

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

**SEELSTER FARMS INC., WINBAK FARM OF CANADA, INC.,
STONEBRIDGE FARM, 774440 ONTARIO INC., NORTHFIELDS FARMS 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

STATEMENT OF DEFENCE

1. The Defendant Her Majesty the Queen in right of Ontario (Crown or Ontario), admits the allegations contained in paragraphs 41, last sentence of paragraph 42, last sentence of paragraph 43, first sentence of paragraph 44, first sentence of paragraph 46, paragraph 50, and the first sentence of paragraph 54 except that this arrangement was not a contractual partnership, paragraph 63, 74, first

sentence of paragraph 101, paragraph 106 except for last sentence, the fact that the email was sent on the date set out in paragraph 116, paragraphs 123-125, paragraph 130 except that SARP was cancelled, the words quoted in paragraph 158 are admitted, 159, 161, the words quoted in paragraph 163 are admitted, the words quoted in 164 are admitted, the words quoted in 165 are admitted, the words quoted in 166 are admitted, and paragraph 170 of the Statement of Claim.

2. The Crown specifically denies the allegations contained in *inter alia* paragraphs 1, first sentence of paragraph 42, first sentence of paragraph 43, 45, 47, 48, 49, 52, 53, last sentence of paragraph 54, 55, 56, 57, 58-62, 64, 66, 67, 68-73, 75-92, 99-100, 101, 102-105, 106 last sentence, 107-114, 115, 117, 118, 119, 120, 122, 126, 127, 128, 129, 131-139, 140, 141, 147, 150-156, 157, 162, 167, 168, and paragraph 169 of the Statement of Claim.

3. The Crown has no knowledge or insufficient knowledge to permit it to plead to the allegations in paragraphs 2-40, 46, 51, 65, 93-98, 121, 142, 143-145, 146, 148, 149, and 160, of the Statement of Claim.

FACTS

Crown Defendant

4. The *Ontario Lottery and Gaming Corporation Act, 1999*, S.O. 1999, ch. 12 (*OLGC Act*) establishes the Ontario Lottery and Gaming Corporation (OLGC) as a without share capital Crown corporation and Crown agent for the purpose of, among other things, conducting and managing lotteries, enhancing economic development and generating revenues for the Province, and promoting responsible gaming. As such, the OLGC had responsibility for managing the slot facilities at racetracks and the

Slots at Racetrack Program (SARP). The OLGC's predecessor entity was the Ontario Lottery Corporation.

5. Save for the paragraphs herein relating to the OLGC, the Crown adopts and incorporates herein the facts and defences in relation to OLGC as they are pleaded in the Statement of Defence of the Ontario Lottery and Gaming Corporation in Court File # 177/14, a companion action commenced by the same Plaintiffs.

6. The Ontario Racing Commission (ORC) is a without share capital corporation and Crown agent established under the *Racing Commission Act, 2000*, S.O., 2000, c.20. This legislation provides that the ORC has the statutory authority to govern, direct, control and regulate horse racing in the Province of Ontario. The ORC is required to exercise its powers and perform its duties in the public interest and in accordance with the principles of honesty and integrity, and social responsibility. The integrity and fairness of horse racing is maintained through the ORC's regulatory functions. These functions are in place to protect the public.

7. Pursuant to orders in council under the *Executive Council Act*, R.S.O. 1990, ch. E.25, the Minister of Finance was responsible for the administration of the *Racing Commission Act, 2000*, and the *OLGC Act* from July 2009 to July 2012. The Minister of Agriculture and Food is currently responsible for the administration of the *Racing Commission Act, 2000*. The Minister of Finance remains responsible for the administration of the *OLGC Act*.

POLICY/FISCAL DECISION MAKING

8. The Crown's decisions relating to the implementation and subsequent termination of the Slots at Racetrack Program (SARP) were part of a larger economic plan. The implementation of SARP was intended, *inter alia*, to provide financial assistance to the horse racing industry and its various stakeholders.

9. The decisions made in relation to the implementation and termination of the Slots at Racetrack Program were core policy and fiscal decisions made in the public interest and made at the Ministerial and Cabinet levels of government and are, accordingly, immune from suit.

1996 Ontario Budget

10. The 1996 Ontario Provincial Budget put forward a number of initiatives to promote Ontario's economic growth. Part of this economic plan was to install video lottery terminals ("VLTs") at race tracks and permanent charity event sites. The potential for expanding the VLT network was great as expansion to the hospitality industry within liquor-licensed establishments was expected.

