CITATION: Seelster Farms et al. v. Her Majesty the Queen and OLG, 2020 ONSC 4013
COURT FILE NO.: 272/14 (Guelph)
DATE: 2020 06 29

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, D10041NE 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, GUY POLILLO, DAVID GOODROW, TIMPANO GAMING INC., CRAIG TURNER, GLENGATE HOLDINGS INC., KENDAL HILLS STUD FARM LTD., ANY 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	*J. Lisus*, *I. Matthews*, *V. Milat* and *P. Underwood*, for the plaintiffs
- and –	
HER MAJESTY THE QUEEN IN RIGHT OF Ontario and Ontario LOTTERY AND GAMING CORPORATION	*R. Ratcliffe, L. La Horey,* and *M. Williams,* for the defendant Her Majesty The Queen in Right of Ontario *N. Finkelstein, M. Rosenberg, A. Sinha and J. Hand*, for the defendant Ontario Lottery and Gaming Corporation **HEARD:** September 10-14 and December 4,6,7, 2018; March 19,

2019 at Brampton, with written submissions that followed.

REASONS FOR JUDGMENT

Emery J.

[1] The several plaintiffs breed standardbred horses to maintain the supply of horses to race at 14 of the 17 race tracks in Ontario where standardbred horses' race. In this action, the plaintiffs advance the case that higher purses awarded to horses that achieve success at those racetracks enhance the value of the horses they are breeding. In their eyes, the profitability, if not the viability of their business to breed horses from conception to starting gate is determined by the law of economics.

[2] The defendant Her Majesty the Queen in Right of Ontario ("Ontario") is the provincial government that continues to govern all citizens in Ontario within its provincial jurisdiction, regardless of what party or group of persons hold office at any given time. Ontario acts through its legislative or executive branches, and by corporations incorporated or created by statute to carry out the will of the government.

[3] The defendant Ontario Lottery and Gaming Corporation ("OLG") is a Crown corporation. OLG is incorporated and governed by the *Ontario Lottery and Gaming Corporation Act* (the "*OLG Act*"). Pursuant to s. 2(3) of the *OLG Act*, OLG

is for all purposes an agent of the Ontario, and its powers may be exercised only as an agent of the Crown.

[4] Like other provinces, Ontario has increased its presence in operating gaming activities at racetracks and casinos over the years. Since 1996, Ontario has recognized that consumers who congregate at racetracks to bet on horse racing would likely be willing consumers to play slot machines (otherwise referred to as “slots”). In a minute passed by Cabinet in1998, Ontario introduced the Slots at Racetrack Program (“SARP”) to incentivise racetracks to permit slots on their premises by sharing revenues from those slots.

[5] The creation of SARP followed in the wake of negotiations between Ontario, horsepeople and associations representing parts of the horseracing industry. Ontario and industry associations signed a Letter of Intent dated June 25, 1998 (the “LOI”) to set out the terms for SARP and how it would work. OLG entered siteholder agreements with individual racetracks under the infrastructure established by the LOI for its implementation.

[6] SARP continued operating at Ontario racetracks and net profits from slots were distributed under the siteholder agreements without much fanfare until the winter of 2011/2012. On February 8, 2012, Cabinet directed OLG to give notice to terminate all siteholder agreements with racetracks, effectively ending SARP as of March 31, 2013.

[7] The plaintiffs as the breeders of standardbred horses do not contest the right of Ontario or OLG to terminate SARP through the non-renewal or cancellation of siteholder agreements. However, the plaintiffs claim that Ontario and OLG gave them insufficient notice of that cancellation because of their rolling investment to breed horses. They claim their level of investment was reliant on representations made by Ontario and OLG that SARP would continue over the long term for the benefit of the industry and the agricultural sector in Ontario. They say the decision to cancel SARP has caused them substantial damages because their economic expectations were calibrated on a five year breeding cycle for standardbred horses.

[8] The plaintiffs commenced this action on various causes of action that have been distilled down to breach of contract, negligence and negligent misrepresentation. Ontario and OLG have brought motions for summary judgment to dismiss the action in its entirety. The plaintiffs have brought a cross-motion seeking summary judgment for a finding of liability on one or more of those causes of action, and for directions on the assessment of damages.

[9] For the reasons that follow, the plaintiffs' motion for summary judgment is granted against Ontario for breach of contract. All claims made on other causes of action pleaded as against Ontario are dismissed as the plaintiffs are unable to

continue those claims at law under the *Crown Liability and Proceedings Act, 2019* (the "*CLPA*") that was proclaimed in force on July 1, 2019.

[10] As OLG did not have a contractual relationship with respect to SARP and as the *CLPA* applies to OLG as an agent of the Crown, the claims of the plaintiffs as against OLG in contract and in tort are dismissed.

Contextual facts

[11] The plaintiffs are all breeders of standardbred horses. Walter Parkinson of Seelster Farms Inc. has featured prominently as a plaintiff throughout this action. He is mentioned more than other plaintiffs in the evidence.

[12] Ontario is represented from time to time by the Premier, members of Cabinet, various ministries and Crown corporations. Many of those heads and arms of government in Ontario had prominent roles in the creation, operation and termination of SARP.

[13] OLG interacts with individuals in government as well as other entities involved with the gaming industry in Ontario to carry out its functions under the *OLG Act.*

Legal authority over gambling

[14] Gaming activities and betting on games of chance or games of mixed skills and chance are illegal in Canada, subject to two exceptions. Sections 201 and 202 of the *Criminal Code* do not apply to bets made through the agency of a pari-mutuel system on running, trotting or pacing horse races that comply with provincial law. In Ontario, this exception applies to betting on horses at licensed racetracks regulated by the Ontario Racing Commission (ORC).

[15] The conduct or management of any lottery scheme prohibited by section 206 is also legal under section 207 of the *Criminal Code* where the lottery scheme is operated in accordance with provincial legislation. OLG is authorized to operate lottery schemes under the *OLG Act*, and gaming activities operated by OLG are regulated by the Alcohol and Gaming Commission of Ontario (AGCO). Lottery schemes include the location and operation of slot machines under section 207(4)(c).

Introduction of SARP

[16] The following facts are drawn from the evidence of the parties as a composite summary on which the plaintiffs have brought their action, and the parties have brought their motions. These facts are set out for the purpose of providing context for deciding the issues in dispute.

[17] Horseracing enjoyed something of a near monopoly on legalized gaming in the province for many years. However, there is considerable evidence that the horseracing industry was in serious decline by 1996 as other legalized gambling opportunities opened up. As a result, Ontario made a policy decision to stimulate the horseracing industry through a number of initiatives put forward in the 1996 provincial budget. These initiatives were designed to promote Ontario's economic growth, as well as to include assistance to a faltering horseracing industry. One of those proposed initiatives was to locate video lottery terminals and slots at Ontario racetracks to attract more consumers, and to generate revenue that stakeholders would share.

[18] The Ontario government also announced the reduction of the provincial tax on pari-mutuel wagering from 7.4% to 0.5% in the 1996 budget. According to Ontario, this reduction allowed the horseracing industry to retain an extra $50 million to $70 million in annual revenues starting in 1997, a portion of which were allocated to the Horse Improvement Program (HIP). HIP was a breeding incentive program administered by the ORC. HIP allocated those extra revenues to provide incentives for the holding of such things as stake races, breeder awards and equine research.

[19] This decision to provide further economic stimulus to the horseracing industry through the sharing of revenue generated by video lottery terminals and

slots at racetracks, as well as the reduction of the pari-mutuel tax, was intended to support the entire horseracing industry and the agricultural sector generally. It was not a commitment made to standardbred breeders alone.

[20] OLG recognized that racetracks provided an established customer base and the infrastructure to expand it's business by locating video lottery terminals, and later slots at Ontario racetracks. The horseracing industry saw it another way. If OLG was permitted to expand its gaming business by locating video terminals and slots at Ontario racetracks, it would essentially compete with pari-mutuel betting at those racetracks for the same consumer revenue.

[21] Between 1996 and 1998, Ontario and OLG negotiated with the Ontario Horse Racing Industry Association (OHRIA) to reach an agreement that would allow video terminals or slot machines into Ontario racetracks without "cannibalizing" the purchasing power of the gaming public. OHRIA was the association representing the industry during those negotiations, including the interests of standardbred breeders. Mr. David Willmot was the lead negotiator for OHRIA.

[22] Ontario at first proposed paying a 10% commission through OLG for the right to locate slot machines on the private property of racetracks. To prevent the risk of cannibalization, the horseracing industry was intent on obtaining a "revenue neutral" deal. The horseracing industry and Ontario ultimately agreed upon a

maximum 20% share of the gross proceeds obtained from slots at Ontario racetracks to compensate for the take out of funds from wagering on horse races. This formula was based on the theory that one dollar played at a slot machine would be equal to one dollar wagered on a horse race.

[23] The agreement between Ontario and various stakeholders in the horseracing industry, including OHRIA, was set out in the LOI. Under the LOI, OLG would enter siteholder agreements with interested racetracks at which it would have the right to locate and operate slot machines. The racetrack would receive 20% of the net proceeds generated by the slot machines at that racetrack as a siteholder commission. The LOI provided that the siteholder commission would be shared between the racetrack and its respective horsepeople on a 50/50 basis. This was the genesis of the slots at racetrack program, or “SARP”.

[24] Mr. Chris Hodgson, Chair of Management Board of Cabinet at the time, signed the LOI on behalf of Ontario. The LOI was signed on behalf of OHRIA and other stakeholders in the horseracing industry. OLG was not a party to the LOI, nor were any of the personal or corporate plaintiffs.

[25] By March 2000, OLG had entered standard form siteholder agreements to locate slot machines at 12 racetracks. The siteholder agreement with each racetrack contained a termination clause that required either party to give not less than six months notice.

[26] In June 2000, Ontario OLG and OHRIA amended the LOI to direct the payment of a portion of those revenues from slots directly to the HIP "to ensure SARP revenue was directed, to an even greater extent, to breeders". HIP included the standardbred improvement program ("SIP") that provided incentives to the breeding of standardbred horses. None of the plaintiffs signed this addendum.

[27] In the years that followed, the horseracing industry, including standardbred breeders, owners and racetracks all benefited from four sources of revenue: pari-mutuel betting on horses racing at those tracks, the sharing of siteholder commissions received by racetracks under SARP, the percentage of revenue from slots directed to HIP, and additional revenues resulting from the decrease in the provincial tax on pari-mutuel wagering.

Horse racing as an industry revisited

[28] There is conflicting evidence that SARP stimulated the horseracing industry and improved the breeding of standardbred horses to increase the value of yearlings and other progeny. However, it is universally accepted that slot machines at racetracks were embraced by the consumer public, and that SARP was a great success. Through siteholder agreements, the horseracing industry received a percentage of slot revenues that enriched the horseracing industry to a greater extent than Ontario had anticipated.

[29] In 2007, Ontario commissioned a panel to conduct the necessary research and analysis to develop a policy for the horseracing and the breeding industry. This panel, chaired by Professor Stanley Sadinsky, produced the report, "ITS ALL ABOUT LEADERSHIP: Strategic Vision and Direction for the Ontario Horse Racing and Breeding Industry" (the "Sadinsky report") in 2008.

