Court File No. 272/14

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

SEELSTER FARMS INC., WINBAK FARM OF CANADA INC., STONEBRIDGE FARM, 774440 ONTARIO INC., NORTHFIELDS FARM INC., JOHN MCKNIGHT, TARA HILLS STUD LTD., TWINBROOK LTD., EMERALD RIDGE FARM, CENTURY SPRING FARMS, HARRY RUTHERFORD, DIANE INGHAM, BURGESS FARMS INC., ROBERT BURGESS, 453997 ONTARIO LTD., TERRY DEVOS, SONIA DEVOS, GLENN BECHTEL, GARTH BECHTEL, 496268 NEW YORK INC., HAMSTAN FARM INC., ESTATE OF JAMES CARR, deceased, by its executor Darlene Carr, ESTATE OF GUY POLILLO, deceased, by its executor Carolyn Polillo, DAVID GOODROW, TIMPANO GAMING INC., CRAIG TURNER, GLENGATE HOLDINGS INC., KENDAL HILLS STUD FARM LTD., ANDY KLEMENCIC, TIM KLEMENCIC, STAN KLEMENCIC, JEFF RUCH, BRETT ANDERSON, DR. BRETT C. ANDERSON PROFESSIONAL VETERINARY CORPORATION, KILLEAN ACRES INC., DECISION THEORY INC., 296268 ONTARIO LTD., DOUGLAS MURRAY MCCONNELL, QUINTET FARMS INC., KARIN BURGESS, BLAIR BURGESS, ST. LAD'S LTD., WINDSUN FARM INC., SKYHAVEN FARMS, HIGH STAKES INC., 1806112 ONTARIO INC., GLASSFORD EQUI-CARE, JOHN GLASSFORD, GLORIA ROBINSON and KEITH ROBINSON

Plaintiffs

- and -

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

Defendants

PLAINTIFFS' RESPONDING FACTUM
(Ontario's Motion to Stay Rule 39.03 Examinations)

April 24, 2017

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TABLE OF CONTENTS

PART I – OVERVIEW

1. Defendants Her Majesty the Queen in right of Ontario ("Ontario") and the Ontario Lottery and Gaming Corporation ("OLG") seek judgment summarily dismissing the Plaintiffs' claims arising from the March 2012 cancellation of the Slots at Racetracks Program ("SARP") revenue sharing arrangement.

2. The Plaintiffs' claims in negligence, negligent misrepresentation, contract, unjust enrichment and equity span the period from 1998 to 2014. The pleadings are comprehensive and detailed. At summary judgment, this Court will decide, among other things, whether any of the following issues are genuine issues that require a trial:

(a) Whether a commercial contract or agreement was formed for the sharing of slot machine revenue and what notice is required for termination;

(b) Whether there was a relationship of proximity and reasonable foreseeability between Ontario and OLG and the Plaintiffs;

(c) Whether the pleaded representations of Ontario and OLG, were or became untrue, inaccurate or misleading;

(d) Whether the representations were reasonably relied upon;

(e) Whether the cancellation of SARP revenue sharing is a non-justiciable policy decision;

(f) Whether the SARP decision was made in bad faith or irrationally;

(g) Whether the SARP decision is a breach of contract; and

(h) Whether Ontario and/or OLG were unjustly enriched by the SARP decision.

3. None of these issues are a pure question of law. All are questions of mixed fact and law. The Plaintiffs have made serious allegations of misconduct by the Crown and senior officers of it. These allegations are supported by the documentary and oral record and will be pressed through

trial. They all require a full evidentiary record for their proper disposition. The Defendants have told the Court that their evidentiary record is complete, nothing more will come at trial, and required the Plaintiffs to put their best foot forward. The Plaintiffs must lead trump or risk losing. As will be demonstrated, the approach of the Defendants, and in particular Ontario, is an effort to keep important evidence from the process, evidence which Ontario (supported by OLG) characterizes as the irrelevant yield of a fishing expedition.

4. Ontario and OLG brought their motions for judgment after completing seventeen examinations for discovery of selected Plaintiffs, just prior to the scheduled examinations of their own representatives, and after representing to the Court that no motion would be brought until all discoveries have been completed.

5. The Plaintiffs have now sought to do precisely what this Court has said a respondent must do in the *Hryniak* era: make "full recourse to all available means under the *Rules of Civil Procedure* … that would enable them to put their best foot forward on the motion for summary judgment, [including their] rights to conduct examinations under Rule 39, but also the right to require those persons to bring with them documents that were listed in a Notice of Examination".[1]

6. The Plaintiffs delivered fifteen summonses to witnesses in accordance with Rule 39.03. Thirteen witnesses are current or former employees of the Ontario public service (the "Ontario witnesses"). Ontario and OLG have moved to quash all thirteen of these summonses.

