CITATION: Seelster v. HMTQ and OLG, 2015 ONSC 908
COURT FILE NO.: 272/14
DATE: 2015 02 09

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., ROBERT HAMATHER, ESTATE OF JAMES CARR, deceased, by its executor Darlene Carr, GUY POLILLO, DAVID GOODROW, TIMPANO GAMING INC., CRAIG TURNER, ROBERT MCINTOSH STABLES INC., 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

v.

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

BEFORE: EMERY J.

COUNSEL: Jonathan C. Lisus and Ian C. Matthews, for the Plaintiffs

Robert Ratcliffe, John Kelly and Sonal Gandhi, for the Defendant, Her Majesty The Queen

Awanish Sinha and H. Michael Rosenberg, for the Defendant, Ontario Lottery and Gaming Corporation

HEARD: September 23, 2014 and October 20, 2014

ENDORSEMENT

[1] The horseracing industry is big business in Ontario. For years, racetracks and horse breeders alike have grown to depend upon the revenues it generates. It would also seem that since 1998, the government of Ontario and its Crown Corporation, Ontario Lottery and Gaming Corporation, have grown accustomed to the concentration of gaming activities at Ontario racetracks.

[2] The plaintiffs are standardbred horse breeders who breed horses to compete at racetracks in Ontario. The plaintiffs bring this action against the defendants Her Majesty the Queen in Right of Ontario ("Ontario") and Ontario Lottery and Gaming Corporation ("OLG") for $60 million in damages. They allege each of them have suffered damages caused by the defendant's negligent misrepresentation, breach of fiduciary duty and breach of contract, among other causes of action, the defendants cancelled the Slots at Racetracks Program (SARP). SARP was a program through which a portion of net revenues from slot machine gambling at Ontario racetracks had been made available one way or another to horse people in the horse racing industry since 1998 until its termination date on March 31, 2013.

[3] The plaintiffs' action against OLG was commenced by a Notice of Action on March 10, 2014 to meet the applicable limitation period. The plaintiffs' action against Ontario was commenced on April 14, 2014 for reasons related to the notice provisions of *Proceedings Against The Crown Act*. Even though the actions were commenced on separate dates, the statements of claim in each action are virtually identical. Together, the statements of claim make a comprehensive and cohesive claim against the two defendants. The actions have now been consolidated by my Order dated October 10, 2014.

[4] The plaintiffs bring this motion for disclosure and the production of documents as terms of a discovery plan they ask the court to impose because the parties have been unable to agree on those terms. The plaintiffs seek an order to compel the defendants to put their resources to the task of making that documentary disclosure and production in advance of examinations for discovery.

[5] The first day of argument proceeded on September 23, 2014. I dismissed Ontario's preliminary motion to adjourn the plaintiff's motion for the purpose of filing further materials on how the proportionality principle should be applied to the scope of disclosure and production at issue. Ontario made a subsequent motion to file further materials when the hearing of the plaintiff's motion resumed on October 20, 2014. I am including in this decision my reasons for dismissing Ontario's subsequent motion. The dismissal of that motion is important to what evidence was before me to decide the plaintiff's motions, particularly with respect to considerations about proportionality.

Preliminary motions

[6] I am the judge appointed under Rule 37.15 to hear all motions relating to the two actions that have now been consolidated. At the request of counsel, I convened a case management call on Monday afternoon, September 22, 2014 when I was informed that counsel for Ontario intended to seek an adjournment of the plaintiff's motion the following day. An appointment for half a day had been reserved earlier in the month to hear the plaintiff's motion on September 23, 2014.

[7] On the case management call, I required Ontario to bring a proper motion to request the adjournment. I required Ontario to bring a motion, even on short notice, so that the parties and the court had notice of the precise relief Ontario was seeking, and the grounds for seeking that relief.

[8] Ontario served its motion as directed. In the notice of motion, Ontario stated as a ground for seeking an adjournment its intention to bring a motion to strike all or part of the statement of claim against it under Rule 21.

[9] Ontario also sought an adjournment to file further material with respect to the plaintiff's motion for productions. In support of its motion for an adjournment, Ontario filed the affidavit of Susan Roback-Lescinsky. Ms. Roback-Lescinsky is described in that affidavit as a law clerk in the Crown Law Office-Civil, Ministry of the Attorney General. Ms. Roback-Lescinsky has experience in the collection of paper and electronic data, and the management of databases for large files that range between 50,000 and 270,000 documents. She has been a Fellow of the Institute of Law Clerks since 2012. To achieve this level, she has completed a number of courses in the area of e- discovery.

[10] Ms. Roback-Lescinsky's affidavit describes the receipt of materials from the plaintiffs and issues relating to the organization of productions from Ontario. These issues arise from Ontario's dispute with counsel for the plaintiffs with respect to proposed search terms for documentary disclosure. The affidavit does not contain any reference to any intention Ontario may have had at the time to bring a Rule 21 motion.

[11] For reasons contained in the endorsement read in court on September 23, 2014, I dismissed the motion made by Ontario for an adjournment. I then proceeded to hear the submissions of counsel for the plaintiffs on the motion for productions. At the conclusion of those submissions, it was too late in the day to hear the responding submissions of counsel for Ontario or OLG. The plaintiffs' motion was therefore adjourned to October 20, 2014 for all counsel to complete argument.

[12] Before the hearing of the plaintiff's motion resumed on October 20, 2014, counsel for Ontario brought a second motion on notice to the other parties for

leave to file further materials for use on the plaintiff's motion. The motion described those further materials to consist of a supplementary affidavit of Susan Roback-Lescinsky, sworn on October 10, 2014, a responding factum and a book of authorities. It was Ontario's position that the further affidavit material was relevant to the issue of proportionality, and would assist the court in determining the proper scope of productions. Ontario advanced this position even though the further proposed affidavit material had not been filed before the commencement of the hearing of the motion on September 23, 2014.

[13] I dismissed Ontario's motion for oral reasons delivered in court on October 20, 2014, with fuller reasons to follow. These are those reasons.

[14] First, the order I delivered in court on September 23, 2014 had been taken out. I considered myself to be *functus officio* and therefore without authority to vary a previous order: *R v. Stephen Morgan*, 2014 ONSC 2456 and *Doucette-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62 (at paragraph 79). I found that this principle applied to me even though I have continuing procedural powers under Rule 37.15 and in the interests of finality to the orders I make through the course of the consolidated action. Interlocutory orders made in a civil action are not isolated decisions of the court. They often have a cumulative effect upon the orderly conduct of an action. Parties to an action and their counsel make decisions and take positions based on the contours of the legal landscape defined by court orders.

[15] I specifically note that Ontario did not bring a motion under Rule 59.06 for me to vary my previous order. Nor did Ontario bring a motion to stay the continuation of the plaintiffs' motion for productions.

[16] Second, the affidavit of Susan Roback-Lescinsky in support of Ontario's second motion lacked any explanation for Ontario's failure to file further material beyond the time permitted by the Rules of Civil Procedure. As Justice Gray

observed in *Bank of Montréal the Lewis*, 2010 O.J. No. 2461, at paragraph 23, "if a defaulting party seeks an indulgence, the very least he can do is provide a convincing explanation for the default." In that case, Justice Gray declined to accept the material tendered by the offering parties.

[17] Third, I also considered Ontario's argument that the plaintiff would suffer no prejudice if further supplementary material was considered. The plaintiffs had already filed all materials on which they relied and counsel for the plaintiffs had made full argument on those materials. To allow Ontario to file further evidence would mean that the plaintiffs would have made their arguments without the benefit of that further evidence. Even if the plaintiffs were permitted to make further submissions, the totality of their submissions would be disjointed and without the cohesiveness a party should want the court to hear to optimize the position advanced.

[18] More fundamentally, Ontario would have had the benefit of the plaintiffs' argument before filing that further material.

[19] There is no reason why this material was not filed before September 23, 2014. The parties had convened a planning meeting to discuss the nature and scope of the prosecutions expected from each side on September 2, 2014. Ontario was expected to file its material for the motion on time under the *Rules of Civil Procedure*. I therefore found that the plaintiffs would suffer prejudice, and Ontario would obtain an unfair advantage, if I permitted Ontario to file supplementary evidence to support its submissions on October 20, 2014.

[20] Finally, and of equal importance, I found that the motion to file further materials on the plaintiffs' motion, particularly with respect to the principle of proportionality, was the same motion as Ontario's motion I had heard and dismissed on September 23, 2014. I say it was the same motion because the notice of motion before the court on September 23, 2014 requested an

adjournment in part to have additional time to file further evidence with respect to the principle of proportionality applicable to the scope of production issue. In fact, the affidavit of Susan Roback-Lescinsky filed in support of that motion was directed primarily, if not exclusively, to issues of production and proportionality. Ontario's motion on October 20, 2014 was seeking leave of the court to file the very material that Ontario would have filed had it been successful on its motion to adjourn the plaintiff's motion on September 23, 2014.

[21] During argument of Ontario's motion I brought the decision of the Court of Appeal in *Earley-Kendall v. Sirard*, 2007 ONCA 468 to the attention of counsel. I gave each of them an opportunity to make submissions on whether that decision applied to Ontario's motion. After hearing those submissions, I found that Ontario's current motion was essentially the same as its motion heard on September 23 2014, much like the two motions at issue in *Earley-Kendall v. Sirard*. In that decision, the Court of Appeal held that once an interlocutory order has been made, a party cannot go back and seek a separate ruling from a different judge on essentially the same motion.