[30] Professor Sadinsky met with a variety of parties and considered written submissions from a number of stakeholders as part of his mandate. The resulting Sadinsky report observed that while Ontario had been financially supporting the industry through SARP and tax reduction, the horseracing industry continued its decline because of the industry's failure to modernize. It concluded that, despite the injection of monies through SARP, the growth to the horseracing industry had not been significant, and the benefit to breeders had been found to be minimal in relation to the price of yearlings.

[31] The report further observed that the industry was unlikely to survive without change.

[32] Although the Sadinsky report recommended the continuation of SARP, it also recommended fundamental changes because of SARP's limited success with stimulating horseracing as an industry. The Sadinsky report provided a number of options. One of OLG's options at the time was to terminate all of the siteholder

agreements at the same time by providing twelve months notice pursuant to the standard provision contained in each agreement.

[33] Ontario and OLG state that the plaintiffs knew or ought to have known from reading the Sadinsky report that there was a real possibility SARP could be cancelled. Ontario and OLG also state that the Sadinsky report was a message to standardbred breeders and to others in the horseracing industry that a new framework was required to make the horseracing industry sustainable.

[34] To the contrary, the plaintiffs submit that Ontario and OLG communicated a long-term commitment to sharing revenue under SARP up to the point of termination. Specific assurances were given to standardbred breeders, including the following:

- [SARP] insures the continued viability of the horse racing industry through improved facilities, increase 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 Race Tracks program;

- [SARP] has been a success for all parties, including the horse racing and breeding industry, local host municipalities and the people of Ontario.

[35] Mr. Parkinson included many of these assurances he received from the defendants in his affidavit.

[36] Standardbred breeders claim they were encouraged by these assurances to make long term decisions to increase the quality and the number of horses to supply the horseracing industry. These assurances were complimented by publications from the ORC.

[37] Rod Seiling, then Chair of the ORC, was examined extensively on the messaging of the ORC to breeders after the release of the Sadinsky report. This messaging was sent through newsletters, HIP financial statements and projections, notices to industry, and publications posted on its website. In that messaging, the ORC committed to "work to do all we can to ensure that the maximum return [from SARP] goes back to the industry; not just race tracks, but horse people and the breeding industry, because we recognize the chain that feeds the whole agricultural community."

[38] The ORC further recognized the need for a "phased implementation and long-term plan 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" in its publications. ORC also recognized

that the SIP "includes a five-year industry consultation and planning cycle" to "create a stabilized environment for business decision-making by Program participants".

[39] There is evidence before the court that the plaintiffs would not have made long-term investments in their breeding operations without these assurances. The submissions made by the plaintiffs in paragraph 28 of their factum describe how breeding is connected to the increased value of purses:

> 28. Breeding has always been directly tied to the value of horses. Government documents confirm a core purpose of SARP was enhancement of purses to incentives breeding. To implement that purpose, the SAs (site holder agreements) impressed horse people'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 trust monies in them as the "motor" for breeding growth.

[40] In 2009, certain siteholder agreements were about to expire, and OLG was renewing those siteholder agreements with race tracks for six months. This caused concern within the horseracing industry, as the extension for only six months was inconsistent with the long-term nature of the breeding cycle.

[41] Jim Bullock, a standardbred breeder, chaired a committee struck by OHRIA to address this concern. Mr. Bullock met with Dwight Duncan, the Minister of Finance on July 20, 2009 at which time Minister Duncan assured Mr. Bullock he understood breeders' need for long-term commitment and stability and that the short-term renewals of the siteholder agreements would be addressed. Mr.

Bullock advised standardbred breeders of Minister Duncan's assurance in this regard.

[42] In July 2010 all siteholder agreements were renewed for five years or longer. The plaintiffs submit that Ontario and OLG documents confirm that they are aware the renewal would bring confidence and stability to the industry.

[43] After a year long consultation process with the industry participants including standardbred breeders, the ORC produced a race date model called the Ontario Racing Program ("ORP"). The ORC told stakeholders that the ORP "confirms the commitment to the sport of live horse racing in Ontario". The Ministry of Finance ("Finance") noted that the ORP would "guide the future of the industry in Ontario" in various Ministry documents identified by Mr. Seiling and by Blair Stransky, then Senior Policy Advisor in Minister Duncan's office. Mr. Seiling gave evidence that the ORP was designed to give breeders confidence to continue making investments in their horses and farms.

[44] Around this time, Ontario directed OLG to conduct a strategic business review ("SBR") of its operations. OLG was to explore "ways to decouple" programs involving OLG's business/operational decisions in the course of the SBR. The plaintiffs state this direction contradicted the commitment made by Ontario in the LOI to "work in cooperation … to ensure that SARP benefits are maximized to the horseracing industry".

[45] By March 2011, OLG had reached the conclusion that locating casinos in the Greater Toronto Area and other urban areas was an obvious opportunity. From June 2011 forward, OLG considered ways to "break the grid lock that currently locks OLG in the slots at race tracks". Ontario characterized the SBR as a review of OLG business and operations to explore ways of modernizing gaming in the province. OLG reported on it's SBR in a Modernization Report that was delivered to Finance in the spring of 2011.

[46] In the late summer of 2011, Finance signed a Memorandum of Understanding (the "MOU") with the ORC. In the MOU, Finance recognized the mandate of the ORC to provide economic oversight for the horseracing industry, and to "set out a policy framework to encourage value for the government's investment and support the sport of horseracing and the sustainability of the industry in the long run."

[47] The mandate of the ORC under the MOU included working collaboratively with stakeholders such as OLG as well as with horse people, racetrack operators and industry associations. Under the MOU, the Minister responsible for the administration of the *Racing Commission Act*, in this case the Minister of Finance, would inform and consult with the Chair of the ORC, at the time Mr. Seiling, on the governments priorities and broad policy directions for the ORC, as appropriate.

[48] The MOU was signed by Mr. Seiling on July 7, 2011 and by Minister Duncan on August 10, 2011. The MOU provided in paragraph 4.3 that it would remain in effect for five years from the date it was signed by both parties, or until replaced by a new MOU.

[49] Around the same time, Ontario was in the process of considering ways to restructure government programs to increase revenues and maximize opportunities for economic growth after the economic recession of 2008/2009. Ontario had incurred a $14 billion deficit in 2010-2011, bringing the provinces net debt to $214.5 billion. The growing debt posed an enormous challenge to Ontario because deficits require tax dollars to pay for interest on debt instead of having those funds available for other purposes. Ontario was also concerned that credit agencies would downgrade its credit rating, leading to increased costs for government borrowing.

[50] As a result, Ontario established a commission on the reform of Ontario's public service chaired by Donald Drummond. This commission was tasked with advising Ontario on how it could make long-term, fundamental changes to the delivery of government services in order to eliminate this deficit by 2017-2018. The mandate included reviewing programs that were no longer serving the purposes for which they were initially intended, and which could be redesigned for greater efficiencies, or eliminated entirely.

[51] The commission delivered a report (that has come to be known as the "Drummond Report") in February 2012. The Drummond Report discussed funding to the horseracing industry in the context of broad, overall economic policy decision-making. It identified that Ontario has more racetracks than any other jurisdiction in the United States or Canada. The commission also observed that over the preceding twelve years, approximately $4 billion dollars had flowed through 17 racetracks to support purses, racetrack capital improvement and operating costs.

[52] The commission also discussed SARP in the Drummond Report. It identified that the slots at racetrack initiative, which allows slot machines to be "co-located" at racetracks only, earmarks a share of revenues generated from slots "for racetrack owners and horse breeders." This amounted to $334 million in 2009-2010.

[53] Recommendation 17-14 in the Drummond report was to evaluate, on a value for money basis, the practice of providing a portion of net slot revenue to the horseracing and breeding industry in order to substantially reduce and better target that value. The Drummond Report projected that the income stream for shared revenue from slot machines located at racetracks would be $345 million a year going forward. This was a recommendation that was bound to attract attention.

Termination of SARP

[54] Members of staff at Finance formulated a recommendation for Minister Duncan to present to Cabinet at the upcoming meeting on Wednesday, February 8, 2012. It was at that meeting that changes proposed in the Drummond Report would be considered by Cabinet in preparation for the 2012 budget. Cabinet would also have the Modernization Report from the SBR conducted by OLG to consider for making decisions at the meeting.

[55] There is evidence before the court that other options were considered by the Ministry of Finance to recommend to Cabinet, starting with a five year phase out of SARP. The five-year plan yielded to a plan in late 2011 to terminate the siteholder agreements, and to replace the siteholder commission with an annual transfer payment from the Consolidated Revenue Fund over a three year transition period. Those transfer payments would be reduced in graduated steps from $250 million in year one, $150 million in year two, and to $100 million in year three. This three-year plan was included in the draft slide deck for presentation to Cabinet, referring to it as OLG's "Recommended Approach".

[56] The Ministry of Agriculture, Food and Rural Affairs ("OMAFRA") was briefed about the SBR and the proposed three-year plan by the Ministry of Finance on January 25, 2012. OMAFRA advised the Ministry of Finance in a memorandum that the impact of the three-year plan could not be predicted because "no design currently exists for the proposed transfer payment program" and that coordinated

communication planning was required. OMAFRA was aware that breeding to ensure horse supply for the new ORP was well underway by that time.

[57] By Friday, February 3, 2012, Finance had completed all briefings on the three-year plan before the Cabinet meeting. However, between February 3, 2012 and the day Cabinet met "something magical happened," in the words of Rod Phillips, then Chief Executive Officer of OLG.

[58] The plaintiffs state that the evidence shows how Tim Shortill, chief of staff for Minister Duncan, was part of a decision-making process to recommend to Minister Duncan that the three year plan be replaced with a direction to cancel the revenue sharing from slots with racetracks effective March 31, 2013, without further notice.

[59] Mr. Shortill has acknowledged when examined for these motions that he told Mr. Duncan and the Premier's office to "go to $0" after the effective date of this termination. His recommendation was based solely on his general knowledge of the government's "priorities for funding health care and education, not subsidizing the horseracing industry." He changed this recommendation for Minister Duncan to make to Cabinet despite the following concessions:

a) He knew very little about the standardbred breeding industry;
b) He did not know the breeding cycle of a race horse;
c) He had never seen the LOI, its addendum or a site-holder agreement;

d) He had no study or analysis of the impact of his advice; and

e) His knowledge of SARP was that "a percentage of revenue generated from the slots was directed to the horse racing industry."

[60] When examined for these motions, Mr. Duncan stated that he had no recollection of discussions that were held with Mr. Shortill on February 2 and 3, 2012. However, he testified at his examination that the decision to "go to $0" 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 was] the policy perspective [from which] this was being looked at."

[61] Mr. McGuinty stated that he did not remember the events of February 2 and 3, 2012 leading up to the Cabinet meeting. He testified that he was told that SARP revenues were public funds. Mr. McGuinty testified that he expected there would have been more of analysis on the impact of the decision than there actually was.

