

**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, 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

Defendant

REPLY

1. The Plaintiffs admit the allegations contained in paragraphs 4, the first, second and third sentences of paragraph 6, the accuracy of the words quoted from the Letter of Intent in paragraph 13, the first sentence and third sentences of paragraph 19 and the accuracy of the words quoted from the Addendum to the Letter of Intent, paragraph 21, the first and second sentences of paragraph 23 and the first and second sentences of paragraph 32 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 the cancellation of the revenue-sharing aspect of SARP and the OLG's 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 senior staff at Ontario's Ministry of Finance, key OLG staff, a review of Ontario and OLG documents, Cabinet submissions and a meeting with OLG's internal auditors.
6. Ontario and OLG 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 Ontario

7. Contrary to paragraph 42 of the Statement of Defence, the Standardbred Breeders had a special relationship of proximity with Ontario. 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. Even if the establishment of the SARP in 1998 and the representations made by Ontario to the Standardbred Breeders over the years did not create a special relationship of proximity between Ontario and the Standardbred Breeders, which is denied, the Standardbred Breeders plead that proximity was created with Ontario through the representations made by Ontario’s agent, OLG, during OLG’s consultations with Standardbred Breeders and horse-racing industry associations as part of its strategic review beginning in 2010.

Termination of SARP Revenue-Sharing Not a Core Policy Decision

9. Contrary to paragraphs 8, 9, 34, 42 and 49 of the Statement of Defence, the manner in which Ontario and OLG decided to terminate SARP revenue-sharing was not a core public policy decision. SARP was a commercial arrangement, the cancellation of which was instituted to enable OLG to pursue its commercial self-interest, and which does not engage any legitimate policy exception or immunity.

10. 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.

11. 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.

12. 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.”

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

14. 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. For example:

- (a) 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."
- (b) In a video uploaded to www.youtube.com on or about December 17, 2012 entitled "Interview with Premier Kathleen Wynne," the Premier admitted that:
 - (i) "The decision [to cancel SARP revenue-sharing], the initial decision that was made, I will be the first to say, was not made with enough thoughtfulness ... there wasn't enough background, people didn't have enough information."
 - (ii) "In the initial decision, there was no thought about the whole industry, and by that I mean the supply chain ... you know, every – every aspect of the industry."

15. Moreover, contrary to Ontario's assertion in paragraph 38 that it has acted honestly and good faith and all times, Ontario has retaliated against the Standardbred Breeders for commencing this action by withholding enhancements to the Horse Improvement Program ("HIP") for all standardbred breeders across the Province. Specifically:

- (a) On March 11, 2014, after Ontario had received notice that the Standardbred Breeders were contemplating a claim, the ORC – acting at the direction of Ontario – announced enhancements to the HIP for thoroughbreds and quarter-horses of \$12 million and \$6 million, respectively. No mention whatsoever was made of HIP enhancements for standardbreds.

- (b) On March 12, 2014, John Snobelen, a representative of the ORC acting at the direction of Ontario, gave an interview to the magazine *Trot Insider*. In that interview, the ORC representative explained that **the refusal to provide enhancements to the HIP for standardbreds was related to the fact that certain breeders – the Standardbred Breeders – had sued the OLG for damages in relation to the manner in which the slots revenue-sharing partnership was cancelled.**
- (c) On March 21, 2014, the Standardbred Breeders wrote to the Premier of Ontario and members of her government, asking for the appointment of a mediator to resolve the issues faced by the Standardbred Breeders without having to go to court. A response was requested by April 3, 2014.
- (d) On April 4, 2014, the Premier of Ontario wrote to the Standardbred Breeders. The Premier refused to comment on matters “related to the litigation” – even though the Standardbred Breeders had not yet commenced a claim against Ontario – but did state that **the HIP “includes an enhanced breeders program that is available for all racing breeds – Standardbred, Thoroughbred and Quarter-Horse.”**
- (e) On April 14, 2014, Walter Parkinson, one of the Standardbred Breeders, wrote to the ORC’s representative to ask for clarification regarding whether Premier Wynne’s statement that there was an “enhanced breeders program that is available for all racing breeds” was correct, or whether it was actually the intention of Ontario to withhold any enhancements to the HIP for all standardbreds because the Standardbred Breeders had asked for an adjudication of their rights related to the manner in which the SARP was cancelled.
- (f) On April 15, 2014, the Standardbred Breeders issued this claim against Ontario. That same day, the ORC’s representative, acting at the direction of Ontario, emailed Walter Parkinson acknowledging receipt of his letter of April 14, but declined to comment because “the matters you refer to are now before the courts.”
- (g) On April 21, 2014, Walter Parkinson replied to the ORC representative’s message, indicating that he was not asking for comment on the lawsuit, but just to clarify the inconsistency between the ORC representative’s statement to *Trot Insider* and the Premier’s statement regarding enhancements to the HIP for standardbred breeders.
- (h) On April 24, 2014, the ORC representative replied to Mr. Parkinson and again refused to comment.
- (i) Meanwhile, on April 23, 2014, counsel for the Standardbred Breeders wrote to counsel to Ontario to ask for clarification regarding the inconsistent statements of Premier Wynne and the ORC’s representative.
- (j) On April 30, 2014, counsel for Ontario replied to the letter of April 23, 2014, stating that “[w]ith respect to your request for clarification regarding the availability of purse enhancements to Standardbred breeders, these issues do not form part of the litigation and, accordingly, we cannot assist with this inquiry.”

16. Ontario's deliberate act in directing that enhancements to the HIP for all standardbred breeders in Ontario, including the Plaintiffs, be withheld is an additional act of bad faith. It demonstrates intentional retaliatory conduct that is directly tied to the Standardbred Breeders' lawsuit.

17. 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 Ontario's direction to OLG to discontinue 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

18. Contrary to the excerpts from the Sadinsky and Drummond Reports quoted at paragraphs 28 and 34 of the Statement of Defence, the SARP revenue-sharing arrangement was a partnership, not a subsidy. At paragraph 1 of its Statement of Defence, Ontario admits the “first sentence of paragraph 54 [of the Statement of Claim] except that this arrangement was not a contractual partnership.” The first sentence of paragraph 54 of the Statement of Claim reads: “The result of these discussions was the establishment of a **revenue-sharing partnership** called the Slots at Racetracks Program (“SARP”).”

19. 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.

20. 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.

The Slots at Racetracks Program is Different than Site Holder Agreements

21. The SARP is not a series of Site Holder agreements, as Ontario’s Statement of Defence could be read to suggest at paragraphs 15-18, 29, 31, 36, 41, 43, 49 and elsewhere. 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.

22. 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 retaining 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.

23. 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.”

Godfrey was acting in his capacity as agent of Ontario when he made this statement.

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Plaintiffs

-and- HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
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Court File No. 272/14

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REPLY

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