7. Only four of these thirteen witnesses are represented by Ontario: Messrs. McGuinty, McMeekin, Orsini and Ms. Wynne. The other nine Ontario witnesses are not represented by either

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[1] *1870553 Ontario Inc. v. Kiwi Kraze Franchise Co. Ltd.*, 2015 ONSC 1632, at para. 45, Plaintiffs' Book of Authorities ("BoA") at Tab 1.

Ontario or OLG: Messrs. Bardeesy, Duncan, Wilkinson, Seiling, Drummond, Stransky, Shortill, McNeill and Snobelen. It is these nine witnesses, whose examinations begin on May 1, that are the subject of the instant motion brought by Ontario and supported by OLG (the "nine witnesses").

8. Ontario seeks to prevent the nine witnesses' examinations from going forward. It does so without regard to whether any of the nine witnesses want to testify.

9. Ontario first seeks to enforce a courtesy that was extended by Plaintiffs' counsel to the Ontario witnesses to defer their examinations, an accommodation made on the belief that all of these witnesses – including the nine witnesses – did not want to testify. When it was revealed that Ontario and OLG had resolved to attempt to unilaterally quash the summonses to the nine witnesses without regard to whether any of these witnesses wanted to testify, the Plaintiffs determined that they wished to proceed with the examinations of the nine witnesses as scheduled.

10. Ontario is not prejudiced by the position of the Plaintiffs in light of these new developments. No consideration has passed from Ontario to the Plaintiffs that would transform a courtesy into a binding, enforceable agreement and Ontario has not changed its position in reliance on the accommodation.

11. Ontario seeks, alternatively, an interim stay of the nine witnesses' summonses pending disposition of the motion to quash. Ontario's arguments on the motion to quash are so demonstrably weak, however, that there is no serious question to be decided on the merits.

12. Ontario has presented no evidence of irreparable harm because it will suffer none. It is an astonishing proposition that the taking of evidence in a sequence of half-day out-of-court examinations that is either irrelevant, as the Crown asserts, or probative, as the Plaintiffs assert,

can be the cause of irreparable harm, or inconvenient in the context of a case of this scale and significance. Ontario invites this Court to accept, as a blanket proposition, that the prospect of its motion to quash being rendered partially moot is irreparable harm. This should be rejected.

13. The Plaintiffs have a right to examine the nine witnesses. Ontario cannot credibly suggest that having these witnesses' evidence taken will cause it harm. The balance of convenience weighs against a stay. In short, Ontario has not shown that it is entitled to an interim stay.

PART II – BACKGROUND AND SUMMARY OF FACTS

The Claim of the Standardbred Breeders

14. The just disposition of Ontario's motion requires an understanding of the claim, the record and procedural history.

15. On summary judgment, the Plaintiffs will have to respond to Ontario and OLG's core defence: that Ontario decided, as a matter of policy, to end a "secret subsidy" program for wealthy racetrack owners after careful deliberation and in accordance with independent external recommendations. This defence is a contrivance. The evidence which Ontario seeks to suppress with its motion to stay and quash will reveal that Ontario, aided by OLG, in bad faith and with knowledge of the harm they would cause, resolved to terminate an arrangement that had been consistently promoted to the Plaintiffs. They did so without any study or consultation for the sole purpose of bettering the commercial bargain they had struck. They resolved to cover their tracks by creating a false narrative through vicious attack ads, pre-determining and even ghost writing so-called independent studies and disseminating false economic information. When the harm caused by their conduct was revealed they hastily compensated the most powerful stakeholders

(racetracks) while denying compensation to the most vulnerable – breeders. And, when the standardbred breeders commenced this action, Ontario retaliated by withholding from them the meagre compensation it had provided to thoroughbred and quarterhorse breeders. The Defendants now seek judgment while trying to deny the Plaintiffs the ability to reveal this record to the Court.

A) Ontario and OLG Needed a Venue to Generate More Gambling Revenue

16. In the mid-1990s, Ontario and OLG wanted to expand casinos and video lottery terminals across the Province. This initiative was deeply unpopular with voters. Municipalities opposed it.[2]

17. This opposition caused Ontario and OLG to approach the horse racing industry to install slot machines at their racetracks. The industry offered Ontario and OLG an enticing revenue springboard: an existing customer base with a propensity for gambling and an accepted venue for gaming activities, already built and equipped with parking lots, security and food and beverage licences.[3] Ontario and OLG simply had to install their slot machines.

B) Ontario and OLG Strike a Bargain With Horseracing Industry

18. Introducing slots at racetracks required more than the agreement of racetracks. Ontario and OLG needed to secure the buy-in of the horse racing industry, as they sought to use a customer base that was developed through the industry's efforts over many years.