[62] It is not disputed that the actual decision to terminate all siteholder agreements effective March 31, 2013 that would essentially end SARP was made at the Cabinet meeting on February 8, 2012. Although the entire slide presentation and set of briefing materials for members of Cabinet to receive before the meeting was produced during this action, Ontario has refused to permit the examination of

any witness on discussions that took place within Cabinet. Only the Cabinet minute itself was produced as evidence of the actual decision that was made.

[63] Ted McMeekin, then Minister of OMAFRA, recalls how he was under the impression that the government was heading in a different direction before he attended the meeting on February 8, 2012. He testified at his examination that the proposal under consideration was suddenly "jettisoned." He also describes how the decision was "sprung on Cabinet". Mr. McMeeken also stated in his evidence that the three-year plan would not have caused the harm that the "go to $0" decision has caused.

[64] Ontario agrees that the option under consideration for a five-year transition had become a proposal for a three-year step down before Cabinet was to meet. That recommendation changed to the termination of SARP without transition funding, which became the "go to $0" result. Ontario submits that this change to the recommendation that Finance was making to Cabinet was not the *de facto* making of the decision to "go to $0" after SARP ended on March 31, 2013. The relevant decision was made at the Cabinet level when it met. As Premier Wynne stated at her examination, Cabinet is always free to reject the recommended option.

[65] This recommendation was formulated by Finance as the ministry responsible for OLG and SARP in February 2012. The responsibility for

horseracing was later transferred to OMAFRA. Mr. McGuinty explained at his examination that OMAFRA is what is known in government as a “line ministry.” Line ministries, including OMAFRA, education and health, are principally concerned with a narrow set of policy goals and stakeholder groups. They are concerned primarily with the formulation of policy, and the implementation of policies that affect them.

[66] Mr. McGuinty contrasted line ministries with the responsibility of the Finance ministry, which must take a province wide perspective. Finance is required to consider the financial feasibility of line ministry programs when considering all funding in the context of the budget as a whole. As Mr. McGuinty put it, “Finance has got to make the numbers work, but the line ministries are where the rubber meets the road.”

After the Cabinet meeting

[67] The Ontario budget in 2012 was an austerity budget where the government’s priorities were placed on health and education. Numerous cuts to several programs, and increases to health and education funding were trimmed in the budget to meet the government’s objectives.

[68] Ontario submits that the decision to terminate SARP was made in the context of making difficult decisions for the 2012 budget. Ontario emphasises that

budgetary secrecy is of vital importance to the budgetary process. This secrecy allows members of the executive to exchange different points of view to enable Cabinet to make the best decision after internal debate and candid discussions between ministers. The principle of cabinet confidentiality permits ministers to weigh important policy views with other members of cabinet without fear of any political fall out. Once a decision is made, however, solidarity prevails, and Cabinet speaks with one voice.

[69] Although the material before Cabinet had promised a careful and collaborative inter-ministry communication plan to manage the expectation of stakeholders, Minister Duncan made a speech to the Economic Club of Canada on February 13, 2012. In that speech, Minister Duncan revealed a new perspective on SARP, that "since 1998, Ontario tax payers have been subsidizing horse racing in Ontario to the tune of $345 million a year."

[70] Minister Duncan's speech on February 13, 2012 attracted a lot of attention. Statements made by the Minister in that speech reversed the narrative over fourteen years that SARP was a valuable partnership between government and the racing and breeding industries.

[71] A great deal of concern and confusion followed Minister Duncan's speech to the Economic Club. Between February 16 and 19, 2012, interested parties spoke with Minister Duncan and Minister McMeekin to understand the basis for the

decision that had been made to bring SARP to an end. A radio advertisement was subsequently released by the Liberal Party of Ontario on February 26, 2012 that served to characterize SARP as a "secret subsidy at the expense of kindergarten programs." Even Mr. McGuinty agreed at his examination that the standardbred breeders were "unfairly characterized" in the press, and that the industry was an "incidental casualty".

[72] Finally, at a televised event on March 12, 2012, Mr. Duncan and Paul Godfrey, Chairman of OLG at the time, announced the conclusions of the strategic business review conducted by OLG, and the end of SARP effective March 31, 2013. This announcement was made in the middle of breeding season for standardbred horses.

[73] The final report on OLG's strategic business review, also known as the Modernization Plan, was released to the public around this time. In the Modernization Plan, OLG had given advice to the Ontario government to draw SARP to a close as part of an overall reform to gaming in Ontario. In his evidence, Mr. Phillips states that the advice for OLG to recommend the termination of SARP to the government had been given at the direction of Mr. Stransky at Finance.

[74] Mr. Seiling confirmed in his evidence that no effort was made by Finance or OLG to seek ORC input for this advice. He stated that this was a breach of the MOU and the undertaking given by OLG in March 2011 to consult with the ORC

before making any big decisions that would affect SARP. He explained that he and the board knew immediately the decision would be “catastrophic”.

[75] In the budget papers dated March 27, 2012, the government identified $3.7 billion that had been provided to the horseracing industry over the years, including $345 million in 2011-2012. As part of the modernization process, the government had reviewed its support for the horseracing industry “as outlined in the previous government’s 1998 letter of intent” and found a need for the horseracing industry to become more self-sufficient.

[76] OLG delivered notices of termination of all siteholder agreements to racetrack owners by March 29, 2012. Three of those siteholder agreements were terminated as of April 30, 2012, and the remaining siteholder agreements with race tracks were terminated effective March 31, 2013.

[77] In this action, the plaintiffs allege a lack of consultation about the recommendation to terminate SARP in advance of the Cabinet meeting. The decision to cancel SARP had the effect of de-valuing purses at those racetracks. This effect reverberated throughout the standardbred breeding industry. The decision to cancel SARP also impacted HIP as revenues from slots made up a significant portion of its funding.

[78] In late May 2012, Ontario established the Horse Racing Industry Transition Panel (the "panel") to address the destabilization in the horseracing industry caused by the cancellation of SARP. In late May 2012, the panel consisted of three former cabinet ministers from different political parties: John Snobelen (PC), John Wilkinson (Liberal), and Elmer Buchanan (NDP). The panel was announced in a news release on June 7, 2012, which stated that Ontario would provide "up to $50 million over three years in transition support".

[79] Mr. Seiling immediately advised the Ministry of Finance that this amount was not enough to support the industry. Ontario ultimately completed short-term transition funding arrangements with 12 racetracks by 2013. It was not until October 11, 2013 that Ontario announced a "5-year plan" that provided "up to $400 million over 5 years" to restore stability.

[80] It was part of OLG's strategic plan in the Modernization Plan to locate casinos in certain urban areas. Locating a casino in a city would require the approval of citizens in that municipality on a referendum. When referendums were held in various Ontario cities, OLG's proposal was rejected, most notably in Toronto. Suddenly, OLG had no place to operate slot machines because it had terminated all siteholder agreements with racetracks effective March 31, 2013.

[81] OLG's miscalculation put a billion dollars of revenue a year at risk. Proceeds from OLG operations represent the largest source of non tax-based revenue for Ontario each year.

[82] OLG ultimately found itself negotiating commercial leases with racetracks to continue operating slot machine on those premises. There is evidence that OLG rushed to negotiate leases with racetracks at rates that were considerably higher than market rents to restore the slot machine business at those locations. There is also evidence that OLG paid $80.6 million in settlements to racetracks even though no compensation was payable to racetracks on termination. This all occurred because racetracks suddenly had enormous leverage as a result of decisions made by Ontario.

[83] None of the new leases included a requirement to share revenue from slots with the horseracing industry as before.

[84] In early 2014, Ontario set aside $30 million to enhance HIP for the breeding of all horses for racing. On March 11, 2014, Ontario announced that $12 million of HIP enhancements would be available for breeding thoroughbreds, and $6 million would be made available for breeding quarterhorses. Mr. Snobelen, the point person for this program, testified the day after the announcement that standardbred breeders were excluded because of the plaintiffs' lawsuit.

[85] On cross-examination, Premier Wynne did not deny that she directed the withholding of funding for standardbred enhancements through the HIP. However, she also testified that she did not "have a recollection of that so I cannot say one way or the other."

[86] Walter Parkinson deposed in his affidavit that the plaintiffs were summoned to a meeting with the ORC in September 2014. At that meeting they were told that HIP enhancements for standardbreds would be released if the lawsuit was discontinued.

Harm alleged because SARP cancelled

[87] Two members of the Transition Panel, John Snobelen, a Minister in the Mike Harris government when SARP was introduced, and John Wilkinson, a former Liberal member of the provincial parliament, agreed that the breeders had behaved "entirely properly" under SARP and were "not doing anything the system did not incent them to do". Even Premier McGuinty acknowledged when he was examined that breeders were making "business investments".

[88] The plaintiffs have given evidence that the impact of the announcement that SARP would end on March 31, 2013 was immediate and economically catastrophic. Breeding was impacted by the cancellation "*en masse*" of stallion

bookings by broodmare owners. They say that stallion owners began to move stallions out of Ontario.

[89] The plaintiffs also say that the decision to end SARP in effect decreased the value of purses available to winning horses up to March 31, 2013. Because of this decrease and the reduction of other breeding incentives, the plaintiffs claim that the value of yearlings already born at the time of the announcement collapsed immediately. This collapse in prices had a cascading effect on future prices going forward: beyond the price of yearlings put up for sale in the year 2012, it impacted on the price of foals born in 2012 that would be sold in 2013, and on pregnant mares producing foals in 2013 that would be offered for sale as yearlings in the fall of 2014.

[90] Rod Seiling has described the impact of the removal of slots revenue for the HIP as causing “utter despair”, leading breeders’ activities to drop by as much as 60% from previous levels.

[91] Mr. Parkinson states that the yearling prices at Seelster Farms dropped from $30,000 on average to around $14,000 for 2012-2014. It sold off 25 broodmares at a loss, and 100 acres of land to raise capital. It lost ‘stud fee’ revenue from cancellations of booking appointments for stallions standing at the farm. Mr. Parkinson has also given evidence that Seelster Farms suffered a significant drop in revenue derived from boarding horses for other owners that has

never recovered to 2011 levels. He states that while Seelster Farms has survived, other plaintiffs have not.

[92] OLG argues that the evidence will show that the price of yearlings was not as great when SARP was cancelled as it was in 2009. This will clearly be an issue for trial. Any finding of fact on this evidence going to damages is best left to the trial when the court has a full evidentiary record on each claim made by individual plaintiffs.

Analysis

[93] The focus of the claims advanced by the plaintiffs for negligence and negligent misrepresentation have shifted from the question on these motions as to whether there is no genuine issue requiring a trial to either grant or to dismiss those claims on a duty of care analysis, to answering that question in the context of the *CLPA*. The plaintiffs' claim for breach of contract remains a question for the court to determine on the unique facts and applicable law. The issues on the three motions are therefore these:

1. Is summary judgment the appropriate procedure to decide the issues raised by the motions brought by each party?

2. If so, what is the effect of the *CLPA* on the claims made by the plaintiffs against Ontario and OLG in negligence or for negligent misrepresentation?