11. The 1996 Budget went on to state that "The recession and the expansion of legalized gaming activities in recent years have adversely affected Ontario's horse racing industry which is one of the largest in North America. The introduction of VLTs at race tracks will attract patrons and generate revenues for the industry". The intention was to provide economic support and stimulus to the horse racing industry which was in decline. The decision to provide economic stimulus at that time was not a commitment to standardbred breeders but rather was in the best interests of the public.

12. In addition, the 1996 Budget announced a reduction of the provincial tax on pari-mutuel wagering from 7.4% to 0.5%. The Minister of Consumer and Business Services, the ORC, and the Ontario Horse Racing Industry Association, entered into a Memorandum of Understanding effective September 30, 1996 to implement the “Business Plan to Support the Reduction in Pari-Mutuel Taxes : Ontario Horse Racing Industry Association, June 10, 1996”. This Business Plan set out the framework for the reduction of the monies collected as tax on pari-mutuel wagering. The reduction, and effective elimination, in the provincial tax on pari-mutuel wagers resulted in Ontario’s racing industry receiving support from the additional revenue of approximately \$50-70 million annually since 1997; this tax reduction continues to date. A portion of these revenues were allocated to, in part, the “Horse Improvement Program” (HIP). The HIP program has been administered and overseen by the ORC except when it was administered by the Ontario Horse Racing Industry Association (OHRIA) from 1996-2005. The HIP allocated revenues to such incentives as stakes races and breeders rewards as well as to equine research.

Slots at Racetracks Program

Letter of Intent

13. The implementation of the Slots at Racetracks Program began with the execution by the Crown, on June 25, 1998 of a Letter of Intent. This Letter of Intent states:

The Ontario Government, as originally announced in the 1996 Budget, will be introducing slot machines into Ontario Racetracks in order to promote live horse racing in the Province and subsequently benefit the agricultural sector in Ontario through support to the horseracing industry. ...

...This letter of intent, which defines the general agreement with the horse racing industry, does not commit individual racetracks or the Ontario Government through the Ontario Lottery Corporation to enter into contracts. Such participation is subject to individual racetrack’s contractual agreement with the OLC through a siteholder agreement and compliance with Government regulations including those made under the *Gaming Control Act*.

14. The Letter of Intent was signed by the Ontario Horse Racing Industry Association (OHRIA), its Board members, and The Honourable Chris Hodgson, Chair of Management Board of Cabinet. The Plaintiffs did not sign this Letter of Intent.

Site Holder Agreements

15. The Site Holder Agreements are between the OLGC and the individual racetracks. These Agreements permit the site holder (i.e. the individual race tracks) to participate in the Slots at Racetracks Program, and prescribe the manner in which the slots at racetrack gaming are to be delivered and how the monies generated are to be paid. The Plaintiffs are not party to the Site Holder Agreements.

16. Article 20.5 of the Site Holder Agreement provides that the Agreement is the entire agreement and supersedes all prior agreements and understandings, oral or written, between the parties or their representatives with respect to the matters in the Agreement and shall not be modified or amended except in writing.

17. The Site Holder Agreements allow for termination of the Agreement. Pursuant to Article 4.6 Site Holder Agreements are for a term of 5 years unless earlier terminated by Article 18. Pursuant to Article 4.7 there is an automatic renewal for one additional 5-year period unless the Agreement is terminated by the OLGC as prescribed. Pursuant to Article 4.8 a second extension term of 5 years may be automatically renewed, unless the Agreement is terminated by OLGC as prescribed.

18. Pursuant to Article 18.3, the OLGC in its own discretion may at any time terminate the Site Holder Agreement upon providing the Site Holder with written notice of termination, which notice is

effective immediately if it is given prior to the 'opening date'. If notice is given on or after the 'opening date', it is generally effective on the day which is 270 days following the date on which notice is given.

Addendum to Letter of Intent

19. An Addendum to the Letter of Intent was executed in 2000 by the OHRIA, The Honourable Chris Hodgson, as Chair of Management Board of Cabinet as well as the OLG. The Plaintiffs did not sign this Addendum. The Addendum provides that no further zoning assistance will be provided by Ontario to racetracks and no further Site Holder Agreements for slot machine facilities at racetracks will be entered into between the Province and racetracks, with limited exceptions:

... the Province wants to proceed cautiously and responsibly with the implementation of its gaming initiatives in order to assess the impact of all gaming, accordingly, the Parties agree that after March 31, 2000, and until a business case developed by the Ontario Lottery and Gaming Corporation (OLGC) and approved by the Province indicates that the Ontario gaming market has stabilized.