[22] I found that on the law and in the interest of fairness, there was no basis to exercise my discretion to allow Ontario to file further affidavit material. For those reasons, I dismissed Ontario's motion for leave to file further affidavit material on the plaintiff's motion.

[23] The plaintiffs' motion proceeded on the evidence filed by the parties prior to the commencement of hearing the motion on September 23, 2014. I considered the first affidavit of Ms. Roback-Lescinsky filed in support of Ontario's first motion to be properly before me for the purposes of the plaintiff's motion. I also considered the supplementary factum and book of authorities filed by Ontario to be a resource to the court on the plaintiffs' motion, except for any reference in the factum to the affidavit I had not allowed. I also had before me the responding motion record filed by OLG prior to September 23, 2014 that contains

the affidavit of Paul Wilkinson in response to the motion, as well as OLG's factum and book of authorities.

Background

[24] According to the statement of claim in each action, Ontario and OLG had shown a great interest in introducing slot machine gaming at Ontario racetracks in 1998. Ontario and OLG considered racetracks as lucrative locations to place video lottery terminals, as gambling activities had a long-established history at these facilities.

[25] The customer base for horseracing presented a significant commercial opportunity for Ontario and OLG. However, Ontario and OLG recognized that introducing slot machines at racetracks could come at a significant cost to horse breeding and horseracing because the revenue stream generated from racing activities would likely be diverted to a certain extent from betting on horses to slot machine gambling. This would have a serious negative impact on horse breeders, including standardbred breeders, and the rural economy.

[26] The plaintiffs allege that standardbred racing is by far the biggest form of horseracing in Ontario. Standardbred racing is carried on throughout the year at 15 of the 17 racetracks in Ontario.

[27] Ontario and OLG entered into negotiations with racetracks to allow the placement of OLG slot machines at racetracks across Ontario for access by the consuming public. These negotiations included certain accommodations to ensure slot machine gambling would not undermine live horseracing. the plaintiffs allege that Ontario recognized the importance of providing support to the continued growth and development of a strong horse breeding and racing industry in Ontario. The Plaintiffs allege that these negotiations resulted in the formation of a "revenue-sharing partnership" in 1998 between Ontario, OLG and the horseracing industry known as the Slots At Racetracks Program (SARP).

[28] It is alleged in each statement of claim that Ontario and OLG knew from the beginning of SARP that the success of the revenue-sharing partnership depended on assuring horse breeders in Ontario that Ontario and OLG were committed to the sharing of slots' revenue over a long period of time. This assurance was required so that breeders such as standardbred horse breeders would make corresponding long-term investments in their breeding operations and farms to ensure a steady supply of quality horses for racing at Ontario racetracks. This assurance was critical to the success of Ontario and OLG slot machine locations, the future of the horseracing industry, and SARP itself.

[29] The statements of claim allege that because standardbred breeders were located across the province in isolated rural communities, Ontario and OLG would communicate with them through the Ontario Racing Commission (ORC). ORC is a corporation continued under the *Racing Commission Act*. ORC is for all purposes an agent of Ontario, and its powers may be exercised only as an agent of Ontario.

[30] ORC has the mandate to act in the public interest and to govern, direct, control and regulate the horseracing industry in Ontario with honesty, integrity and social responsibility. Ontario and OLG would communicate with the standardbred horse breeders by making statements in ORC annual reports, business plans, strategic reports, industry newsletters and through the ORC's racing and breeding incentive program, the Horse Improvement Program (HIP).

[31] Ontario and OLG entered into site holder agreements with all 17 racetracks in Ontario to locate slot machine gambling, and to implement SARP. These racetracks included the 15 racetracks where standardbred horses are raced in Ontario.

[32] The site holder agreements are typically for five-year terms, with a number of successive renewal terms to be exercised only by OLG. The site holder agreements provided that 20% of the "net win" revenues generated by slot machines at each racetrack will be paid to that track, provided the racetrack pays 50% of that amount to horse people in the form of enhancements to purses won for races at that racetrack.

[33] Ontario and OLG did not permit the breeders, including the standardbred breeders, to see the site holder agreements. The standardbred breeders were not themselves a party to any agreement with Ontario and OLG with respect to SARP. However, reports by ORC and other publications reflected the long-term nature of the commitments Ontario and OLG were making to the racetracks and stakeholders in the horseracing industry.

[34] The enhancement to purses funded by 50% of the "net win" revenues received by racetracks through the SARP and anchored by the site holder agreements were visible and transparent. Through these enhanced purses, the standardbred breeders participated directly in the SARP revenue.

[35] Submissions were made at the motion that Ontario directed that the designated percentage of the share of SARP revenue that would otherwise flow to horse breeders through purse enhancements was redirected to HIP in 2002. HIP is a racing and breeding incentive program that was established by the Ontario government in 1974 to help Ontario farms remain economically liable, and to encourage the breeding and ownership of Ontario produced horses. At all material times, HIP was overseen by the ORC and its budget was audited and reviewed annually by the auditor for the Province of Ontario.

[36] Ontario and OLG encouraged the standardbred breeders to make the necessary long-term investments to ensure a supply of high-quality horses to support racetracks, promote live horseracing and to expand the customer base at

racetracks. Through the implementation of SARP and the subsequent allocation of a defined percentage of that revenue to HIP, a percentage of the revenues from the slot machines operated by OLG at Ontario racetracks would be channelled directly to all qualifying horsebreeders. This created a self-fulfilling benefit to both Ontario and OLG, the racetracks and horse breeders. A greater customer base at racetracks would generate additional revenue from the slot machines located at those racetracks for the benefit of all interested parties.

[37] Despite various assurances and public announcements since the inception of SARP in 1998, Ontario announced in March 2012 that SARP would be terminated effective March 31, 2013.

[38] The action against OLG was commenced when a notice of action was issued on March 10, 2014. OLG demanded particulars for the allegations in the notice of action on March 14, 2014 after the plaintiffs sent the notice of action to counsel for OLG. This resulted in a detailed statement of claim delivered to OLG on April 14, 2014.

[39] The plaintiffs' action against Ontario was commenced when a statement of claim was issued on April 14, 2014.

[40] The allegations of fact contained in the statements of claim against Ontario and OLG are equally detailed.

[41] Ontario and OLG each delivered its statement the defense on or about May 15, 2014.

[42] The plaintiffs served a reply to each Ontario and OLG on or about May 26, 2014.

[43] The pleadings in the two actions are now closed.

[44] Counsel for all parties have had various planning meetings since this litigation began. Counsel met on April 14, 2014, June 12, 2014 and September 2, 2014, not including attendances before the court.

[45] At the meeting between counsel on April 14, 2014, a timetable for the litigation was discussed. Counsel for the plaintiffs wrote to all parties on April 17, 2014 to propose the following timetable

a. the commencement of rolling productions on June 16, 2014, with subsequent productions on July 15, August 15 and September 15 (at which time productions would be complete);

b. examinations for discovery completed by October 31, 2014; and

c. a final adjudication on the merits to be scheduled for December 2014, subject to the court's availability.

[46] On April 25, 2014, the plaintiffs produced their first tranche of documents in each action consisting of approximately 4200 pages. The plaintiffs state that these documents closely aligned with the allegations contained in the two statements of claim.

[47] After the meeting between counsel on June 12, 2014, counsel for the plaintiffs circulated minutes that included a number of "agreement and action items". Those items set out that:

a. the priority period for document collection production is 2009-2012. Counsel agree to collect and produce documents on a rolling basis having regard to this priority period;

b. OLG to produce a list of prospective custodians to the plaintiffs;

c. Ontario commits to rolling productions [beginning at the end of July], with tranches of documents to be delivered at the end of each month, which are to be substantially complete by the end of September; and

d. counsel agree that March 2015 is the most appropriate time for a trial, with discoveries to proceed in October or November 2014.

[48] On or about June 19, 2014, counsel for the plaintiffs wrote to counsel for OLG to provide a list of search terms to retrieve relevant documents from electronic databases. Further revisions to this proposal were made on July 3 and July 8, 2014.

[49] On June 20, 2014, counsel for the plaintiffs provided each of the defendants with an affidavit of documents.

[50] On July 16, 2014, OLG produced 196 documents. Many of these were heavily redacted as "irrelevant". Counsel for the plaintiffs wrote to counsel for OLG on July 18, 2014 to take issue with the extensive redactions. Counsel for OLG asserted in a letter dated July 22, 2014 that these redactions were "limited to information that is both irrelevant and sensitive".

[51] On August 6, 2014, counsel for OLG advised counsel for the plaintiffs that OLG was refusing to provide a list of the custodians.

[52] There is no evidence that Ontario engaged in a discussion between counsel about the disclosure of custodians prior to September 23, 2014.

[53] All counsel appeared before me in Brampton for a case management conference on August 15, 2014. I recommended that counsel meet one more time to seek an agreement on the production issues concerning them.

[54] On September 2, 2014, counsel for all parties met in Toronto to discuss the scope of discovery. On September 3, 2014 counsel for the plaintiffs wrote to the court to schedule a motion for all discovery related issues.

[55] After this motion had been scheduled, counsel for OLG replied in a letter dated September 11, 2014 to the search terms proposed by the plaintiffs on July 8, 2014. Counsel for OLG indicated that the search terms proposed on July 8,

2014 would result in approximately 26,405 "duplicated search hits". If the time period was restricted to 2009-2012, this number would shrink to 21,394.

[56] OLG has also produced seven binders of "unredacted documents" on a "for counsel eyes only" basis. There remain those documents that are redacted. There is no list or schedule identifying what those documents are, or where they came from.