3. Is there an exception for the extinguishment of either of those claims under the *CLPA* that is applicable on the facts?

4. Do the plaintiffs have enforceable rights under a contract with either Ontario or OLG, and if so, were those rights breached?

Is summary judgment appropriate?

[94] The parties bring their respective motions under Rule 20. Each party takes the position there is no genuine issue requiring a trial. The motions for summary judgment have been brought to have the court determine the liability of either Ontario or OLG, if any, before the parties are put to the time and expense of a trial on damages.

[95] The court is mandated by Rule 20.04(2)(a) of the *Rules of Civil Procedure* to grant summary judgment if "the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or a defence."

[96] It is incumbent on the motions judge to determine if the summary judgment procedure is a fair process to adjudicate the issues on their merits and there is no genuine issue requiring a trial. There is no genuine issue requiring a trial if the evidence before the court allows the judge to make the necessary findings of fact on which to apply the law, and is a proportionate, more expeditious

and less expensive means than a conventional trial to achieve a just result: *Hryniak v. Mauldin*, 2014 SCC 7.

[97] The parties are each expected to put their best foot forward when presenting their evidence. The court is entitled to presume all evidence that would be available at trial is in evidence before the court on the motion so that the court is assured of a sufficient evidentiary record on which to decide the case. See *Sweda Farms v. Egg Farmers of Ontario,* 2014 ONSC 1200, affirmed on appeal at 2014 ONCA 878.

[98] The plaintiffs and each of the defendants are content to have the action decided by summary judgment. While there is no dispute about the process between the parties, I must also conclude that summary judgment would be a fair and just process to adjudicate the central issues on their merits. The Court of Appeal held in *Gordashevskiy v. Aharon,* 2019 ONCA 297 that the motions judge must also make an assessment whether other steps are necessary to have a sufficient evidentiary record to adjudicate the issues where there is conflicting evidence. The agreement between the parties to proceed by summary judgment is not enough.

[99] I have an abundance of evidence, as well as the benefit of submissions from accomplished counsel representing the respective parties, to give me the confidence that I am able to find the necessary facts on which to apply the law to

reach a just result on the issues. The facts in evidence have been developed to the point in this action where the summary judgment process is the most fair and proportionate way to reach a determination on the merits. It would, in my mind, be disproportionate to have a conventional trial, at least on the liability issue, given the static nature of the evidence, the candour in which it has been given, and the law that now applies.

The CLPA

[100] The coming into force of the *CLPA* has dramatically altered the nature of the three motions with respect to the plaintiffs' right to maintain certain causes of action since they were argued. The *CLPA* does not merely codify what the common law has developed as lines between liability and immunity from liability for the Crown in right of Ontario and its agents. The new legislation moves those lines to define a changed legal landscape. Those changes impose a new statutory framework relevant to the plaintiffs' ability to make their claims against Ontario and OLG as of July 1, 2019.

[101] Section 8 of the *CLPA* preserves the right to bring an action in tort against the Crown, except as provided in the *Act*:

> 8 (1) Except as otherwise provided under this Act or any other Act, the Crown is subject to all the liabilities in tort to which it would be liable if it were a person,
>
> (a) in respect of a tort committed by an officer, employee or agent of the Crown;

> (b) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property;
>
> (c) in respect of a breach of an employment-related obligation owed to an officer or employee of the Crown; and
>
> (d) under any Act, or under any regulation or by-law made or passed under any Act.
>
> (2) For greater certainty, nothing in clause (1) (a) subjects the Crown to liability for a tort that is not attributable to the acts or omissions of an officer, employee or agent of the Crown.

[102] The *CLPA* then goes on in section 11(4) to provide those causes of action that cannot be maintained in negligence against the Crown or an agency of the Crown for making, or the failure to make, a "decision" respecting a policy matter in good faith:

> Policy decisions
>
> (4) No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care in the making of a decision in good faith respecting a policy matter, or any negligence in a purported failure to make a decision respecting a policy matter.

[103] When looking at the nature of decisions that are protected by the *CLPA,* the legislature set out what is included as a "policy matter" within the meaning of that term under ss. 11(4) by providing in ss. 11 (5):

> 5) For the purposes of subsection (4), a policy matter includes,
>
> (a) the creation, design, establishment, redesign or modification of a program, project or other initiative, including,
>
> (i) the terms, scope or features of the program, project or other initiative,

(ii) the eligibility or exclusion of any person or entity or class of persons or entities to participate in the program, project or other initiative, or the requirements or limits of such participation, or

(iii) limits on the duration of the program, project or other initiative, including any discretionary right to terminate or amend the operation of the program, project or other initiative;

(b) the funding of a program, project or other initiative, including,

(i) providing or ceasing to provide such funding,

(ii) increasing or reducing the amount of funding provided,

(iii) including, not including, amending or removing any terms or conditions in relation to such funding, or

(iv) reducing or cancelling any funding previously provided or committed in support of the program, project or other initiative;

(c) *the manner in which a program, project or other initiative is carried out, including,*

(i) the carrying out, on behalf of the Crown, of some or all of a program, project or other initiative by another person or entity, including a Crown agency, Crown corporation, transfer payment recipient or independent contractor,

(ii) the terms and conditions under which the person or entity will carry out such activities,

(iii) the Crown's degree of supervision or control over the person or entity in relation to such activities, or

(iv) the existence or content of any policies, management procedures or oversight mechanisms concerning the program, project or other initiative;

(d) *the termination of a program, project or other initiative, including the amount of notice or other relief to be provided to affected members of the public as a result of the termination;*

(e) the making of such regulatory decisions as may be prescribed; and

(f) any other policy matter that may be prescribed. *[emphasis added]*

[104] Causes of action pleaded by the plaintiffs that are caught by section 11(4) cannot be maintained. Section 11(8) further provides that any proceeding that cannot be maintained is deemed to be dismissed, without costs, on the day the cause of action was extinguished.

[105] The legislation goes on to provide that causes of action in any action to which ss. 11(4) applies are extinguished retroactively under section 31(4), which reads:

> s. 31 (4) Section 11 and the extinguishment of causes of action and dismissal of proceedings under that section apply with respect to proceedings commenced against the Crown or an officer, employee or agent of the Crown before the day this section came into force.

[106] The decision of Belobaba J. in *Leroux v. Ontario,*2020 ONSC 1994 is one of the first decisions to consider the effect of section 11 (4) of the *CLPA*. Belobaba J. provided his views on the *CLPA* in response to a direction of the Divisional Court sitting on appeal of his decision to certify an action against the provincial government under the *Class Proceedings Act*.

[107] In *Leroux,* Belobaba J. found that the *CLPA* did not apply to the facts pleaded by the plaintiff. There was no specific decision pleaded in the statement of claim that had allegedly been made by the province to meet the “decision” requirement within section 11(4) to extinguish a claim for negligence as a result. Belobaba J. considered the allegations in the statement of claim detailing

instances of certain conditions encountered by developmentally disabled persons allegedly caused by the operational negligence of a government run social assistance program. He found that the pleadings did not identify a decision that would subject the plaintiff's cause of action to the *CLRA.* He concluded on the facts pleaded that the operational negligence claim was not statute barred by subsections 11(4) and (5), and therefore not doomed to fail.

[108] The *CLPA* was also considered in *Francis v. Ontario*, 2020 ONSC 1644. In *Francis*, Perell J. reviewed the concept of Crown immunity from its historical origins, and traced the development of the law to the time where the legislative branch of governments accepted that the Crown can be held liable for civil wrongs, subject to certain limits and conditions and the introduction of the *Proceedings Against the Crown Act* in 1963. This was the statute the *CLPA* replaced when it came into force on July 1, 2019.

[109] *Francis* involved a motion for summary judgment brought by the plaintiff within a class proceeding against Ontario as represented by the Ministry of Correctional Services. In granting summary judgment, Perell J. decided against Ontario's defence that, assuming section 11(4) of the *CLPA* applies, Ontario was immunized only for negligent policy decision making. In the case before him, he found that Ontario's negligence went far beyond making that kind of decision.

[110] The expanded scope of the term “policy matter” under section 11(5) of the *CLPA* blurs, if not removes the distinction between Crown immunity for policy decisions, and operational decisions made to implement policy matters of the Crown and its agents. However, it is clear from the emerging jurisprudence on the *CLPA* that the reach of section 11(4) is dependant on a careful consideration of the language of section 11(4) and by extension subsection (5) and how they are applied to the specific facts of a case. The application of ss. 11(4) is therefore specific to the term “decision” and whether it is respecting a “policy matter.” The analysis with reference to these terms is fact driven, particular to the circumstances and the subject matter of the claim.

The claim in negligence

[111] The plaintiffs claim that each defendant owed them a private law duty of care to continue and to properly administer SARP. They claim that Ontario and OLG breached that duty of care when they made the decision to terminate SARP without reasonable notice, thereby causing the plaintiffs to suffer damages.

[112] In *Francis*, Perell J. outlined the historical framework of the law for bringing a civil action against the Crown for negligence as follows:

> [387]. When the conduct of a public authority is in issue, the legislative scheme that governs the public authority must be examined to determine whether a private law duty should be imposed in the circumstances.[176] Only in certain circumstances will a public authority owe a private law duty of care towards individuals.[177]

> [388]. When the defendant is a statutory actor, the allegation of negligence must be also be analyzed having regard to the distinction between a government's policy decisions, which are sometimes described as non-operational decisions, and its operational decisions. Carelessness in legislating is not actionable and that type of carelessness is a matter for the electorate not the judiciary.[178] Canadian law holds that legislative and core policy decisions by government actors are not actionable in negligence.[179]
> [389]. As will be discussed in more detail below, under Canadian law, generally speaking and with some exceptions, a government or public authority is not liable for the failure to legislate or about its core policy decisions that are dictated by economic, financial, political, and social factors or about infrastructure decisions or about the allocation of public resources.[180]
>
> …
>
> [392]. When the defendant is a statutory actor, the allegation of negligence must be analyzed in the context of the statutory scheme.[182] The purpose of the analysis is to determine whether there is proximity between the plaintiff and the public authority, and the statutory scheme is the root of the proximity analysis.[183] The statutory scheme must be examined to determine whether it establishes a direct relationship between the public body and the plaintiff and conversely whether the statutory scheme forecloses the existence of a proximate relationship and a common law duty of care between the plaintiff and statutory actor or public authority.
>
> [393]. When the defendant is a statutory actor, other relevant factors to the proximity analysis are: (a) reliance; (b) whether the statute provides adequate alternative remedies for a person injured by his or her interaction with the public authority;[184] and, (c) whether the recognition of a duty of care would conflict with an overarching statutory or public duty.[185]
>
> [394]. Thus, a public authority's duty of care may arise from an express or implied statutory duty or it may arise as a matter of the common law through the conduct and interaction of the public authority or government body with its citizens.[186] In addition to a statutory duty of care set out in the governing legislation, there may be a common law duty of care that arises by virtue of interactions between the statutory actor and a private individual.[187]

[113] The decision of the Supreme Court of Canada in *R. v. Imperial Tobacco,* at 2011 SCC 42 is the leading authority on Crown liability to private parties for decisions made by the executive branch of government. In *Imperial Tobacco*, the Supreme Court established the fundamental distinction between "core" or "pure"

policy decisions, which were immune from any claim in tort, as distinct from decisions of an operational nature. Chief Justice McLachlan described the concept of what is a "core policy" decision in the following way:

> [90] I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.