20. Further, at paragraph VI, the Addendum provides that the OLG obligations in respect to a specific site (under the Site Holder Agreements) will not be extended beyond the term of the Site Holder Agreement.

21. The executed Addendum was sent to the Ontario Horse Racing Industry Association with a covering letter, dated June 19, 2000, from The Honourable Chris Hodgson, Minister and Chair of the Management Board of Cabinet. This covering letter to one of the signatories of the Letter of Intent and Addendum, stated:

“... The horseracing industry has been requesting a provincial gaming strategy to deal with the changing marketplace and this is part of the government's response to provide stability over the next few years.”

Changes to the Slots at Racetrack Program

22. The Crown continued to consider the policy and financial implications of the Slots at Racetracks Program within the overall issue of gaming modernization, including horse racing, in the Province.

23. In January 2003, an Addendum to the 1996 Memorandum of Understanding in relation to the reduction in pari-mutuel taxes was signed. This Addendum provided that a certain small percentage of revenue from slot machines were to be applied to the Horse Improvement Program. The Plaintiffs did not sign this Addendum.

24. On July 5 2007, the former Minister of Government and Consumer Services, retained a Strategic Planning Panel to carry out research, policy and analysis, in order to develop a direction for the Ontario Horse Racing and Breeding Industry. This Panel was comprised of Stanley Sadinsky, Jane Stewart, and William McDonnell. The Panel produced the 2008 Sadinsky Report, "IT'S ALL ABOUT LEADERSHIP: Strategic Vision and Direction for the Ontario Horse Racing and Breeding Industry".

25. The 2008 Sadinsky Report explained the limited success of the Slots at Racetrack Program. It identified that the government had been financially supporting the horse racing and breeding industry by virtually eliminating the tax on pari-mutuel wagering and by introducing the Slots at Racetrack Program. Although it recommended the continuation of the Slots at Racetrack Program, it recommended fundamental changes to the program and indeed referenced it as the "New Slots Program" as well as the creation of a new body called Horse Racing Ontario to, among other things, provide needed oversight of the industry and to develop a strategic plan for industry sustainability. The Report stated:

"...the ability of HRO's new Board to come together and work in the best interests of the industry as a whole is perhaps the single most important element for the future success of

the horse racing and breeding industry in Ontario.” (emphasis in original)

26. The Sadinsky Report outlines the reason for the decline of the horse racing industry as follows:

The days of the horse racing monopoly have long gone. The days of failing to respond adequately to or consider the needs of customers are long past and will never return. What was a ‘supply’ based attitude in some sectors of the industry must change to a ‘demand’ based approach in all of its sectors. The horse racing product must become attractive to the betting consumer; otherwise, the industry is unlikely to survive. Customers will vote with their dollars and unless the industry can find ways to attract those dollars to its core racing product, it will be out of business.

This Report is designed to develop a strategic vision and direction that will assist the industry in developing the details of a Strategic Plan for the industry to follow in order to put it on the right path toward economic success and long-term viability. In order to forge the appropriate path forward, hard decisions will have to be made. There may be casualties along the way. This is inevitable given that the industry has a lot of catching-up to do.

27. The Sadinsky Report concluded, *inter alia*, that despite the injection of monies by the Slots at Racetrack Program, growth in the horse racing industry was not significant, the impact on breeders was found to be minimal in relation to the price of yearlings and only a few racetracks were holding or increasing wagering interest in an Ontario racing product. Further, there had been no benchmarks implemented to measure what progress, if any, was being made to strengthen the industry. The Report contained a recommended framework for the implementation of benchmarks as a key component to monitor the progress of the New Slots program.

28. At page 36 the Report stated:

A new framework for economic success for the horse racing and breeding industry must focus on finding ways of encouraging the wagering public to bet on horse races. In order to accomplish this objective, it will often be necessary for industry stakeholders to make decisions that will put the overall welfare of the industry first and their own self-interest

second. This is especially important when considering how public funds that are flowing to the industry should be allocated.

...First, it must never be forgotten that the core product that the industry has to offer to the public is the horse race that attracts wagering. If the wagering public is unwilling to wager on horse races, the industry is not sustainable. Of course, government can subsidize the industry if it considers that there are policy reasons to do so. In the case of the horse racing and breeding industry, the objective of supporting the agricultural sector of the economy is a sound reason that supports subsidization. However, subsidization may take alternative forms and is rarely a sound policy for the long term. Accordingly, the industry must concentrate on garnering public support for its core product. (emphasis in original)

29. In discussing why improvements were not made at certain racetracks, the Report states that:

There were no guarantees that the Program would continue in its original form or at all beyond the ten-year period, thereby ensuring that new owners would be able to retire any debt that might have been incurred as a result of the purchase.