[57] Ontario has filed evidence that, since the claim was served, ORC and the six ministries having the responsibility for SARP at specific points in time since 1998 have served 542 paper records on the plaintiffs. The first tranche of documents was produced on July 4, 2014 and the second tranche of those documents was produced on August 5, 2014. The second tranche of documents was provided to counsel for the plaintiffs on a disk containing those documents in electronic form, loaded for the Summation program, with field references provided for access.

[58] There have been a number of different government ministries, departments and agencies involved with SARP since 1998, including:

1. Ontario Racing Commission (ORC) (1998 - present);
2. Ontario Lottery and Gaming Corporation (OLG) (1998 - present) – separately represented
3. Ministry of Consumer and Commercial Relations (1998 - 1999)
4. Ministry of Consumer and Business Services (2000 - 2005)
5. Ministry of Government Services (2005-2007)
6. Ministry of Government and Consumer Services (MGCS) (2007-2008)
7. Ministry of Energy & Infrastructure (MEI) (2008 – July 2009)
8. Ministry of Finance (MOF) (July 2009 – July 2012)
9. Ministry of Government Services (MGS) (July 2012 – January 2013)

10. Ministry of Agriculture, Food and Rural Affairs (OMAFRA) (January 2013 – present).

[59] According to Ontario's factum, ORC and the six ministries have identified 51 custodians who may have relevant electronic search information that should be included in any electronic search. The affidavit of Ms. Roback-Lescinsky sworn on October 10, 2014 is referenced as the evidentiary basis for stating the number of custodians in the factum. As I have disallowed the use of that affidavit on the plaintiffs' motion, I will say no more about that.

[60] Ms. Roback-Lescinsky describes that this should be a consultative process because individuals may have transferred to other ministries, or may have left the Ontario Public Service since their involvement with SARP. She also describes in her affidavit how it may be necessary to access electronic search information data for those custodians through multiple locations. Ms. Roback-Lescinsky states in her affidavit that it may be more efficient to gather all electronic search information in one search rather than going back multiple times to request the further searches be done.

[61] Ms. Roback-Lescinsky has deposed that on June 12, 2014, Ontario provided the plaintiffs with an initial draft list of keyword search terms. However, that list was not attached to her affidavit sworn on September 19, 2014 for this motion.

[62] Ms. Roback-Lescinsky also deposes in her September 19, 2014 affidavit that the scope of the searches will be important to conduct discovery of electronic search information. In paragraph 14 and 15 of her affidavit, she states that:

> In order to conduct discovery of ESI, there will need to be agreement on the search terms, date ranges (which in turn will depend on the parameters of a lawsuit) and a determination of the custodians for each party who may have relevant documents (which also will depend on the parameters of the lawsuit).

> Once an agreement on date scope, custodians and search terms is achieved, IT specialists will need to retrieve the electronic data specific to each custodian. The retrieved data will then need to be searched using the keywords. A potentially relevant documents will then have to be reviewed for relevance and privilege by counsel before being returned to the IT specialist to be processed and returned to our office to be loaded into our software database program called summation at which point the documents can be prepared for productions.

[63] Against the backdrop of this litigation with Ontario and OLG, the Plaintiffs allege that Ontario has excluded the standardbred horse breeders from all forms of compensation and denied them benefits that other horse breeders are receiving to compensate them from the economic impact of terminating SARP. Ontario has allegedly compensated thoroughbred and quarterhorse breeders with enhanced financial rewards through the provincial Horse Improvement Program, but has withheld equivalent benefits from standardbred breeders. There was no evidence on the motion before me to provide the reason why HIP has not provided funding for enhanced financial awards or purse enhancements to standardbred breeders at the same time.

[64] The plaintiffs argued on evidence before me on the motion that immediately after terminating SARP, Ontario and OLG paid over $80 million to compensate the owners of Woodbine Racetrack (Toronto), Georgian Downs (Innisfil), Western Fair (London) and Ajax Downs racetracks. These payments would appear to be funds paid as compensation in addition to amounts that OLG will continue to pay racetracks for allowing OLG to locate slots at their facilities.

Discussion

[65] The plaintiffs seek an order imposing a discovery plan for this consolidated action to the extent requested in the notice of motion. In particular, the plaintiffs seek an order:

a. Requiring the defendants to serve their affidavit of documents and all Schedule A documents by a date to be set by the court;

b. Requiring the defendants to substantially complete documentary production by a date to be set by the court;

c. Requiring OLG to produce its documentary productions to the plaintiffs in an unredacted form, or alternatively to require OLG to bring a motion, on a schedule to be set by the court, to demonstrate the propriety of its extensive redactions; and

d. Requiring each defendant to provide a list of proposed custodians whose documents they propose to search, along with the job titles of those custodians, to the plaintiffs forthwith.

[66] I was advised by counsel for the plaintiffs that the redaction issues with respect to the productions made by OLG have now been resolved. I also understand that there is no need for me to address the redaction issue with respect to productions made or that will be made by Ontario. If redaction issues arise in the future with respect to the productions made by either defendant, a separate motion may be brought at that time.

[67] The motion before me was argued without placing any emphasis on that part of the motion seeking a list of custodians who may have received, compiled or that retain relevant documents. Receipt or retention of those documents by custodians would *de facto* make those documents subject to disclosure by the parties whom they represent or who employ them because they are in the possession, power and control of that defendant. I take it that the request for this order has been subsumed by the motion for an order requiring the defendants to serve affidavits of documents according to results from the search terms the court may order, and to make full production of all Schedule A documents by a specified date.

[68] The sole issue before me would therefore appear to be the search terms for each defendant to use for the collection and retrieval of relevant documents,

and the deadline for each defendant to make disclosure and production. I propose to make those orders as the first stage of an evolving discovery plan.

[69] Prior to January 1, 2010, each party to an action was required to serve an affidavit of documents within 10 days after the close of pleadings under former Rule 30.02. After January 1, 2010, the time requirement under Rule 30.02 to serve an affidavit of documents was governed by the discovery regime that contemplates a discovery plan under Rule 29.1. Rule 30.02 was amended to impose the mandatory obligation of a party to an action to disclose every document relevant to any matter in issue in an action that is or has been in the possession, control or power of that party as provided in Rules 30.03 to 30.10, whether or not privilege is claimed over that document. Further, under Rule 30.02(2), the parties are obliged to produce for inspection every document relevant to any matter in issue in an action if requested, as provided in Rules 30.03 to 30.10, unless privilege is claimed in respect of the document.

[70] The scope of documentary disclosure is also subject to any order the court may make for a party to disclose all relevant documents in the possession, control or power of a subsidiary or affiliated corporation of that party under subrule 30.02(4).

[71] Rule 30.02 itself does not provide the court with power to order the production of documents. It refers to Rules 30.03 to 30.10 that provide various mechanisms for the inspection or production of documents. However, the disclosure process imposes a duty on each party to an action to disclose all relevant documents that are not only in that parties possession, power or control, but also documents over which privilege is claimed, and documents no longer available to that party on different schedules. A fulsome and honest approach to making documentary disclosure serves the interests of justice because it gives an adverse party the ability to request production of documents not subject to a claim for privilege, to know what documents exist over which privilege is claimed

and the reasons for that claim, and to know what and why documents are no longer available so that steps can be taken to seek whatever orders are necessary.

[72] The court has the power to order the service of an affidavit of documents and production of documents listed in Schedule A through the discovery plan rule. Although Rule 29.1 does not expressly give power to the court to impose a discovery plan in the absence of an agreement between the parties, that power was imported from Rule 20.05 by analogy in *Telus Communications Company v. Sharp*, 2010 ONSC 2878 and followed in *Ravenda Homes Ltd. v. 1372708 Ontario Inc.*, [2010] O.J. No. 3593. Accordingly, the court may impose all or part of a discovery plan to meet the obligations of the parties and the rule governing discovery plans, and to enforce the provisions of Rule 29.01 as and when required.

[73] It is an express term in Rule 29.1.03 that the parties are to agree to a discovery plan before the earlier of 60 days after the close pleadings or such longer period as the parties may agree upon, or attempting to obtain the evidence. I am satisfied from the evidence filed on the motion that the parties have met and conferred in an attempt to agree upon a discovery plan when they met on June 12, 2014. The meeting on September 2, 2014 was not a discovery plan meeting but rather a meeting between counsel to explore resolution of those issues relating to disclosure and production.

[74] The parties have not reached an agreement on a discovery plan because of the simmering dispute about documentary disclosure and the scope of production. This impasse is primarily due to the determination of what documents are relevant to any matter in issue in the action under Rule 30.02, and the application of the proportionality principle introduced by the amendments to the *Rules of Civil Procedure* on January 1, 2010. Proportionality became an overriding consideration with the advent of new subrule 1.04(1.1) generally, and

Rule 29.2.03 that introduced proportionality to matters relative to discovery in particular.

[75] Parties to an action are frequently in an unequal position to either bargain or to litigate because one side holds most, if not all of the relevant information. The disclosure of documents under the Rules is often an instrument to equalize access to potential evidence, which in turn enables the litigants to fully and fairly advance their respective interests in the case. In a very real way, the entitlement to disclosure is a question of access to justice.

