the province.

24. Ontario and OLG's announcement on or about March 12, 2012 that they were terminating the Site Holder agreements did not terminate the SARP. Rather, Ontario and OLG unilaterally changed the program by eliminating revenue-sharing but retained most of its slot machines at the racetracks. The Slots at Racetrack Program still exists. Ontario and OLG are simply keeping the revenue it generates for themselves.

25. The former Chair of OLG, Paul Godfrey, admitted on March 14, 2012 that the change to the SARP had to do with the removal of revenue-sharing, telling a news conference he held with Finance Minister Dwight Duncan that the "slots program has been cancelled with respect to the financial – situation is concerned. That doesn't mean the slots will come out of all racetracks."

SARP Incentivized Breeding and Compensated for Access to Customers at Tracks

26. The Standardbred Breeders expressly deny OLG's assertion in paragraph 27 of the Statement of Defence that the use of Site Holder agreements to implement certain aspects of SARP caused standardbred racing to experience an "unexpected, unplanned, and ultimately unsustainable expansion." To the contrary, the Letter of Intent that outlined the SARP confirmed that the program was intended to "promote live horse racing in the Province and subsequently benefit the agricultural sector in Ontario through support to the horse racing industry."

27. OLG consistently confirmed that slots revenues were incentivizing standardbred racing and breeding activities. OLG's Annual Reports between at least 2007-2008 and 2010-2011 indicate that SARP revenue was a "major economic stimulus for the overall agricultural industry in Ontario."

OLG and Ontario Not Immunized by the *OLGC Act*

28. Contrary to any suggestion in paragraph 8 of the Statement of Defence, nothing in section 8 of the *OLGC Act* immunizes OLG from liability in this action, or immunizes Ontario from liability in the companion action, bearing Court File No. 272/14.

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