30. The Sadinsky Panel received written submissions from an identified list of stakeholders and also identified the various stakeholders with whom it met when undertaking its considerations and preparing its report. These stakeholders included a number of the entities who signed the Letter of Intent in 1998 and many others who had not been a signatory to the Letter of Intent, such as the Standardbred Breeders Association of Ontario and the Standardbred Horse Owner's Panel.

31. As a result of the foregoing, the Standardbred breeders and everyone else in the industry were aware, at least by 2008, that the continuation of the Slots at Racetrack Program was not guaranteed funding on a long-term basis.

32. In 2010, the OLGC was directed by the Crown to conduct a strategic business review to find ways to modernize gaming in the Province. As part of their efforts, the OLGC requested that race-track

operators account for the slot revenue they had received since 1998. The responses gave no clear indication whether or how the funding had been used to improve the Ontario horse-racing industry.

Economic Downturn and Deficit

33. Ontario experienced a \$14 billion deficit in 2010-2011 which was the equivalent to 2.3 per cent of gross domestic product (GDP), the largest deficit relative to GDP of any province. Net debt came to \$214.5 billion, 35 per cent of GDP. The 2011 Ontario Budget set 2017-2018 as the target year to eliminate the deficit in order to encourage and foster the overall economic well-being of the Province. In order to achieve this overall economic security, the Crown assembled the Commission on the Reform of Ontario's Public Services (the "Drummond Report") and requested an exhaustive analysis of the Ontario's spending and costs as well as recommendations on how to achieve this goal.

34. In the said report, dated February 15, 2012, funding to the horse racing industry was again reviewed, this time in the context of this broad, overall economic policy decision-making. In particular, the Drummond Report states: "Action must begin very soon. The deficit is expected to be \$16 billion this year. By 2017-18, it will almost double – and the debt will climb to more than half of gross domestic product – if the status quo is left in place. Decisive, firm and early action is required to get off this slippery and ultimately destructive slope." In relation to the horse racing industry, the Drummond Report provided the following analysis and recommendation:

The horse racing industry is another area where subsidies to racetracks and horse people require a review and adjustment to realign with present-day economic and fiscal realities. Ontario has more racetracks than any other jurisdiction in the U.S. or Canada...Over the past 12 years, approximately \$4 billion has flowed through 17 racetracks to support purses...

Recommendation 11-11: Review and rationalize the current provincial financial support provided to the horse racing industry so that the industry is more appropriately sustained by the wagering revenues it generates rather than through subsidies or their preferential treatments.

And the Drummond Report also provided:

...

- The Slots at Racetracks Initiative, which allows slot machines to be co-located at racetrack facilities only, earmarks a share of revenues generated from slots for racetrack owners and horse breeders. This amounted to \$334 million in 2009–10. Municipalities that play host to a racetrack also receive a share — five per cent of proceeds from the first 450 slot machines at the facility and two per cent for each machine over that. This totalled \$78 million in 2009–10,

...

Recommendation 17-4: Re-evaluate, on a value-for-money basis, the practice of providing a portion of net slot revenues to the horse racing and breeding industry and municipalities in order to substantially reduce and better target that support.

2012 Budget

35. On March 27, 2012, Ontario's 2012 Budget Speech was presented in the Legislature. The Budget identified changes to be made to reduce Ontario's deficit and set as its goal the elimination of the deficit by 2017-2018. In this Budget, the following Executive decision is identified:

Based on OLG's strategic business review, the government has directed it to modernize its operations. In doing so, OLG will maximize its return to government by increasing its revenues, becoming more efficient, and broadening the role of the private sector in its operations and capital requirements. Proposals include:

reconfiguring the number and location of gaming sites and tailoring the type of gaming activities at those sites, the benefits of which will be enhanced by ending the Slots at Racetracks Program effective March 31, 2013;

...

Since 1998, \$3.7 billion has been provided to the horseracing industry in Ontario, including \$345 million in 2011–12. As part of OLG's modernization process, the government reviewed this support for the horseracing industry, as outlined in the previous government's 1998 letter of intent. In doing so, the government determined that the industry needs to move towards greater self-sufficiency without government support. This will allow the industry to respond competitively to market demands for its racing product.

The government remains committed to supporting horseracing through its reduction to the Province's pari-mutuel tax. This leaves wagering revenues with the industry for programming support.