[76] The amendments to the *Rules of Civil Procedure* were made in large part to increase access to justice for parties litigating civil proceedings before the Ontario courts. This objective has found renewed expression in *Hryniak v. Maulden*, 2014 SCC 7. The Supreme Court of Canada took the opportunity on an appeal of a summary judgment under the amendments to Rule 20 to sound a clarion call that access to justice is fundamental to a fair and just society. *Hryniak* is not just a summary judgment case, it is a case about access to justice. Justice Karakatsanis, speaking for the court, said this about access to justice at paragraph 1:

> Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

[77] The Supreme Court in *Hryniak* made specific reference to the introduction of proportionality to the application of the Rules of Civil Procedure in Ontario by recognizing that Rules 1.04(1) and (1.1) relate to one another as a means for ensuring access to civil justice. These subrules read as follows:

> ***General Principle***
>
> 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).
>
> ***Proportionality***
>
> (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. O. Reg. 438/08, s. 2.

[78] Justice Karakatsanis also recognized that a complex claim may take on different dimensions and that proportionality is inevitably comparative. At paragraph 33, Justice Karakatsanis stated:

> A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

[79] The actions in which the plaintiffs' motion is brought clearly involves complex claims. To paraphrase Justice Karakatsanis in *Hryniak*, the question is whether the added time and expense of the comprehensive scope of documentary production requested by the plaintiffs is proportionate to the issues and to the resources of the parties. The focus must be on what is required in terms of the scope of documentary disclosure and the production of documents to be a fair process in order for the court to make a just adjudication of the consolidated action on its merits.

[80] Justice Perell in *Ontario v. Rothmans Inc.*, 2011 ONSC 2504 approved the observation of the court in *Warman v. National Post*, 2010 ONSC 3670 that the proportionality guidelines are the starting point, and not the afterthought of the disclosure process mandated by the amendments to the Rules of Civil Procedure effective January 1, 2010. It would appear that relevancy is now part of the test for the scope of productions, not the paramount factor to determine the disclosure obligations of each party to an action. Therefore, as proportionality is

the starting point, I propose to begin by looking at proportionality issues relating to the disclosure aspects on this motion, and the evidence filed by the parties with respect to those issues.

Proportionality

[81] The scope of the documentary production requested by the plaintiffs on this motion is set out on three pages of search terms attached as Exhibit 49 of the affidavit sworn by Lily Iannacito in support of the motion. A copy of those search terms has been modified by OLG at Exhibit G on pages 120-122 of the responding motion record to number the specific searches proposed by the plaintiffs. I shall use the numbered version of the plaintiffs' proposed searches in this analysis, which is attached on Schedule 1 to these reasons. Where the two versions may differ, the form and content of the corresponding search in the plaintiff's version under Exhibit 49 of the Iannacito affidavit shall take precedence.

[82] The defendant OLG filed a revised form of those search terms including a black line version of those terms it challenges as Exhibit O to the affidavit of Paul Wilkinson. Although Ontario had attached a copy of its search terms to the affidavit of Susan Roback-Lescinsky dated October 10, 2014, that document containing proposed search terms from Ontario was not before me on the motion because I dismissed Ontario's motion for leave to file that affidavit.

[83] The proposed search terms of the plaintiffs are organized by first stating basic search formulations, being universal terms of reference and their derivatives. There are four basic search formulations categorized. Basic search formulation "A" essentially contains various forms of the root terms standardbred and standardbred breeder. Basic search formulation "B" relates to variations on SARP. Basic search formulation "C" contains variations on the terms racehorse, racing industry or horse people. Basic search formulation "D" contains variations on HIP or the Horse Improvement Program.

[84] The plaintiffs do not require the defendants to run electronic searches using any of these four basic search formulations within themselves. The basic search terms in A, B, C or D consist of universal search terms consisting of defined words used throughout the pleadings. The proposed search terms propose to combine the designated basic search formulations with 51 specific searches within 3 separate categories of subject matter. The basic search formulations are intended to be used in conjunction with the key words that are specific to factual allegations in each statement of claim.

[85] Each category of search contains a descriptive paragraph setting out the "idea" or objective behind the specific searches involving the combination of the specific search identifier and the indicated basic search formulation required for running that search. The first set of proposed searches 1 to 19 utilize individual names to be searched in connection with A, B, C or D. The second is set of searches 20 to 29 specify entities/organizations/reports to be searched in conjunction with the basic search formulations. The third category of specific search terms 30 to 51 utilize key word searches in conjunction with the basic search formulations. The plaintiffs proposed search terms also include other document requests relating to external publications published by OLG, HIP and ORC.

[86] The searches proposed by the plaintiffs require each defendant to search its databases for documents and emails involving the individual name or defendants identifier where any of the terms in one or more of A,B,C or D is specified within an indicated word range. For instance, if each defendant were required to conduct search number 12 for the name McGuinty, that search would relate to Dalton McGuinty who served as the premier of Ontario from 2003 to February, 2013. The name McGuinty would be searched within 30 words of any of the universal search terms set out in basic search formulation "A". The search would produce all documents where the specific identifier for that search appears

in the same document as any universal search term contained in basic search formulations "B" or "C" or "D" within the specified word range.

[87] Rule 29.2 governs proportionality in discovery. Rule 29.2 sets the stage for all other discovery rules that follow between Rules 30.02 and 30.10. It is applicable to any determination by the court under Rule 30 governing the discovery of documents and Rule 31 governing examinations for discovery whether a party or a person must answer a question or produce a document. The factors for the court to consider whether proportionality should be applied in a given situation are found in Rule 29.2.03 (1):

> **CONSIDERATIONS**
>
> ***General***
>
> **29.2.03** (1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,
>
> (a) the time required for the party or other person to answer the question or produce the document would be unreasonable;
>
> (b) the expense associated with answering the question or producing the document would be unjustified;
>
> (c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
>
> (d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
>
> (e) the information or the document is readily available to the party requesting it from another source. O. Reg. 438/08, s. 25.

[88] I am required to consider those factors set out in Rule 29.2.03(1) to decide whether it would be proportionate to order a party to produce a document or documents of a particular nature. Those factors must be interpreted according to the evidence before me and how the authorities have determined how those factors apply. For each factor I shall consider what evidence has been filed for the court to consider as well as the relevant authorities to determine how that factor is applied.

(A) *whether the time required for the party to produce a document would be unreasonable*

OLG

[89] The plaintiffs referred to evidence filed by OLG in the form of an affidavit by Paul Wilkinson. Mr. Wilkinson describes himself as employed by OLG as a senior consultant for security assessment in the IT risk management and planning department. Mr. Wilkinson conducts electronic searches in this capacity to assist counsel with documentary production in civil litigation cases involving OLG. In his affidavit, Mr. Wilkinson states that he works with Rhonda Perch, litigation support case manager at McCarthy Tetrault LLP, the law firm that represents OLG in these actions.

[90] Mr. Wilkinson explains in his affidavit that he spoke with Mr. Yoon, in-house counsel at OLG to arrange a litigation hold on email databases and archives of certain OLG personnel. He was authorized by his supervisor, Steve Madden, Executive Director of OLG's information security office, to implement the litigation hold requested by Mr. Yoon, and promptly did so.

[91] Mr. Wilkinson deposes that he consulted with external counsel and conducted internal inquiries within OLG to identify a list of 16 custodians ("OLG custodians"). These custodians are people whose email databases/archives contain records that are potentially relevant to the matters in issue in this consolidated action.

[92] Mr. Wilkinson further deposes that he was advised by Mr. Yoon that Mr. Yoon's inquiries have identified several shared network drives that likely contain documents that are likely relevant to the matters in issue ("OLG shared drives"). He further understands from Mr. Yoon that three individual hard drives have been identified as belonging to certain OLG custodians that are likely to contain potentially relevant documents ("OLG individual drives.").

[93] Mr. Wilkinson states that he has created a digital image of the entirety of each of the OLG shared drives. He deposes that he already had available to him digital images of two of the OLG individual drives and created a digital image of the documents on the third OLG individual drive.

[94] Mr. Wilkinson has also created a digital image that copied the email databases/archives of each OLG custodian. These files include emails sent and received by that custodian. He deposes that the process of creating a digital image of email databases/archives of OLG custodians usually takes several days and requires a significant quantity of digital storage.

[95] After Mr. Wilkinson compiled the digital images from the OLG shared drives and the OLG individual drives, he indexed the data using a specialized software program called NUIX and used the index data to conduct certain searches. He gathered the records returned from low searches into a single collection of records (the "item set"). He describes NUIX as having the ability to display various data about records contained within an item set, including the results of the de-duplication of identical records within that item set. Using the item set data, he can then organize statistics on the search results. This results in a process set out as the total number of individual records yielded by each set of search terms.

[96] Mr. Wilkinson has deposed that he is confident, based on the data collection exercise he conducted, that the searches within the date range of January 1, 1998 to April 15, 2014 are comprehensive.

[97] Mr. Wilkinson deposes that given the time to complete the process described above, he advised Rhonda Perch of McCarthy Tetrault LLP several months would likely be required to complete the electronic search and the records collection process since he was advised by Mr. Yoon that OLG does not have in-house capabilities to perform document. Once the search terms have

been determined he will upload the records generated from the searches for McCarthy Tetrault LLP to review.

[98] Mr. Wilkinson was advised by Ms. Perch that counsel for OLG would respond to the plaintiff's request for early production of documents by producing the first tranche on July 17, 2014. The documents contained in the first tranche were obtained from OLG's production in an action involving the Windsor Raceway where McCarthy Tetrault LLP is counsel for OLG. The documents produced in this consolidated action are of a similar nature to the Windsor Raceway action because the subject matter in that action is similar to the consolidated action. The Windsor Raceway action has already progressed through the documentary production stage.