[114] Policy decisions were not subject to review, and immune from attracting liability if they were a "reasonable exercise of discretion", and not "irrational or made in bad faith." These principles were also considered in *Just v. British Columbia*, 1989 CarswellBC 234 (SCC) and again in *Childs v. Desormeaux*, 2006 SCC 18.

[115] A finding that either Ontario or OLG was in a relationship of sufficient proximity with the plaintiffs as standardbred breeders is required to show that one or both defendants owed a duty of care to the plaintiffs. In *Cooper v. Hobart*, 2001 SCC 79, the Supreme Court set the threshold for establishing the required

proximity as relatively low in any event, measured by values such as representations, expectations and reliance.

[116] The plaintiffs have filed evidence on these motions that, from their perspective, SARP was designed and implemented to incentivize breeding, and that they relied upon and were dependant on SARP because higher purse values translated into more demand for quality horses. They say that the ORC made representations on behalf of Ontario, notably about the ORP and the HIP, to encourage standardbred breeders to invest in their businesses for the long term.

[117] The *CLPA* removes the distinction between decisions that are policy decisions, and decisions that are operational in nature, made for the purpose of implementing or carrying out a government policy or program. The language used in subsection 11(5) (c) extends the traditional immunity afforded to policy decisions to those decisions made to implement a policy matter to decisions that include the termination of that policy, and any notice or other relief claimed by affected parties. The lines of analysis have been moved by the *CLPA* for the purpose of determining Crown immunity from questioning whether the decision was one of policy or if it was operational in nature, to whether it was made in good faith. As Belobaba J. observed in paragraph 3 of *Leroux*,

> Before the appeal was heard, the provincial legislature enacted the *Crown Liability and Proceedings Act* (“CLPA”). The CLPA repealed the *Proceedings Against the Crown Act* (“PACA”) and arguably reversed almost six decades of case law that would have allowed the operational negligence claim to proceed

> against the Crown based on the well-developed distinction between a "true policy decision" and its implementation.

[118] With the proclamation of the *CLPA* into law, defining the decision of Cabinet that effectively ended SARP as a policy decision or an operational directive is essentially rendered academic. However, the statutory immunity to liability for this decision is also subject to the terms of the *CLPA* that limit its scope. The language of section 11(4) provides that it applies only to those decisions that are made in respect to a policy matter, and that are made in good faith. Those authorities that interpret the principles of Crown immunity on the grounds a decision was "irrational" or made "in bad faith" are, in my view, just as relevant today for assessing if the impugned decision was made in good faith.

Whether the decision to end SARP was made in good faith

[119] A decision can be said to be made in good faith in the absence of evidence it was made in bad faith. Absent evidence of bad faith, the logical default position must be to assume that a decision was made by government in good faith unless it is proven to the contrary. The onus to prove that a decision was not made in good faith is on the party challenging that good faith, and as always in civil proceedings, the burden of proof is on the balance of probabilities.

[120] Bad faith has been defined as conduct that covers "acts committed deliberately with intent to harm." It also has been used to characterize acts that are "so markedly inconsistent" with the events in which they are carried out that a court "cannot reasonably conclude that they were performed in good faith." Descriptions of such conduct found in the jurisprudence include "reckless behavior;" conduct that "implies a fundamental breakdown in the orderly exercise of authority;" conduct that implies a "lack of candour, frankness and impartiality;" and irrational decision-making that is arbitrary, or plainly unreasonable because it fails to consider the appropriate information on which to decide. See *Enterprises Sibeca Inc. c. Frelighsburg (Municipalite)*, 2004 SCC 61 and *Grosvenor v. East Luther Grand Valley (Township)*, 2007 ONCA 55.

[121] The actual decision at the heart of the plaintiffs' case, both in tort and in contract, is Ontario's decision on February 8, 2012 to "go to $0" after the end date for SARP. There is no dispute that Ontario had the right to terminate any long-standing contract, or a program based on a contractual relationship having no provision for termination, as long as commercially reasonable notice was given to the other parties.

[122] The plaintiffs allege that the "go to $0" decision after ending SARP effective March 31, 2013 did not give them the time that was fair to scale down operations or to make other business arrangements. This lack of reasonable

notice is what fractured the economics of the plaintiffs' business of breeding race horses.

[123] The plaintiffs have constructed a narrative that Cabinet failed to consider a complex set of competing values when the decision was reached to terminate the siteholder agreements, thereby ending SARP, without sufficient notice. Even if this was a policy decision at its core, the plaintiffs argue that it was made in bad faith by advisors and executive assistants who knew nothing of the context or the consequences.

[124] Briefing documents prepared by Mr. Shortill for Minister Duncan and by other members of staff for the Cabinet meeting are only evidence of what information ministers going into the meeting of Cabinet were given by their offices. Those documents do not represent evidence of what was discussed at Cabinet that day.

[125] The plaintiff's argument that the decision was made in bad faith because it was irrational is premised on the evidence that Cabinet made the decision without considering any of the studies of how terminating SARP would impact the horseracing industry. They refer to a five year plan that had been developed by officials in the Gaming Policy Branch in the Ministry of Finance. This plan had been discussed with OMAFRA, and Cabinet members had been briefed on its terms. Cabinet did not consider what the Sadinsky report contained. When asked

on his examination conducted for these motions on what he based his advice to Minister Duncan and to other members of Cabinet when revising the briefing materials to Cabinet at the eleventh hour, Mr. Shortill answered that:

> "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 a 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."

[126] The argument the plaintiffs are really making is that the Cabinet decision to terminate SARP and to "go to $0" effective March 31, 2013 was arbitrary, made without any basis to formulate policy, and was therefore made irrationally. Without any rationalization behind it, the decision could not be taken as having been made in good faith.

[127] The evidence is clear that the Ontario government found itself in dire financial circumstances in late 2011. The McGuinty government was bracing to bring in an austerity budget early the following year. The government had the Drummond Report in hand that described where money could be saved, and other places where money could be found.

[128] Mr. McGuinty stated that government has a responsibility to access the best information, and must make decisions responsibly, carefully and fairly "taking all information that it has or can have into account." When Ms. Wynne was

examined, she said that government must act with compassion, and must make and implement decisions in a fully considered way."

[129] There is no evidence about how the decision to terminate SARP was made in Cabinet, as convention requires that deliberations in Cabinet are understandably secret, and subject to Cabinet confidentiality: *Babcock v. Canada (Attorney General)*, 2002 SCC 57. The reasons for a government to make a decision effecting policy, even if politically motivated, is not justiciable: *Ontario Black Bear/Ontario Sportsmen & Resource Users Assn. v. Ontario*, 2000 CanLII 22815 (SCJ).

[130] If the decision to terminate SARP as of March 31, 2013 without any transition plan had been made to support and promote the horseracing industry in Ontario, then Cabinet's decision on February 8, 2012 could possibly be seen as arbitrary, or even irrational. This might be so if the decision was made without any reference to studies done, or the weighing of competing interests. However, in *Bowman v. Her Majesty the Queen*, 2019 ONSC 1064, the Divisional Court held that policy decisions that are made without consultation do not amount to bad faith. See also *Canadian Union of Public Employees v. Ontario*, 2018 ONCA 309.

[131] There is compelling evidence that the decision to terminate SARP effective March 31, 2013 on a "go to $0" basis was a decision made by Cabinet for financial reasons, driven by the Ministry of Finance. The decision was made to

formulate policy in the same manner, and to achieve the same objectives, as those policy decisions of the nature described at paragraph 90 in *Imperial Tobacco*. The decision was made at the same Cabinet meeting as the policy decision to implement the recommendation made in the Modernization Report for shifting land-based gaming sites under judicial review in *Wauzhushk Onigum Nation v. Minister of Finance (Ontario)*, 2019 ONSC 3491 (Div. Court). In that case, the court found the decision made by Cabinet with a view to "increase net provincial revenue by modernizing commercial and charitable gaming in the province" was not improper or made in bad faith.

[132] As abrupt as the decision to end SARP was made, Cabinet's decision was by its nature a policy decision that was made in good faith by the executive council to meet the challenges of the day.

[133] The evidence given by Mr. McMeekin and Ms. Wynne as members of Cabinet in the McGuinty government does not prove that the decision to terminate SARP was irrational or otherwise made in bad faith. They may not have been involved with any change to the five year plan or OLG's "Recommended Approach" before the meeting on February 8, 2012 because it was made for reasons that did not directly involve their portfolios.

[134] The decision of Cabinet to end SARP essentially took away a commercial activity involving a Crown agent from racetracks for the operation of slots, for the

purpose of providing OLG with a different delivery system. By making its decision, Cabinet was exercising its policy making function for economic, if not social or political reasons. It did not single out, by name or by business model, a particular company or set of interests as the court found an Ontario regulation had the effect of doing in *Tesla Motors Canada ULC v. Ontario (Ministry of Transportation*), 2018 ONSC 5062.

SARP was not a subsidy

[135] The plaintiffs submit that the fact Premier McGuinty also believed that cancelling SARP was effectively cancelling a subsidy of the horseracing industry with public money is evidence of bad faith. This subject took up a considerable amount of time in legal argument. The plaintiffs submitting that the portion of those amounts paid to race tracks under siteholder agreements that went to enhance race purses was a revenue stream from a private commercial arrangement. Ontario and OLG argued the contrary view that it was a subsidy in all but name, and constituted revenues that would otherwise have been paid to the Consolidated Revenue Fund for the benefit of the people of Ontario.

[136] I agree with the plaintiffs' position on the nature of the revenue, but disagree about what it means in the larger context. The revenues arising from enterprises operated by OLG are defined and governed by the *OLG Act*. With

respect to slot machine revenues, section 14 of the *OLG Act* in effect between May 12, 2011 and May 31, 2012 provided as follows:

> Payments from 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. ….

[137] It is apparent from the legislation in effect in February 2012 that OLG was mandated to pay revenue from slots for specific purposes and in the priority required by statute. After paying winners, paragraph 2 of the section 14(1) required OLG to pay the operating expenses of the Corporation before the distribution of funds under paragraphs 3 and 4. A close scrutiny of the Public Accounts Books does not show payments made under SARP as a subsidy, nor does the governments "Project 76" listing subsidies made by the government show SARP among them.

[138] After a review of the evidence, I conclude that the siteholder commissions were captured as operating expenses and paid directly from slots revenue pursuant to the statute. They were not paid from public funds after a detour through the Consolidated Revenue Fund. There is nothing in the legislative scheme for the payment of revenues from slot machine facilities to support the

Crown's contention that the siteholder commissions were funds belonging to Ontario before they were payable to the racetracks under siteholder agreements. The legislation at the time did not designate those funds as payable to the Consolidated Revenue Fund, and therefore subject to Ontario's discretionary spending as subsidies.