36. The cancellation of the SARP was a decision made by Cabinet in February 2012, and was announced on March 27, 2012, effective March 31, 2013. On March 14, 2012 and March 29, 2012, OLGC provided formal written notices of termination to the industry for the cancellation of the Slots at Racetrack Program. In most cases, the Site Holders were provided with the required notices of termination which satisfied, or exceeded, the notice requirements under the Site Holder Agreements.

37. In order to provide assistance during the transition arising from the cancellation of SARP, the Crown has, through the Horse Racing Industry Transition Assistance Program (Order in Council 116/2013) and now the Horse Racing Partnership Funding Program (Order in Council 251/2014), committed to investing a significant amount of funding in the industry. HRPFP will invest up to \$500 million in the industry over a period of up to 5 years.

Liability

38. The Crown denies any and all allegations of liability and wrong-doing referred to in the Plaintiffs' claim. At all times the Crown acted in the public interest, honestly, in good faith, and in accordance with any and all applicable statutes.

39. The Crown denies that the Plaintiffs had any legal entitlement to any slot revenues. The exercise by the Crown of its discretion to allocate a certain proportion of the slot revenues to the horse racing industry, on an ex gratia basis, does not create legal obligations and the withdrawal of such funding by the Crown cannot form the basis of a cause of action.

40. The Crown denies that there was any contract, written or otherwise, between the Crown and the Plaintiffs – either directly or through associations allegedly representing the Plaintiffs. The Crown denies that there was any quasi-contractual relationship between the Plaintiffs and the Crown– either directly or through associations allegedly representing the Plaintiffs. The Crown denies that there was offer, acceptance or consideration which could form the basis for any contractual relationship between the Crown and the Plaintiffs.

41. The only contractual relationship involving the slot revenues was the Site Holder Agreement entered into between the Crown and race track owners. The Plaintiffs were not signatories to that Agreement and have no legal rights under the Agreement. In most cases, the Crown complied with or exceeded the notice requirements to terminate funding under the Site Holder Agreements.

42. The Crown denies that there was any negligence or negligent misrepresentation on its part. More specifically, the Crown denies that there was special relationship between the Plaintiffs and the Crown giving rise to a duty of care. Funding decisions on the part of the Crown involved core policy decisions and negated any *prima facie* duty of care, if such a duty existed. The Crown specifically denies that any policy decisions made by the Crown involving funding were either irrational or taken in bad faith, and puts the Plaintiffs to strict proof thereof.

43. Any representations made were true and did not misinform the Plaintiffs. The Crown specifically denies that there were any misrepresentations by commission or by omission. Further, the Crown denies that there was any legal duty to consult with the Plaintiffs on any issues with respect to the slot revenues, including the termination of funding under the Site Holder Agreements.

44. The Plaintiffs did not act to their detriment based on any representations of the Crown. In the alternative, any representations the Crown may have made did not have a real and substantial effect on the Plaintiffs, and any actions they may have taken to their detriment.

45. If the Plaintiffs suffered any losses, which the Crown denies, those losses resulted from something other than actions of the Crown.

46. The Crown denies that any of the statements referred to in the claim gave rise to a contractual or quasi contractual relation, to a duty of care or to any legal obligations to the Plaintiffs – including, but not limited to, any obligation to consult with the Plaintiffs regarding the termination of slot revenue funding.

47. The relationship between the Crown and the Plaintiffs did not give rise to any equitable rights or obligations.

48. The facts do not give rise to a legal wrong that grounds a cause of action or a claim for damages in waiver of tort, as against the Crown.

49. The Crown denies that the Plaintiffs gave anything to the Crown to enrich it, and denies that the Plaintiffs have suffered a corresponding deprivation. Moreover, there are juristic reasons for the Crown's alleged enrichment. The cancellation of SARP was a core policy decision made by Cabinet to reduce public funding for the horse racing industry. In addition, the termination provisions to the Site Holder Agreements were properly executed.

Damages

50. The Crown did not commit any act that caused damage to the Plaintiffs. In the alternative, the damages claimed by the Plaintiffs are excessive, speculative, and remote.

51. It is the Plaintiffs' failure to mitigate against their damages which is the cause of their losses, if any.

52. There is no basis for a punitive, aggravated and exemplary damage claim. At all times the Crown was acting in good faith.

53. The Crown requests that the action be dismissed, with costs on a substantial indemnity basis.

Date: May 15, 2014

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SEELSTER FARMS INC., et al. and
Plaintiffs

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
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PROCEEDING COMMENCED AT
GUELPH

STATEMENT OF DEFENCE

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