[99] Mr. Wilkinson deposes that he was advised by Ms. Perch that on June 12, 2014, McCarthy Tetrault LLP provided a list terms to produce the first tranche of documents to the plaintiffs. OLG proposed that these same terms be used to gather records from the OLG custodians, OLG shared drives and the OLG individual drives.

[100] Ms. Perch informed Mr. Wilkinson that plaintiff's counsel instead proposed a new list of search terms on June 19, 2014. After McCarthy Tetrault LLP provided a detailed response to those search terms, he was advised by Ms. Perch that counsel for the plaintiffs had proposed a revised list of search terms.

[101] Mr. Wilkinson states that he ran the plaintiff's proposed search terms on the electronic files of the OLG custodians, OLG shared drives and OLG individual drives. With the assistance of Ms. Perch, he compiled the results of each search string and prepared a chart marked as Exhibit H to his affidavit. After de-duplication, the plaintiff's proposed search terms yielded 26,405 individual records.

[102] After a date range restricted to 2009 through 2012 was applied to the plaintiff's proposed search terms, Mr. Wilkinson states that he and Ms. Perch compiled the results of each search string and after de-duplication, the search terms proposed by the plaintiffs yielded 21,394 individual records.

[103] McCarthy Tetrault LLP wrote to plaintiff's counsel on September 12, 2014 to provide the search results set out above.

[104] Mr. Wilkinson states that he was advised by Ms. Perch that McCarthy Tetrault LLP used the results of the plaintiff's proposed search terms, together with the facts pleaded in OLG statement of defense, to generate a revised list of search terms. This revised list of search terms, restricted by the material facts in dispute according to OLG statement defense, resulted in 10,931 individual records after de-duplication.

[105] Mr. Wilkinson also ran OLG's proposed search terms restricted to 2009 to 2012. After de-duplication, OLG's proposed search terms confined the 2009 to 2012 time frame yielded 9,909 individual records.

[106] After reviewing the data, Mr. Wilkinson discovered that one of the OLG shared drives was counted twice in the total for individual search strings, but not in the de-duplicated total for each set of documents. Therefore, the number of search results from each individual search string provided to counsel for the plaintiffs on June 12, 2014 and September 15, 2014 likely overestimated the actual number of identified documents. This, he said, does not affect the total number of de-duplicated documents for each of the four sets of search terms and in turn, the quantities of documents to be reviewed are unaffected.

<u>Ontario</u>

[107] Ms. Roback-Lescinsky states in her affidavit sworn on September 19, 2014 that to get a sense of the amount of data that could be collected from one source, she ran a search using the plaintiffs proposed keyword search terms.

According to that search, she determined that there would be approximately 13,500 documents retrieved.

[108] Based on her experience, Ms. Roback-Lescinsky deposed that with litigation files involving large productions, once the date range, custodians and keyword search terms are agreed by the parties, the following steps must be completed:

1) the relevant electronic search information needs to be located and collected from the custodians in the various ministries and ORC. The data collected could amount to tens of thousands of documents for each custodian as no search term filter would be used at this stage. This process could take a number of weeks;

2) the data would then need to be searched with the agreed-upon keywords to identify potentially relevant documents. This process could take approximately 2 weeks;

3) the documents will then need to be reviewed for relevance and privilege. This process could take a number of weeks or months depending on the number of documents;

4) the relevant data would then be provided to an IT specialist for processing so that the data could be loaded for viewing into summation. This process could take a few weeks or more depending on the amount of data to be processed;

5) the relevant documents would then be produced in a list of documents to the plaintiffs.

[109] Ms. Roback-Lescinsky made this affidavit in support of Ontario's motion for an adjournment of the plaintiff's motion for productions. I take it from her

statement that Ontario would have relied upon her to make it clear in her affidavit what demands under Rule 29.2.03 would be required of Ontario to make the scope and nature of documentary disclosure and production the plaintiffs require.

Analysis

[110] A party that seeks to limit the production of certain documents that are otherwise relevant on the basis of proportionality must put cogent evidence forward that addresses the factors under Rule 29.2 .03. If a party has not done so, the court has nothing to assess for the applicability of those factors. This is even more important when the evidence concerning a factor will not support limiting the production of relevant documents on the basis of proportionality.

[111] It would appear from the evidence of Paul Wilkinson that the collection and searching of the plaintiff's proposed search terms as of July 8, 2014 for the first tranche has already been accomplished. The collection and searches of the OLG custodians, OLG shared drives and the OLG individual drives using the plaintiffs revised search terms have been in the possession of OLG since July 8, 2014. Those searches would likely have been completed by now if they had been undertaken at the time. I do not see that OLG's evidence is specific enough to suggest that the time for conducting the plaintiffs search terms is so disproportionate to the matters at issue and the remedies the plaintiffs seek in the consolidated actions to limit the scope of productions proposed by the plaintiffs on the basis of the time.

[112] I also am of the view that the evidence of Susan Roback-Lescinsky with respect to the time estimates she has given for Ontario to conduct searches using the plaintiff's key words before any search term filter is applied, is both general and generous. Her evidence that data would then be searched with agreed-upon keywords to identify potentially relevant documents and would take probably two weeks favours the plaintiffs, particularly since Ontario would have had the same revised search terms since July 8, 2014. Ms. Roback-Lescinsky's

estimate of time being a number of weeks or months to review the documents for relevance and privilege depending on the number of documents is so vague as to be of little assistance.

[113] I also note that Ontario has filed no evidence whether its search engines or computer systems use the NUIX software or a comparable program for sourcing, sorting and de-duplication functions.

[114] I consider Ontario's evidence that the relevant data would then be provided to an IT specialist for processing so that the data could be loaded into Summation for viewing to be irrelevant for the purposes of applying this factor. That time goes to litigation preparation on the part of Ontario and does not count against the time to collect, search and assemble the necessary electronic search documentation to provide a proper affidavit of documents to comply with Rules 30.02 and 30.03.

(B) whether the expense associated with producing the document would be unjustified

[115] At paragraph 35 of the plaintiff's factum, the following paragraph appears:

> 35. Moreover, both defendants are significant entities with large counsel teams (10 in total) and in the case of OLG, have additional in-house counsel resources and an external document management company. Both are seasoned litigants and OLG is currently engaged in litigation around the cancellation of syrup with the Windsor Raceway. This is not a matter of lack of resources.

[116] The source of this statement may be within the knowledge of counsel for the plaintiffs, but there is no evidence before this court to support those facts. However, I draw from this statement the reference that OLG is engaged in litigation with the Windsor Raceway. This fact reiterates paragraph 21 of Mr. Wilkinson's affidavit in which he makes reference to that action with respect to producing OLG's first tranche of documents. I consider this evidence to be sufficient to support an inference that OLG has a legal team assembled and

already producing documents to address many of the same issues OLG has encountered in the Windsor Raceway action.

[117] In *Midland Resources Holding LTD v. Shtiaf*, [2010] O.J. No. 2767, this court held the onus is on the party seeking an order from the court to restrict the scope of document reproduction on the basis of proportionality to produce evidence to justify that order. I can see no evidence in the affidavit of either Paul Wilkinson or Susan Roback-Lescinsky sworn on September 19, 2014 indicating the cost to either defendant to produce the scope of documentary production required by the plaintiffs. While it is acknowledged that there is an internal cost to a government ministry agency or Crown corporation to compile data and expense, no cost breakdown was provided in evidence by either defendant.

[118] The defendants in this case are significant defendants with significant resources. It should also be remembered that these defendants have collected substantial net profits from the slots program at 15 of the 17 racetracks in Ontario after the SARP program was terminated on March 31, 2013. This may be the reason why each defendant does not raise the cost of disclosure using the plaintiffs proposed search terms as a basis for opposing the plaintiffs' motion.

(C) Whether requiring the party to produce the document would cause that party undue prejudice

[119] Apart from any tangential statements in the affidavit of Paul Wilkinson or the affidavit of Susan Roback-Lescinsky sworn on September 19, 2014 relating to issues of privilege, there was no evidence filed on the plaintiffs' motion as to what prejudice either OLG or Ontario would suffer if this court were to make an order for the scope of production requested by the plaintiffs.

[120] In *McGee v. London Life*, Justice Strathy (as he then was) made it clear that it is impermissible for a party to redact portions of a relevant document simply because of an assertion made that portions of that document are not

relevant. After reviewing the authorities, Justice Strathy observed that it is sometimes the case that redactions are made in the case of privileged documents. Justice Strathy therefore concluded that an entire document that is relevant must be produced except to the extent where it contains information that would cost and a significant harm to the producing party or would infringe public interest deserving of protection. I am of the view that the court could only be in a position to conclude what would cause significant harm to the producing party, or what disclosure would infringe a public interest deserving of protection if the court was given having the benefit of proper evidence relating to each part of those issues to make either determination. Here, there is no evidence about interests deserving of protection to speak of, and neither defendant is raising parliamentary privilege at this stage.

(D) Whether an order requiring the party to produce the document would unduly interfere with the orderly progress of the action

[121] On April 25, 2014, the plaintiffs delivered the first tranche of documents comprised of approximately 4200 pages of material. On April 29 and April 30, 2014, counsel for the plaintiffs and counsel for Ontario exchanged emails relating to the timeline for production of documents. On June 2, 2014, the plaintiffs delivered their second tranche of documents, consisting of a further 836 pages of material. The plaintiffs served their affidavit of documents on counsel for each defendant on June 20, 2014. On July 24, 2014, the plaintiffs delivered their third tranche of documents, comprising some 259 pages of material.