[139] The conclusion that the revenues payable under the siteholder agreements were not government subsidies as Premier McGuinty or Minister Duncan believed them to be, does not mean the decision to terminate SARP was made in bad faith. Cabinet has the power to make decisions about changes in government policy, and how it relates to industry players. There is no evidence that the mischaracterization of SARP revenues was done purposely or recklessly, or that the decision to cancel SARP was not otherwise a decision made by the government in good faith.

[140] It is also not inconsistent with the function of government for a Premier and his or her ministers to respond to public pressure, or to act in a manner of political expediency. This is part of the policy making process for a government when responding to political and partisan goals in a democratic society: *Trillium Power Wind Corp. v. Ontario (Ministry of Natural Resources)*, 2013 ONCA 683.

[141] I find that the plaintiffs have not discharged their burden to show on the balance of probabilities that the decision of Cabinet to have OLG terminate the

siteholder agreements and to effectively end SARP as of March 31, 2013 was not made in good faith. Any claim for negligence against either defendant based on that decision is therefore dismissed under ss 11(4) and (8) of the *CLPA*.

Negligent Misrepresentation

[142] In *Darmar Farms Inc. v. Syngenta Canada Inc. and Syngenta AG*, 2019 ONCA 789, the Court of Appeal confirmed that negligent misstatement or misrepresentation depend on the same approach as in other claims alleging negligence for the court to determine whether one party owes a duty of care to another. Following the direction of the Supreme Court in *Deloitte v. Livent Inc. (Receiver of)* at 2017 SCC 63, the Court of Appeal confirmed that the courts have recognized certain categories that give rise to proximate relationships where the claim is for pure economic loss. One of those categories is where the claim is based on negligent misrepresentation.

[143] In *Darmar*, Zarnett J.A. highlights the principle developed in *Deloitte* that it is not only the existence of the category of the relationship between parties that defines their proximity to find a duty of care, but also the scope of that proximity that must also be considered in the duty of care calculus. This consideration brings into play questions about whether the impugned statement falls outside the relationship between the parties, or the duty of care that the defendant may have owed.

[144] In *Queen v. Cognos*, 1993 CarswellOnt 801, the Supreme Court restated the classic test for negligent misrepresentation to include proving a special relationship that would give rise to a duty of care, and the reasonable reliance on the statement made by the other party. The plaintiff claiming to have suffered an economic loss because of the statement made by another party must show that they suffered the loss claimed because they in fact relied upon the statement that was negligently made. In other words, the plaintiff must prove causation just as in any other case framed in negligence.

[145] Counsel for the plaintiffs examined Elizabeth Yeigh on her affidavit filed in support of Ontario's motion to dismiss the action. Ms. Yeigh was Senior manager of the Gaming Policy Branch in Finance from October 2009 to October 2011, and its Director from October 2011 to September 2016. At questions 271 to 282 of her cross-examination, Ms. Yeigh agreed that up until February or March of 2012, the ORC in its various publications and newsletters encouraged breeders to breed Ontario race horses, and encouraged them to invest in their breeding operations. Ms. Yeigh also agreed that the ORC was, at the time, an agency of the Ministry of Finance.

[146] The record on the three motions before this court is voluminous, with evidence of statements made by Ontario, its agent OLG and various ministries, regulators like the ORC and government officials filed for the purposes of refuting

or establishing as the case may be) the causes of action pleaded by the plaintiffs in tort and in contract. Statements shown as made by a government actor or official, put in evidence for all purposes, tends to diffuse the effect of that statement on a particular issue.

[147] In my view, there is no direct line shown between a particular statement or representation made by Ontario or OLG that can be linked to a corresponding reliance by specific plaintiffs to continue their breeding programs. I can see that standardbred breeders engaged in the business of breeding horses to maintain the supply of quality horses to Ontario racetracks. Those standardbred horses that won enhanced purses commanded higher prices, either through sale or for stud fees. However, it has not been proven that representations made before the Cabinet meeting on February 8, 2012 by Ontario or its agents the ORC or OLG were untrue, let alone made in bad faith to exempt them from the reach of the *CLPA.*

[148] It is also difficult to find on the record where many of the plaintiffs actually relied on a particular statement made by an official or branch of either defendant. Several plaintiffs admitted when cross-examined on their affidavits under Rule 39.02 that they were unaware of certain statements they allege were material and that they relied upon in the amended statement of claim. Without evidence of reliance, a claim for negligent misstatement or misrepresentation would fail.

[149] The inquiry into this cause of action based on statements made by either defendant to the plaintiffs need not be determined on the questions of whether a duty of care was owed, or whether any plaintiff relied on a particular statement to their detriment, because of the *CLPA.* The sole issue for determination is whether any statement was made in good faith. The difficulty with identifying a particular statement or representation that the plaintiffs relied upon as a group undermines the basis for the court to analyze the motivation behind any statement made. In the absence of compelling evidence that government made a statement lacking in good faith, the honour of the Crown doctrine discussed in *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation and Her Majesty the Queen in Right of Ontario*, 2020 ONSC 1516 (at paras 103-112) that presumes servants of the Crown will conduct themselves with honour.

[150] For these reasons, the cause of action for negligent misrepresentation made prior to February 8, 2012 is dismissed.

Breach of contract

[151] The *CPLA* does not apply to claims for breach of contract. Accordingly, each motion for summary judgment as to the liability of either Ontario and OLG on the plaintiffs' claim for breach of contract must be determined on its merits.

Positions of the parties

[152] The plaintiffs do not dispute that they are not parties to any siteholder agreement. They claim the LOI dated September 25, 1998, as amended, is the document that is an enforceable agreement between themselves and Ontario. The plaintiffs submit that the evidence on these motions proves that Ontario formed a contractual relationship with the horseracing industry, including standardbred breeders, when it entered the LOI to create SARP.

[153] The plaintiffs argue that Ontario formed this contractual relationship knowing that the breeding cycle for horses is generally five years. Since there was no termination date specified in the LOI, the plaintiffs argue that it was an implied term that Ontario and OLG would not terminate SARP without giving reasonable notice. They take the position that the Cabinet minute that would effectively end SARP by March 31, 2013 did not provide that reasonable notice.

[154] The plaintiffs have maintained throughout this action that the LOI is contractual in nature, and that it formed a binding contract between Ontario and the parties who signed it. It was an agreement to employ the means by which Ontario would implement SARP to maximize the benefits from locating slots at racetracks through siteholder agreements. The plaintiffs submit that the LOI was entered by OHRIA on their behalf as horse people, giving them contractual rights under the LOI. The plaintiffs argue that the termination of SARP constituted a

breach of contract, requiring Ontario to give reasonable notice of that termination, or to pay them damages in place of that notice.

[155] Ontario and OLG disagree with the plaintiffs' position, arguing that the LOI was a non-binding document that set out the intent behind a program the government was proposing to introduce to stimulate the declining horseracing industry. The defendants also rely on the fact that the plaintiffs were not parties to either the LOI or any siteholder agreement. They raise the doctrine of privity of contract to deny the plaintiffs standing or any right to bring a claim under the LOI even if they are third party beneficiaries. OLG also submits it was not a party to the LOI.

[156] In addition, or in the alternative, the defendants state that the LOI could not be a contract because Ontario could not bind itself in a manner than fetters its discretion to make policy decisions in the future.

Is the LOI contractual in nature?

[157] SARP was implemented at racetracks throughout Ontario through the instrumentality of OLG, which had the direct relationship with racetracks. To implement SARP, OLG was authorized by Ontario to enter siteholder agreements that expressly shared the net proceeds generated from slot machines at those racetracks, returning 20% of the net proceeds to the racetrack.

[158] It was a term of each siteholder agreement that the racetrack was required to contribute one half of that amount to purses available for successful horses racing at that racetrack to win. It is through this mechanism that 10% of all net proceeds earned through slots at those racetracks enhanced the purses available between April 1999 and March 31, 2013.

[159] To ensure that the proper funds were available for the purpose of enhancing purses, the standard siteholder agreement impressed a trust on one half of the 20% that racetrack owners received from the slots at their racetrack. This term allowed both OLG and the racetrack to carry out the purpose of the trust intended by the provisions of the standard siteholder agreement.

[160] The LOI was the crucible that contained the overall terms for SARP, how it would work, and the essential benefits it would yield to interested parties. The LOI was signed on September 25, 1998 by Robert Hall as Chair of OHRIA, Harry Rutherford as a director of the Canadian Standardbred Horse Society (now, Canadian Standardbred Association), David Willmot, on behalf of the Ontario Jockey Club (now, Woodbine Entertainment Group) and the Honourable Chris Hodgson, Chair of Management of Cabinet, among others.

[161] Both Ontario and OLG admit the following facts as true, pursuant to a Request to Admit served by the plaintiffs:

1. The terms and conditions contained in the June 25, 1998 Letter of Intent ("LOI") were the result of negotiations with representatives of the Ontario Horse Racing Industry Association ("OHRIA");

2. When OHRIA signed the LOI in 1998, breeders of standardbred horses in Ontario were part of the "horse racing industry", as that term is used in the LOI; and

3. Breeders of standardbred horses in Ontario are "horsepeople".

[162] The plaintiffs advanced the position that the LOI was an enforceable agreement despite its name, as it sets out all essential terms of the agreement between the parties. The fact that a letter of intent anticipates further agreements will be entered to carry out the intent of the parties does not cancel or defeat the enforceability of the LOI: *Atlas Corp. v. Emmerson Group Inc.*, 2011 ONSC 8304.

[163] The plaintiffs further submit that the nature of the LOI and the contractual intentions of the parties to it must be determined under modern principles of interpretation that call for a practical, common sense approach to finding a contract has been formed, and contractual intent of the parties to the contract. The modern approach to analyzing the contractual intent of contracting parties is governed by principles set out by the Supreme Court of Canada in *Saatva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.

[164] The plaintiffs go on to argue that, as the LOI is a contract, the duty of good faith discussed in *Bhasin v. Hrynew*, 2014 SCC 71 applies to the contractual relationship between the plaintiffs and the defendants.

[165] Ontario and OLG take the position that the LOI contained none of the essential terms to make an enforceable agreement. In *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.*, 1991 CanLII 2734, the Court of Appeal clearly stated that a contract or agreement must include all essential terms of the agreement between the parties to be enforceable. Ontario makes also makes reference to *Prolink Broker Network Inc. v. Jaitley*, 2013 ONSC 4497, where R.F. Goldstein J. held that there must be an intention to create a legally binding relationship, and an agreement on all of the essential terms, whether or not there are formal documents are executed. See also *Wallace v. Allen*, 2009 ONCA 36 (Ont. C.A.).

[166] The LOI was negotiated by Minister Hodgson on behalf of the Mike Harris government, the OHRIA representing horsepeople, and other stakeholders. In *Saatva*, the Supreme Court of Canada recognized that examining the surrounding circumstances, or factual matrix, behind the formation of a contract informs the court when resolving issues about the intention of the contracting parties.