[122] In one message, counsel for Ontario acknowledged that he would do everything he could to move the production process forward as quickly as possible. In that message he stated:

> With respect to the timetable, as indicated in my letter dated April 25, 2014, we cannot agree to your deadline of September for completion of productions because we cannot commit to having all relevant documents produced by that date. I can assure you that we will do everything we can to move the production process forward as quickly as possible.

[123] The plaintiffs have received only the first tranche of Ontario's productions on July 24, 2014 consisting of approximately 205 documents and the second tranche of Ontario's documents composed of some 330 documents on August 5, 2014.

[124] The affidavit of Ms. Iannacito filed in support of the motion seeks firm dates by which the defendants are to deliver an affidavit of documents containing all documents required by Rule 30.02. Each affidavit of documents must include, but not be limited to those documents generated by the defendants upon using the plaintiffs proposed search terms.

[125] It is for the plaintiffs to object to an unduly long delay to the progress of the action for the defendants to make a full range of documentary production available under Rule 30.02. Here, it is the plaintiffs who are seeking full and proper disclosure of all documents relevant to matters at issue in the consolidated actions. There is no evidence provided by either defendant to support an argument that the scope of production the plaintiffs seek would unduly interfere with their ability to make a full defence, or the orderly progress of the action.

(E) Whether the document is readily available to the party requesting it from another source

[126] There is no evidence in the affidavits filed by either of the defendants on the motion that documents within the proposed search terms are readily available to the plaintiffs from another source. In argument, counsel for each defendant stated that documents produced to date are readily available to the plaintiffs in the form of public documents or that documents are available to them over the internet. However, there is no evidence from either defendant that documents that may be generated by using the plaintiffs proposed search terms would otherwise be available to the plaintiffs elsewhere.

[127] The onus is on the defendants to justify the imposition of proportionality to confine or reduce the scope of productions the defendants are to make and to which the plaintiffs are entitled under Rules 30 and 31. I conclude after applying the specific factors set out in Rule 29.2.03(1) on the motion before me does not justify the imposition of proportionality for the purposes of disclosure and the production of documents.

[128] The court is also required to determine if the overall volume of documents would justify the application of proportionality to the production of documents that one party must make to the other under Rule 30.02. Subrule 29.2.03(2) reads as follows:

> ***Overall Volume of Documents***
>
> (2) In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person. O. Reg. 438/08, s. 25.

[129] Ontario and OLG each make the argument that the overall volume of productions that would result from the unbridled search terms proposed by the plaintiffs would be disproportionate to the matters at issue between the parties in the consolidated actions.

[130] In dealing with search terms, particularly with respect to addressing the scope of productions and whether to apply proportionality to determine the appropriate scope, the court is faced with dealing with search terms rather than documents to make a just decision. However, subrule 29.2.03(2) does not direct the court to consider search terms, but rather documents. How the court in other cases has dealt with how much is too much illustrates the fact specific basis on which this factor has been addressed.

[131] In *Siemens Canada LTD v. Sapient Canada Inc.*, [2014] O.J. No. 1930, Master Short was called upon to decide two motions in an action where the

plaintiff was seeking damages for breach of contract in the amount of $21 million. The defendant in that action was seeking damages of $10 million on his counterclaim for unpaid invoices, breach of contract and negligence relating to a subcontract.

[132] In the first motion, the plaintiffs requested an order from the court to impose a discovery plan on the parties that set out, among other things, the scope of documentary discovery, the custodians holding documents to search, an order for a further and better affidavit of documents from the defendant, and the timely production by the defendant of any relevant documents not already produced. The defendant brought a cross-motion seeking an order for an order for further documentary production, but only in the event that the plaintiff was successful on its motion.

[133] After an extensive discussion with respect to the cultural shift in the civil justice system in Ontario under the Rules after January 1, 2010, Master Short reviewed the volume of documents produced to date by each party in the action before him. The plaintiff had selected 20 custodians as persons having data to produce in the action, and had produced 120,043 documents to date. In contrast, the defendant had selected 10 custodians for production out of approximately 120 employees and contractors involved in the project at issue. The defendant initially produced 23,536 documents initially, and had produced a further 17,474 documents after the examination for discovery of the plaintiff's representative. Master Short recognized at that stage of the litigation and given the history of the action overall, that it would be appropriate for the parties to rerun searches for new documents running additional search terms on existing databases.

[134] I cannot determine from the authorities where a test defines how the court can assess whether search terms in dispute will yield an excessive volume of documents for the documentary disclosure process that is disproportionate to what would otherwise be the relevant documents to the matters at issue between

the parties. I cannot determine whether the issues in the consolidated actions before me justify an overall volume of documents as great or greater than those issues between the parties in *Siemens v. Sapient*. Here, the defendants have not provided any evidence that the overall volume of documents is disproportionate to the matters at issue between the parties except for describing the actual or proposed volume of those documents that may result from conducting the required searches using search terms proposed by the plaintiffs. If the *Siemens* case is any measure, the projected volume of the documents in the consolidated actions are likely proportionate to what the parties could reasonably expect to produce in litigation of this magnitude. It is not unreasonable for the plaintiffs to seek the broadest scope of disclosure possible in view of the factual allegations made, causes of action asserted and the causal links to damages allegedly caused by the defendants conduct over time.

[135] In *Ontario v. Rothmans Inc.*, Justice Perell held that the proportionality principle is a parsimonious principle. He explained that proportionality was intended to reduce the scope of evidence or disclosure where and when appropriate, depending on the case. However, Justice Perell did not find that proportionality is applicable in every case to reduce or restrict disclosure. At paragraph 163, Justice Perell put it this way:

> In my opinion, an expansionary approach to proportionality is wrong. A parsimonious proportionality principle provides a useful tool for cases large and small. The base line is that the *Rules of Civil Procedure* are designed for cases of all sizes, but the proportionality principle allows the court to downsize the procedure and still do justice for the parties. If downsizing is not procedurally fair then the normal rules should apply to the proceedings without augmentation.

[136] The real question is whether there is evidence or good reason why the scope of documentary disclosure as required by Rule 30.02 should be in some way confined from the proportions it would otherwise take, or if the disclosure be made according to the Rule unbridled by the restraints of proportionality. If proportionality is not appropriate under the circumstances, then the court should

not impose its strictures upon the parties and their obligations for documentary disclosure. In that event, the ordinary rules for documentary disclosure based on relevance shall apply.

[137] In summary, I do not have sufficient evidence from the defendants to determine if the overall volume of documents that the plaintiffs proposed search terms would generate will be excessive to make that volume disproportionate to what is at stake in the action. I therefore do not consider the overall volume of documents in this case to be applicable as a factor to apply proportionality to limit the documentary disclosure obligations of the defendants.

Relevance

[138] Before considering the relevance of the search terms proposed by the plaintiffs to the matters at issue and what limits, if any, should be imposed on those terms, Rule 29.1.03 relating to a discovery plan requires the court to take into account certain practical considerations.

[139] In *Ontario v. Rothmans*, Justice Perell discussed how the availability of search engines will inform the formulation of a discovery plan. In the consolidated actions before this court, it is clear that the defendants have Ms. Roback-Lescinsky and Mr. Wilkinson respectively for expertise, and the technology complete with search engines at their disposal. This is important to keep in mind when reading Rule 29.1.03(4) that directs the parties in unequivocal terms to consult and have regard to "the Sedona Canada Principles Addressing Electronic Discovery." In particular, OLG relies upon Principle 2 for its position that the search terms proposed by the plaintiffs be consistent with the Sedona Principles. Principle 2 states as follows:

> In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at state; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and

> (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.

[140] OLG also relies upon Principles 4 and 5 of the Sedona Canada Principles, which read as follows:

> Principle 4 states:
>
> Counsel and parties should meet and confer as soon as practicable, and on an ongoing basis, regarding the identification, preservation, collection, review and production of electronically stored information.
>
> Principle 5 states:
>
> The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.

[141] Although OLG takes the position that the Sedona Canada Principles relate to proportionality, in my view those principles also apply to any consideration of relevance because of the materiality of any proposed search term to the matters at issue between the parties.

[142] What makes a document relevant? In *Imperial Oil v. Jacques*, 2014 SCC 66, the Supreme Court of Canada recognized the concept of relevance is generally interpreted broadly at the exploratory stages of an action. Justice Lebel wrote at paragraph 30 that "to be relevant, the requested document must relate to the issues between the parties, be useful and be likely to contribute to resolving the issues." At paragraph 31, Justice Lebel stated that the relevance rule requires a balancing "that ensures the efficiency of the judicial process while facilitating the search for truth."

[143] In *Canadian Imperial Bank of Commerce v. Deloitte and Touche*, 2013 ONSC 917, Justice Perell examined the concepts of "materiality" and "relevance" to determine whether a deponent was justified in refusing to answer a question if it was not material or relevant. At paragraph 67 of that decision, Justice Perell stated that evidence that does not address an issue arising from the pleadings or the credibility of a witness is immaterial, and therefore inadmissible. If the fact is

not in issue in the case, then the evidence to prove that fact is immaterial because it would not matter to the outcome of the issues between the parties. Justice Perell further stated at paragraph 68 that "to be relevant, evidence must increase or decrease the probability of the truth of the facts in issue. Relevance is about "the tendency of the evidence to support inferences."

[144] The defendants submit that any fact that has been admitted removes the materiality of the fact from the truth seeking purpose of obtaining documents to prove that fact, making those documents irrelevant for the purposes of disclosure and production. I disagree. Where there are causes of action that depend on the proof of facts over time, or proof of facts that underpin the constituent elements of a cause of action or other facts that go to a claim or defence, admitting one or more facts in isolation to the larger picture does not make those facts immaterial. In any event, a review of the statement of defence of each defendant reveals that Ontario admits to various allegations contained in the statement of claim against it, where OLG pleads it has no knowledge or denies most of allegations pleaded in the statement of claim. Accordingly, the statements of defence operate to raise matters at issue between the parties from what each says, and by the differences between them now that the actions are joined.

[145] What documents are relevant turns on the allegations of material facts and the components of each cause of action pleaded in the case. The authorities have generally considered the scope of questioning on an examination for discovery to be defined by the pleadings: *Ontario v. Rothmans Inc.*, 2011 ONSC 2504, at paragraph 129, citing *Playfair v. Cormack* (1913), 4 O.W.N. 817 (H.C.J.). I see no reason why the relevance of the documents generated by search terms in this case cannot be determined using the same measurement.

[146] No agreement has been reached between counsel with respect to a timetable for completion of documentary production. Neither Ontario or OLG

have delivered an affidavit of documents. Nor have Ontario or OLG provided the plaintiffs with a list of custodians who hold documents in their possession, power or control relevant to the consolidated action. Counsel have not been able to agree on search terms or parameters to utilize for the retrieval of relevant documents.

[147] The constituent elements of the claims being made by the plaintiffs against each defendant form a continuum from 1998 to 2012, if not beyond. In particular, the claims of negligent misrepresentation and bad faith support allegations that project a factual arc from 1998 to the present. For example, the tort of negligent misrepresentation has five general requirements to plead and prove:

(1) there must be a duty of care based on a "special relationship" between the representor and the representee;

(2) the representation in question must be untrue, inaccurate, or misleading;

(3) the representor must have acted negligently in making said representation;

(4) the representee must have relied, in a reasonable manner, on the said misrepresentation; and

(5) the reliance must have been detrimental to the representee in the sense that damages resulted: *Queen v. Cognos Inc.*, [1993] S.C.J. No. 3.

[148] Whether bad faith is alleged by the plaintiffs in their action as a cause of action or as an attribute to the damages claimed, the plaintiffs argue that the acts, words and deeds of the defendants in their various manifestations occurred

from a point in time starting in 1998. The claims of the plaintiffs in the statements of claim are sufficiently pleaded to make documents they came into existence during the intervening years relevant to the matters at issue.

[149] The statement of defence delivered by each defendant also puts matters at issue between the parties. Ontario denies a "special relationship" with the standardbred breeders at paragraph 42 of its statement of defence. At paragraph 47, Ontario denies any facts giving rise to any equitable rights or obligations. Each defendant denies the plaintiff's claims for unjust enrichment by not only pleading no entitlement or compensation deprivation to the plaintiffs, but also that there was a juristic reason for its conduct. These elements of the plaintiffs claim for unjust enrichment and the defence of Ontario and OLG to each element, even if pleaded in the alternative, raise factual matters that are at issue between the parties entitling the plaintiffs to full disclosure.

[150] Any argument that the proposed search terms of the plaintiffs do not distinguish between the search terms required of Ontario as distinct from OLG can be answered by the observation that the actions have now been consolidated. Therefore, each of the defendants are required to run any search terms ordered by this court or required by the *Rules of Civil Procedure* according to their abilities and to the extent of the databases available to them.

[151] The proposed search terms provided by counsel for the plaintiffs on July 8, 2014 is the third iteration of the suggested search terms provided after consultation with counsel for each of the defendants. It is this third iteration that contains the search terms proposed by the plaintiffs.

[152] The scope of the search terms at issue concern the time periods applicable to the proposed search terms, as well as the degree of precision for the language of those search terms as it relates to the allegations of material fact contained in the statement of claim against each defendant.

[153] From reviewing the proposed search terms of the plaintiffs against the statement of claim in each action, the first and foremost issue is the timeframe for each search. The plaintiffs bring those actions alleging negligent misrepresentation, bad faith in decision-making, and a theory based on breach of contract. Each cause of action alleges a legal relationship established through the course of conduct spanning a period of time dating back to 1998. The denial of any course of conduct by each defendant puts facts in dispute that requires documentary disclosure if there are facts that would establish a course of conduct leading to a cause of action or relating to damages.

[154] The plaintiffs allege that each defendant made a systemic series of representations over a number of years that were ultimately breached. The plaintiffs allege that the defendants and each of them knew at all material times that the standard bred breeders made decisions based on five-year production cycles in their business. They allege that they made decisions and business plans in reliance on those representations. The plaintiffs argue that the purposes of the discovery process concerns how the characterization of those representations made by Ontario and OLG to them changed, and how the revenue-sharing relationship between each defendant, the horseracing industry and themselves as standardbred breeders changed over time, ending with the termination of SARP.

[155] In a case of this magnitude, the law should favor a generous interpretation of disclosure requirements under the *Rules of Civil Procedure* and therefore a broad scope of document production. This case involves too much money, and too many people whose livelihoods depend upon a fair and transparent discovery process. The plaintiffs are entitled to proper disclosure by each defendant for the production of documents from which facts can be determined, or that will provide the basis to conduct examinations for discovery to determine those facts.

[156] I am mindful that the plaintiffs' motion seeks an order from the court imposing the first steps in a discovery plan for the disclosure and production of documents. I must therefore keep Rule 29.1.03(3) in mind, particularly subrule (a) that requires that the intended scope of documentary discovery under Rule 30.02 must take into account the relevance, cost and the importance and complexity of the issues in the action when devising a discovery plan.

[157] The parties themselves identified that the primary period for document collection and production would be 2009 to 2012 on a rolling basis. It was during this period that the plaintiffs allege they continued their reliance on receiving funds that originated because of SARP, and it was during this period that the decision making process occurred resulting in the termination of SARP. I am of the view, having regard to the relevance of documents that would have come into existence during the primary period and the other considerations mandated by subrule 29.1.03(3)(a), that the proposed search terms of the plaintiffs should be limited in terms of time at this stage to the time period between January 1, 2009 and December 31, 2012. If relevance, cost and importance can be made out at a later time, the plaintiffs may seek an order extending the reach of any search terms further back or forward in time. The only exceptions to limiting the current timeframe for search terms shall be any search that makes SARP or HIP or any derivative of those terms set out in basic search formulation B or D part of that search, and for that aspect the search shall extend back to January 1, 1998.

[158] I therefore find that the search terms proposed by counsel for the plaintiffs on July 8, 2014 in the numbered version of the plaintiff's search terms attached as Schedule 1 shall be the search terms each defendant is ordered to run for the purpose of serving an affidavit of documents. Where there are no time parameters to any of the 51 searches, those searches shall be run within the core time parameters of January 1, 2009 to December 31, 2012 inclusive, except for those searches that include using basic search formulations "B" or "D" which

shall extend the time frame back to 1998. Any search limited by this order is without prejudice to any further order for expanding search terms by time, or by reference to facts in issue after examinations for discovery, if a proper foundation for relevance is provided.

Conclusion

[159] For the above reasons, I make the following orders as the first stage of a discovery plan under Rule 29.1.03 (3) for the disclosure and production of documents:

(a) that each of the defendants shall serve an affidavit of documents that conform strictly with the requirements of Rule 30.03 on all parties by March 23, 2015.

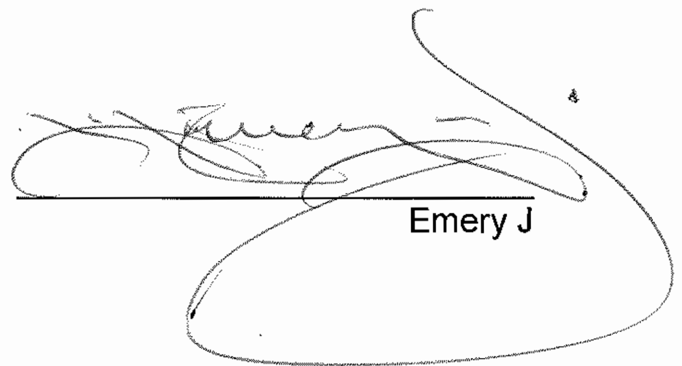
(b) that each of the defendants shall produce a copy of all documents listed in and numbered according to Schedule A of that party's affidavit of documents to the plaintiffs by March 31, 2015. These productions may be provided electronically on a disk or memory stick, or alternatively printed on paper provided that those documents are indexed according to Schedule A, tabbed and bound. The documents produced by Ontario shall not be redacted anyway, and the documents produced by OLG shall only be redacted pursuant to any agreement in writing with the plaintiffs.

(c) The defendants are each ordered to use the search terms search terms set out in Schedule I for the purpose of preparing an affidavit of documents, except for those modifications set out in paragraph 158 above.

[160] The plaintiff's motion for Ontario and OLG respectively to provide a list of custodians, their identities, job descriptions and contact information is dismissed without prejudice to the right of the plaintiffs to bring a separate motion if and

when required. If the issue of the identity and job description of any one or more of those custodians becomes an issue for the plaintiffs upon being served with the affidavit of documents of each defendant along with their respective Schedule A documents, or related questions are not answered at examinations for discovery, a separate motion may be brought in respect of those issues.