[167] A review of the factual matrix reveals that Minister Hodgson negotiated with various stakeholders in the horseracing industry who would be affected by the placing of slot machines at Ontario racetracks. The predominant concern of the

horseracing industry was that a competitive form of gaming available at racetracks to a consumer base already harnessed to spend dollars on gaming activities would "cannibalize" the purchasing power that would otherwise go to bets on horses. The issue for negotiation between the government and the industry in 1998 became what share of revenues from slots would be distributed to the horseracing industry, and in what form, to compensate for any loss.

[168] David Willmot, who identified himself as a director of the OHRIA at the time, engaged in negotiations with Minister Hodgson on or about Queen's Plate day in June 1998. Whether the government was prepared to increase the percentage of net proceeds from slots the horseracing industry would receive from the 10% that the OHRIA board had turned down earlier in May was a matter of considerable contention between the government and the industry at the time.

[169] In his cross-examination, Mr. Willmot acknowledged that by this time he had become, for lack of a better term, lead negotiator of the OHRIA board of directors. He offers first hand evidence of the back and forth discussions with Minister Hodgson, and the agreement about the rate for the siteholder commission reached between them that concluded with the following exchange (on pages 59 and 60):

> "…And he (Mr. Hodgson) said, "so 20%?" And I said "Yes, it's got to be 20%"
>
> And he said, "Can you deliver the industry?

> And I said, “Yes, I can.”
>
> And I said, “Can you deliver the Premier and the Minister of Finance?”
>
> And he said, “Yes, I can.” And we shook hands.

[170] No evidence was filed by any party on Minister Hodgson’s recollection of the negotiation.

[171] The LOI specified that one half the 20% share the racetrack would receive from slots would go to enhance purses for horses running at that racetrack. This provision was an essential term of SARP from its inception in 1998 to its termination 14 years later. Other essential terms were included in the LOI that Ontario drafted after Mr. Willmot and Minister Hodgson shook hands that day in June 1998. Those terms included how the benefits of SARP would be implemented through standardized siteholder agreements that OLG would enter with individual racetracks.

[172] The LOI specifically described itself as defining the general agreement between the horseracing industry and Ontario. It set out as a condition for the industry’s participation in the slots at race tracks program a requirement for the standardized siteholder agreement to contain nine terms. Term number 3 required that total compensation under the site holder agreement(s) shall be 20% of the total gross slot machine revenues at racetracks across the province. Term number 7 specified that it was understood the “siteholder commission” would be shared on

the basis agreed to by the horse racing industry as it was outlined in Schedule 2. That schedule was attached to the LOI, and read as follows:

> Schedule 2
>
> ONTARIO HORSE RACING INDUSTRY
>
> Slot Revenue Sharing Agreement
>
> The industry revenue from the siteholder commission will be shared between the racetrack and its respective horsepeople on a 50/50 basis.
>
> Should the slot program at racetracks negatively affect the industry sponsored Horse Improvement Program, the protection of funding of such programs will be the responsibility of the horsemen for their respective needs.

[173] This was the deal. The horseracing industry, from breeders to horse owners to jockeys, had made their pact with Ontario to compete for revenues spent at racetracks by the gaming public. Each side was bound by this pact, whether the industry received nominal amounts annually through SARP, or the $345 million that Mr. Drummond identified many years later.

[174] The purpose of the LOI was expressly to identify the terms and conditions on which slots would be "implemented into racetracks." The LOI contemplated how the Ontario Gaming Secretariat and OHRIA would work in cooperation with OLG to ensure the benefits of the program were maximized to the horse racing industry.

[175] The LOI terms related to Ontario directly and through its agent OLG, as well as OHRIA and other stakeholders in the horseracing industry who signed the

LOI. It's purpose and method of delivery was described in the LOI, including the terms that site holder agreements would contain to satisfy the condition of the horse racing industry to participate. The LOI recognized that the siteholder commission was compensation for allowing OLG to locate slots at racetracks to compete for gaming dollars, thereby reflecting the flow of consideration from and to each of the parties. These were the essential terms that went into establishing SARP, and they were accepted when the LOI was signed.

[176] There is no language contained in the LOI that it is not intended to have a binding effect. It is clear from *Prolink* that the intention of parties to enter an agreement having a binding nature must be determined from the evidence. This would include a statement whether the terms of a letter of intent are intended to be binding, thereby making it an enforceable agreement.

[177] The factual matrix provides the context in which the LOI evolved. This context is relevant to determine the existence and nature of contractual relations: *Kentucky Fried Chicken Canada v. Scotts Food Services Inc.*, 1998 CanLII 8304 (Ont.C.A.). The LOI contains language commonly found in contractual documents such as the terms "agreement", "conditions" and "compensation." There is also authority that inter-related agreements must be construed as a "composite whole" to interpret the contractual relations between the parties: *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673 (Ont. C.A.).

[178] The relationship between Ontario and the plaintiffs, built on the cornerstone of the LOI, had the contractual underpinnings of identified parties, an offer and an acceptance at its inception, and consideration. The LOI had all the hallmarks of an agreement to which parties intend to be bound.

[179] The siteholder agreements were mandated by the LOI to establish the locating and operation of OLG slots on the premises of individual racetracks, and to manage the business of accounting and the flow of funds. They were an extension of the agreement between parties to the LOI to implement the benefits of SARP, and do not detract from the terms of the overall agreement. I find as a fact that the parties to the LOI, including Ontario and the OHRIA, had the intention of forming a contractual relationship according to its terms for the LOI to be considered an enforceable agreement.

Privity of contract

[180] The defendants raise the doctrine of privity of contract to argue there was no contractual relationship between either of them, and the plaintiffs. It is true that no plaintiff was a party to the LOI, or to any siteholder agreement between OLG and a racetrack. It is also fair to say that the LOI did not contemplate or require any standardbred breeder, person or participant in the horseracing industry other than a racetrack to enter a siteholder agreement with OLG to benefit from SARP.

[181] The evidence of the plaintiffs that they were breeders of standardbred horses at all material times to this action is not disputed by the defendants. There was also no controversy about the evidence of Mr. Willmot and others that OHRIA spoke for the breeders of standardbred horses at the time the LOI was signed. I find those to be facts.

[182] The defendants have also admitted the truth of the fact that the standardbred breeders were part of the "horse racing industry" as that term is used in the LOI. They have also admitted as true that the standardbred breeders are "horsepeople" in Ontario.

[183] The plaintiffs do not allege they were parties to any siteholder agreement. However, those siteholder agreements provide for the distribution of net proceeds from slots at that racetrack to enhance the purses available for standardbred races. The siteholder agreements provide that one half the siteholder commission a racetrack receives are trust funds for the benefit of horsepeople. This provision in the standard siteholder agreement makes owners racing successful horses at a racetrack where slots were located the beneficiaries of that trust.

[184] The historical reticence of the court to find a contract where the third-party claimant is not party to a contract, or to recognize a claim of a third-party beneficiary in a contract between others, has been relaxed to a measured extent in recent years. In *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992]

3 S.C.R 299, the Supreme Court of Canada held that third parties, such as employees of an insured, are able to rely on a limitation of liability clause in a contract even though they are not parties to it. Similarly, in *Fraser River Pile & Dredge Ltd. v. Can-Drive Services Ltd.*, [1999] 3 S.C.R. 108, the Supreme Court allowed an incremental exception to the privity rule to find that a third party was able to rely on a contractual provision to defend an action brought by one of the parties to a contract.

[185] The defendants state that the plaintiffs cannot meet the test for standing to assert contractual claims under an agreement to which they are strangers. Even with the relaxed standard for privity in *London Drugs* and in *Fraser River* to allow third parties to claim a benefit of a contract, those defendants submit that there is no binding authority to apply this relaxed standard "as a sword rather than a shield." The defendants make this argument mindful of the *obiter* comments made by Cronk J.A. in *Brown v. Belleville (City of)*, 2013 ONCA 148.

[186] The Court of Appeal in *Brown* was dealing with the rights of a successor in title to an agreement a previous owner had entered with the City of Belleville to repair and maintain a drainage ditch. In the action, the plaintiffs had claimed damages against the City for breach of contract for its failure to provide the required services under an agreement it had entered with the previous owner.

[187] The plaintiffs in *Brown* succeeded on the privity issue on appeal through their reliance on an inurement clause in the agreement between the previous owner and the City that allowed them to enforce obligations under it. However, the Court in *Brown* went further when it addressed the plaintiffs' alternative argument by recognizing circumstance that a party in the position of those plaintiffs could have standing to sue for breach of contract despite the lack of privity as a "principled exception" to the traditional doctrine. At paragraph 79, Cronk J.A. offered the following view:

> It is important to note at the outset that the doctrine of privity of contract is of considerably diminished force in Canada as a continuing principle of contract law. It has been subject to a wealth of repeated academic and judicial criticism, leading to frequent calls for law reform in Canada and elsewhere. See for example, *London Drugs*, at pp. 418-26; *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, 1999 CanLII 654 (SCC), [1999] 3 S.C.R. 108, at para. 26; McCamus, at pp. 296-301. Indeed, several Commonwealth jurisdictions have abrogated the privity doctrine entirely, or in specific contexts, by statute. In other instances, the reach of the doctrine has been "significantly undermined by a growing list of exceptions to the rule": McCamus, at p. 299. See also Angela Swan and Jakub Adamski, *Canadian Contract Law*, 3rd ed. (Markham: LexisNexus Canada Inc., 2012) at p. 229. Several of the leading cases cited by the parties on this appeal afford abundant evidence of the relaxation of the ambit of the doctrine in particular cases. Thus, while the doctrine survives in Canada, it persists only in weakened form

[188] Cronk J.A. distinguished *Greenwood Shopping Plaza Ltd. v. Neil J. Buchanan Ltd.*, [1980] 2 S.C.R. 228, where the traditional view on privity was expressed. Justice Cronk explained that she would have given effect to the intention of the contracting parties to allow the plaintiff to step into the shoes of the previous owner to make the defendant City keep the promises it had made as a

"principled exception" to the general rule. To apply the doctrine of privity otherwise would ignore the nature, stated purpose and express terms of the agreement the City had entered.