[161] The parties are encouraged to discuss the resolution of costs for the plaintiffs' motion and the motion made by Ontario on October 20, 2014. If the parties cannot agree to those costs, I invite counsel for the plaintiffs to make written submissions consisting of no more than three pages, not including a costs outline, bill of costs or time dockets by February 27, 2015. Each of the defendants shall have until March 14, 2015 to make written submissions in response, subject to the same limits. The plaintiffs shall then have until March 6, 2015 to provide written submissions consisting of no more than two pages in reply to the written submissions of each defendant. All submissions may be filed with the trial coordinator's office or with my judicial assistant, Sherry McHady by facsimile at 905-456-4834.



Emery J

DATE: February 9, 2015

LOSL Proposed Search Terms – Seelster Farm v. OLG; Seelster Farm v. Ontario

Basic Search Formulations

Idea: Owing to their breadth, none of these terms will be searched in isolation, but these search strings will form the basis for other searches later on in this document.

Basic Search "A"

- standardbred or "standard bred" or breeder! or breed! or "standardbred breeder"

Basic Search "B"

- "SARP" or (slot! /5 racetrack!) or "slots at the racetrack!" or "slots-at-racetrack"

Basic Search "C"

- racehorse or "race horse" or (horse! /30 (track or racetrack)) or horseracing or "horse racing" or "racing industry" or horsepeople or "horse people"

Basic Search "D"

- "HIP" or "horse improvement" or "horse improvement program" or (sire! /5 stake!) or "OSS" or "Ontario Sires Stakes" or "SIP" or "standardbred improvement" or "standardbred improvement program"

Individual Names to be Searched

Idea: For there to be a hit, the individual or entity name must appear, PLUS a variant of standardbred / breeder must be within 30 words' proximity to variants of SARP / horseracing / HIP OR a variant of SARP must be within 30 words proximity to variants of horseracing / HIP. For the search related to "Premier", the string has been modified to exclude references to Woodbine being a "premier" track.

1. Bullock and (("A") /30 (("B") or ("C") or ("D"))) or (("B") /30 (("C") or "D")))
2. Parkinson and (("A") /30 (("B") or ("C") or ("D"))) or (("B") /30 (("C") or "D")))
3. McNiven and (("A") /30 (("B") or ("C") or ("D"))) or (("B") /30 (("C") or "D")))
4. Meyers and (("A") /30 (("B") or ("C") or ("D"))) or (("B") /30 (("C") or "D")))
5. Demarchi and (("A") /30 (("B") or ("C") or ("D"))) or (("B") /30 (("C") or "D")))
6. Duncan and (("A") /30 (("B") or ("C") or ("D"))) or (("B") /30 (("C") or "D")))
7. Godfrey and (("A") /30 (("B") or ("C") or ("D"))) or (("B") /30 (("C") or "D")))
8. Phillips and (("A") /30 (("B") or ("C") or ("D"))) or (("B") /30 (("C") or "D")))
9. Clouthier and (("A") /30 (("B") or ("C") or ("D"))) or (("B") /30 (("C") or "D")))
10. Leslie and (("A") /30 (("B") or ("C") or ("D"))) or (("B") /30 (("C") or "D")))
11. Wynne and (("A") /30 (("B") or ("C") or ("D"))) or (("B") /30 (("C") or "D")))
12. McGuinty and (("A") /30 (("B") or ("C") or ("D"))) or (("B") /30 (("C") or "D")))
13. Premier and (("A") /30 (("B") or ("C") or ("D"))) or (("B") /30 (("C") or "D"))) and not (Premier /10 Woodbine)
14. McDougall and (("A") /30 (("B") or ("C") or ("D"))) or (("B") /30 (("C") or "D")))
15. Flynn and (("A") /30 (("B") or ("C") or ("D"))) or (("B") /30 (("C") or "D")))

16. Moore and ((“A”) /30 ((“B”) or (“C”) or (“D”))) or ((“B”) /30 ((“C”) or “D”)))
17. Deacey and ((“A”) /30 ((“B”) or (“C”) or (“D”))) or ((“B”) /30 ((“C”) or “D”)))
18. **Each individual Plaintiff name** and ((“A”) /30 ((“B”) or (“C”) or (“D”))) or ((“B”) /30 ((“C”) or “D”)))
19. **Each individual farm name [as distinguished from Plaintiff name]** and ((“A”) /30 ((“B”) or (“C”) or (“D”))) or ((“B”) /30 ((“C”) or “D”)))

Entities / Organizations / Reports to be Searched

Idea: For each of the entities / organizations / reports listed below, we are looking for mentions of the specific entity or organization or report within 50 words' proximity to a variant of SARP. For references to OLG / Auditor General / ORC, given the number of documents we would expect to contain reference to those entities and variants of SARP, further narrowing will also require a reference to variants of standardbred / horseracing / /subsidy within 50 words' proximity to a variant of SARP. A date range limiter is also proposed for the Auditor General search.

20. Cabinet /50 (“B”)
21. (SBOA or “Standardbred Breeders of Ontario Association”) /50 (“B”)
22. (“Standardbred Canada” or “SB Canada” or SBC) /50 (“B”)
23. (OHRIA or “Ontario Horse Racing Industry Association”) /50 (“B”)
24. (COSA or “Central Ontario Standardbred Association”) /50 (“B”)
25. (OHHA or “Ontario Harness Horse Association”) /50 (“B”)
26. (OLG or “Ontario Lottery”) /50 (“B”) /50 ((“A”) or (“C”) or subsid!)
27. (“Auditor General” or AGO) /50 (“B”) /50 ((“A”) or (“C”) or subsid!) and daterange (2009-2014)
28. (ORC or “Ontario Racing Commission”) /50 (“B”) /50 ((“A”) or (“C”) or subsid!)
29. ((Sadinsky or “It's All About Leadership”) /50 (“B”)) and (“A”)

Key Word Searches

30. (Advisory /5 Group) /5 (“A”)
31. ((agricultur! or rural!) /30 (econom! or job! or employ! or stimul!)) /30 ((“A”) or (“C”))
32. compensat! /30 ((“B”) and ((“C”) or (terminat! or cancel! or stop! or end! or cease! or expir! or discontin! or close!))) and daterange (2008-2012)
33. (Duncan or Flynn or Godfrey or Phillips or Moore or McDougall or OLG or “Ontario Lottery”) and ((terminat! or cancel! or stop! or end! or cease! or expir! or discontin! or close!) /30 (“B”)) and daterange (2008-2012)
34. (employ! or job!) /30 (“C”) /30 (“A”)
35. ((financial /5 plan!) or strateg!) /30 (“D”)
36. ((financial /5 report!) or (business /5 plan!)) /20 (“OLG” or “ORC” or “HIP” or “Ontario Lottery” or “Ontario Racing Commission” or “horse improvement” or “Horse Improvement Program”) and ((“B”) or (slot! /5 revenue!)) and daterange (2008-2012)
37. invest! /20 (“A”)
38. (“letter of intent” or “LOI”) /30 ((“B”) or (slot! /5 revenue!))
39. (“long-term” or “longterm” or “long term”) /30 (invest! or stimul!) /30 (“A”)

40. McKinsey /30 (terminat! or cancel! or stop! or end! or cease! or expir! or discontin!) /30 (“C”)
41. “net win” /30 (pay! or paid) /30 ((“C”) and (“A”))
42. (terminat! or cancel! or stop! or end! or cease! or expir! or discontin! or close!) /20 ((“B”) or (slot! /5 revenue!)) and daterange (2008-2012)
43. (trickle or trickledown or “trickle-down”) /30 ((“A”) or (“B”))
44. subsid! /30 (“B”) /30 (“C”)
45. (produc! or cycle!) /10 year! /30 ((“C”) or horse)
46. purse! /30 (“B”) /30 ((“A”) and (“C”))
47. (renew! or extend! or amend! or prolong! or expand! or lengthen! or broaden! or continu!) /30 (“A”) /30 (“D”)
48. (report! or stud!) /30 ((“A”) and (“B”))
49. (((siteholder /5 agreement) or (“site holder” /5 agreement!)) and ((“A”) or (“horsepeople” or “horse people”)) /30 (renew! or extend! or amend! or prolong! or expand! or lengthen! or broaden! or continu!) and daterange (2009-2012)
50. “secret subsidy” /30 (Hudak or radio)
51. (standardbred or “standard bred”) /5 (breed! or sector or industr!)

Other Document Requests

- Instead of conducting a search for OLG, HIP and ORC Annual Reports, we would be satisfied with copies of the final versions of the Annual Reports for OLG / ORC /HIP between 1998 and 2013.
- All consultation memos and accompanying correspondence with consulted stakeholders that OLG prepared or collected in conjunction with its strategic review (via the Modernization Rcport) for the period 2010 to 2012.

CITATION: Seelster v. HMTQ and OLG, 2015 ONSC 908
COURT FILE NO.: 272/14
DATE: 2015 02 09

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., ROBERT HAMATHER, ESTATE OF JAMES CARR, deceased, by its executor Darlene Carr, GUY POLILLO, DAVID GOODROW, TIMPANO GAMING INC., CRAIG TURNER, ROBERT MCINTOSH STABLES INC., 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

v.

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

COUNSEL: Jonathan C. Lisus and Ian C. Matthews, for the Plaintiffs

Robert Ratcliffe, John Kelly and Sonal Gandhi, for the Defendant, Her Majesty The Queen

Awanish Sinha and H. Michael Rosenberg, for the Defendant, Ontario Lottery and Gaming Corporation

HEARD: September 23 and October 20, 2014

ENDORSEMENT

EMERY J

DATE: February 9, 2015