[189] When the Court went further to pronounce on the law of the principled exception to the privity doctrine after disposing of the appeal, it was, in my view, exercising its jurisprudential function. Cronk J.A. explained how the law was developing to encompass new extensions to the privity doctrine in the following manner:

> [97] As this court stated in *Madison Developments Ltd. v. Plan Electric Co.* (1997), 1997 CanLII 1277 (ON CA), 36 O.R. (3d) 80, at para. 30, leave to appeal to S.C.C. refused, [1997] S.C.C.A. No. 659, the Supreme Court in *London Drugs* not only distinguished and declined to follow *Greenwood*, it also applied new reasoning to create an incremental change in the law of privity and set forth a test for the application of this change.
>
> [98] More specifically, the majority of the Supreme Court held in *London Drugs*, at p. 448, that while none of the traditionally-recognized exceptions to the privity of contract doctrine applied to assist the employees, the privity rule should be relaxed where the following requirements were satisfied:
>
> > 1. the limitation of liability clause must, either expressly or impliedly, extend its benefits to the employees (or employee) seeking to rely on it; and
> >
> > 2. the employees (or employee) seeking the benefit of the limitation of liability clause must have been acting in the course of their employment and must have been performing the very services provided for in the contract between their employer and the plaintiff (customer) when the loss occurred.
>
> [99] The principled exception to the privity rule introduced in *London Drugs* was again considered and applied, this time unanimously, by the Supreme Court in *Fraser River*. In that case, at paras. 28-29 and 32, the court clarified that satisfaction of the first branch of the *London Drugs* test is a threshold requirement: to invoke the exception, there must be a showing that the contracting parties intended to extend the benefit in question to the third party seeking to rely on the contractual provision. Further, under the second branch

> of the test, the intention to extend the benefit of the contractual provision to the actions of a third-party beneficiary is irrelevant unless the actions of the third party come within the scope of the contract in general, or the provision in particular, between the initial contracting parties.
>
> [100] The Supreme Court emphasized in *Fraser River*, at para. 32, as did the majority of the court in *London Drugs*, at p. 449, that the extension of the principled approach to create a new exception to the doctrine of privity of contract, "first and foremost must be dependent upon the intention of the contracting parties". Finally, the application of the principled approach is not confined to situations involving only employer-employee relationships or limited liability: see *Fraser River*, at para. 31; *Madison*, at para. 30.

[190] The importance of this *obiter* cannot be overstated. Justice Cronk recognized that, while the context in which the issue of privity was raised in *London Drugs* and in *Fraser River* was different as those cases involved questions of privity in defence of a claim, the principles to apply when seeking to enforce an agreement are the same.

[191] In the context of the current action, the legal requirement for privity of contract is not as strict as it once was. Another party meeting the requirements of the principled exception to doctrine may have contractual rights under an agreement to expect compliance with, and to seek a remedy for any breach of it.

[192] The first branch of the test to qualify under the principled exception to the privity doctrine was expanded in *Fraser River*. The party claiming the exception must show that the contracting parties intended to extend the benefit in question to the third party seeking to rely on it. The emphasis under this branch is on the person claiming, and whether that person was someone or a member of a group

of persons who would have been within the contemplation of the contracting parties.

[193] The defendants argue that the plaintiffs cannot make a claim in contract where they stand only to have a benefit conferred on them, and not a detriment. To argue a legal basis for this argument, they refer to the decision of this court in *Bank of Nova Scotia v. Lockerbie & Hole*, 2013 ONSC 1601 where it was held that the principled exception to the privity doctrine, which applies to the "very activity" contemplated by the contract, is shown where there is detrimental reliance by the claimant.

[194] The defendants also refer to the decision of this court in *Bombardier Inc. v. AS Estonian Air*, 2013 ONSC 3039, affirmed on appeal at 2014 ONCA 41. In its factum, OLG states that, as a general rule, the exception to privity of contract "can only be used as a shield, absent 'extenuating circumstances'."

[195] In *Bombardier*, Justice E.M. Morgan recognized those principles and their foundation before stating the general proposition advanced by the defendants. However, he also states that a third party who seeks to advance claims derived through a prior agreement may not advance claims that would take the actual contracting parties by surprise, citing *Virk v. Sidhu*, 2010 BCSC 369, a trial decision from British Columbia decided before Brown, as authority. In the final analysis, Morgan J. concluded that Bombardier could not rely upon the waiver clause as a

stranger to the shareholders' agreement, holding that it was intended only to apply to those shareholders, and regarding disputes arising under that agreement.

[196] The facts in evidence and the purpose and effect of the LOI with respect to Seelster Farms and the other plaintiffs are very different. I make the following findings of fact on the evidence that:

a) the standardbred breeders are part of the horse racing industry that the parties to the LOI contemplated;

b) the risk and reward analysis of trading market share of channeled consumer spending at racetracks between slots and para-mutuel betting with purses enhanced by SARP provide a downside to the plaintiffs as well as an upside; and

c) the LOI placed horsepeople squarely in the contemplation of the contracting parties as they were the part of the horseracing industry SARP was designed to benefit.

[197] I further find that it should not take Ontario by surprise that the plaintiffs would seek to enforce those contractual terms if SARP was terminated without reasonable notice.

[198] The plaintiffs have been satisfied this part of the test on the evidence filed. OHRIA negotiated the LOI on behalf of the horse racing industry. That was the

very reason why Ontario considered it important to reach an agreement on the terms of revenue sharing from locating slots at race tracks with OHRIA and other associations. This reason was acknowledged in speaking notes for the Attorney General for Budget Report Back Items for Cabinet – June 25, 2003 where the government contemplated the re-opening of revenue-sharing agreements. In the note marked as Exhibit 16 to the examination of John Snobelen, the following acknowledgement appears:

> Those of you who were at the Cabinet table when we first looked at putting slot machines at our licensed racetracks will recall the difficulty we had to convince both track owners and the horse racing industry to make the investment.
>
> *For that reason, we entered into long-term revenue sharing agreements with them [emphasis added].*

[199] The second branch of the test is whether the claim of the third parties come within the scope of the contract or the provision at issue, as though they were contracting parties. The Supreme Court in *Fraser River* made it clear that the extension of the principled exception to the doctrine of privity "first and foremost must be dependant upon the intention of the contracting parties." This branch places the emphasis on the nature of the activity the contracting parties intended to cover, either by extending or limiting rights under the contract.

[200] The plaintiffs have offered convincing evidence, developed through affidavits from David Willmot and others through the examinations of witnesses

under Rule 39.03 and the cross-examinations of affiants to show the intention of the contracting parties to the LOI was to benefit the horseracing industry through SARP. The scope of this intention included the plaintiffs as standardbred horse breeders.

[201] There is no dispute that standardbred breeders were engaged in the supply of race horses to race at Ontario racetracks at the time Cabinet signed the minute to terminate SARP on February 8, 2012. Their business was the very activity that the contracting parties intended to cover and protect by the LOI. It is not enough for the defendants to say that many of the plaintiffs had no knowledge of the LOI until their lawyers were preparing them for cross-examination as knowledge of the contract at issue is not an element of the test to find that the principled exception to the privity doctrine applies. The plaintiffs, as standardbred breeders, were an "ascertainable group" or class of persons as those terms were discussed in *Brown.* They were entitled to rely upon the LOI as a contract, whenever it became known to them, if they had an actionable claim to make for its breach.

Is there a claim for how SARP was terminated?

[202] In a very real sense, SARP defined the business model for the breeding of standardbred horses to run at Ontario racetracks between 1998 and 2012. The LOI established a contractual relationship between Ontario and the horseracing

industry for an indefinite term. A long standing contractual relationship with no fixed term implies that one party will give reasonable notice of an intention to terminate the relationship to the other: *1397868 Ontario Ltd. v. Nordic Gaming Corporation*, 2010 ONCA 101 (at paragraphs 13 and 14).

[203] The plaintiffs are members of the horseracing industry who bred horses to race at Ontario racetracks during the period of time revenues shared under SARP enhanced the value of race purses, and increased funding to the HIP. As horsepeople within OHRIA, it was reasonable for them to expect that Ontario would recognize their right to reasonable notice as an express or implied term of the LOI when SARP ended.

[204] The Supreme Court made it abundantly clear in *Bhasin* that parties to an agreement owe a duty of good faith to each other during the life of an agreement. This duty includes obligations for each party to deal with the other party honestly and fairly. Ontario owed a duty good faith to the plaintiffs when it terminated SARP to give them reasonable notice that would be sufficient under the circumstances to modify their breeding operations accordingly. Ontario's failure to give reasonable notice was a breach of that implied term.

Conclusion on liability for the breach of contract claim

[205] I find that an enforceable agreement was formed between Ontario and those horsepeople represented by OHRIA in 1998 when the LOI was signed. Those members of OHRIA over the time SARP was implemented are entitled to enforce their contractual rights or to sue for the breach of those rights by virtue of the LOI, even though the composition of that association may have changed over time.

[206] The plaintiffs are members of the constituency of horsepeople who have rights under the LOI. I have concluded that the plaintiffs have contractual rights that flow under the LOI and at law. Those rights include the expectation that they would be given reasonable notice if and when Ontario terminated SARP directly or, as it did, by directing OLG to terminate the siteholder agreements with racetracks.

[207] A great deal of the evidence has been given on the liability issues of the case, and very little on damages. I have found that Ontario was required to give the plaintiffs reasonable notice as an implied term of the LOI or at law. To assess damages, the court requires the appropriate evidence, with submissions on what that reasonable notice would be after conducting their businesses under SARP for 14 years, and proof of the damages claimed by each plaintiff.

[208] In view of my conclusion on the plaintiffs claim for breach of contract, I have not considered the claim made in the amended statement of claim for unjust enrichment. Counsel for the parties made little mention of that claim in their submissions in any event, or tendered evidence to show a whether a benefit was received by either defendant, a corresponding deprivation to any plaintiff, and no juristic reason for the enrichment on these facts.

Judgment

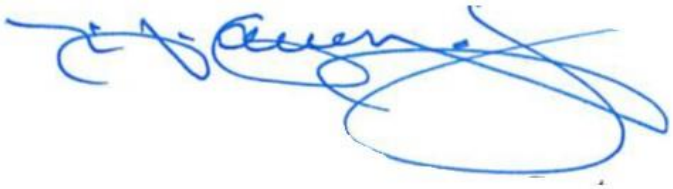
[209] The plaintiffs' motion for summary judgment is granted as against Ontario, with an order directing a trial on damages under Rule 20.04(3). Ontario's motion is granted to the extent that the plaintiffs' claims on all other causes of action are deemed to be dismissed as of July 1, 2019, without costs, under section 11(8) of the *CLPA*.

[210] As OLG is entitled to the benefit of the *CLPA* as an agent of the Crown, and as the court has not found that OLG ever stood in a contractual relationship with the plaintiffs, the motion of OLG is granted and the action is dismissed as against it entirely.

[211] Should counsel for the remaining parties wish to make submissions on terms and directions for the court to order under Rule 20.05 with respect to the trial on damages, they may arrange an appointment by video-conference to make

those submissions. Arrangements for that video-conference may be made by emailing a request to my judicial assistant at melanie.powers@ontario.ca.

[212] I encourage counsel to use their best efforts to resolve the issue of costs on these motions. If any party requires the court to hear submissions on costs, a timetable for exchanging written materials and hearing or receiving those submissions may be spoken to at the same video-conference.



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Emery J.

Notwithstanding Rule 59.05, this Judgment is effective from the date made and is enforceable without any need for entry and filing. As per Rules 77.07(6) and 1.04, no formal Judgment [Order] need be entered and filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party to this Judgment may submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.

Released: June 29, 2020

CITATION: Seelster Farms et al. v. Her Majesty the Queen and OLG, 2020 ONSC 4013
COURT FILE NO.: 272/14 (Guelph)
DATE: 2020 06 29

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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, D10041NE 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, GUY POLILLO, DAVID GOODROW, TIMPANO GAMING INC., CRAIG TURNER, GLENGATE HOLDINGS INC., KENDAL HILLS STUD FARM LTD., ANY 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

-AND-

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

REASONS FOR JUDGMENT

Emery J.

DATE: June 29, 2020