19. Cannibalization of betting dollars was the principal concern for the industry. Over a period of months, Ontario bargained with the horse racing industry to reach a commercial arrangement. The process was protracted and hard fought. It culminated in the June 25, 1998 Letter of Intent

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[2] Amended Statement of Claim against Ontario at para. 49, Affidavit of M. Lilly Iannacito, Plaintiffs' Motion Record, Tab 2 ("Iannacito Affidavit"), Exhibit DD ("Amended Statement of Claim").
[3] Amended Statement of Claim at paras. 51-52.

establishing SARP, which was signed by Ontario and the Ontario Horse Racing Industry Association ("OHRIA"), which was said to be "representing all segments of the Ontario horse racing industry."[4]

20. SARP and its revenue share with breeders and others was the product of a negotiated commercial arrangement, not legislation. The commercial agreement reflected in the Letter of Intent was that Ontario and OLG would share 20% of revenue generated by slot machines at racetracks with the horse racing industry. Of that 20%, half would go to the track hosting the slot machines, and half would go to the respective horsepeople at the track through enhanced purses.

21. In response to the motion for judgment, the Plaintiffs will deliver an affidavit from David Willmot, the chief negotiator of SARP on behalf of the horse racing industry. Mr. Willmot will depose, among other things, that:

(a) the industry would not have accepted slots at racetracks without a revenue-sharing agreement;

(b) he participated in hard-fought negotiations on behalf of the industry with Ontario and OLG that resulted in the Letter of Intent;

(c) the Letter of Intent established a bilateral, commercial revenue-sharing agreement or partnership between Ontario and OLG and OHRIA;

(d) the operational details about precisely how slot machines were to be located at participating racetracks were dealt with in subsequent siteholder agreements, which were effectively lease agreements that authorized the installation of slot machines into racetracks;

(e) Ontario and OLG intended SARP revenue to benefit breeders;

(f) Ontario and OLG understood that, under SARP, breeders were being asked to make long-term investments and required a stable, predictable environment to make business decisions regarding their breeding operations;

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[4] Amended Statement of Claim at para. 56; Iannacito Affidavit, Exhibit "QQ" (Tab 1)(CR0020345).

(g) Ontario and OLG expected that OHRIA would "deliver the industry" on SARP and that industry associations within OHRIA's umbrella – such as Standardbred Canada and the Standardbred Breeders of Ontario Association ("SBOA") – would communicate important information about SARP to their constituencies and ensure that their constituencies were committed to SARP; and

(h) it was understood and expected among all participants in SARP that, in view of the long-term investments that were being made in furtherance of the partnership, any changes to revenue sharing would involve sufficient notice and meaningful consultation with the other partners.

22. Breeders were very important partners for Ontario and OLG to have under SARP. Securing a steady supply of quality horses at Ontario racetracks was essential. It was a necessary condition of SARP that racetracks hosted exciting, high-quality live horseracing and without it, Ontario and OLG made clear, there would be no sharing of slots revenue. OLG, for example, is recorded as telling the Standing Committee on Government Agencies in 2009 that "the presence of slot machines at racetracks is tied to horse racing; therefore, if a racetrack ceases to offer racing, the OLG's obligation to provide the Slots Program ceases."[5]

23. Among thoroughbreds, standardbreds and quarterhorses, the participation of standardbred breeders in SARP was critical. Standardbred horse racing was by far the largest form of horse racing in Ontario, and was carried on throughout the year at fifteen of Ontario's seventeen racetracks in rural communities across the Province.

C) The Implementation of SARP

24. In addition to earning billions of dollars in gaming revenue from the horse racing industry's venues and customers (always a sensitive topic for Ontario given the controversial social and psychological/medical issues around gambling), Ontario and OLG benefitted from the

[5] Iannacito Affidavit, Exhibit "QQ" (Tab 2)(SB0000902, page 11).

partnership by being able to project positive messaging that SARP was promoting live horse racing in the Province and benefitting the broader agricultural sector.[6]

25. From the day it was conceived until the day it was unilaterally cancelled, Ontario and OLG vociferously and consistently characterized SARP as a unique partnership with rural Ontario and the agricultural sector that created and sustained tens of thousands of jobs in rural communities and allowed breeders to invest in, build and sustain their farms and breeding operations.

26. In order to deliver this encouraging messaging, and to assure its horse racing industry partners that it remained committed to the revenue sharing arrangement over the long-term, Ontario and OLG utilized a variety of communications channels that were understood and agreed to be the means of delivering information relevant to SARP to the horse racing industry.

27. These channels included communications through the Ontario Racing Commission ("ORC"), a Crown agency whose mandate was to govern and regulate the horse racing industry, and through various industry associations. For that reason, the Memorandum of Understanding between the ORC and its overseeing Minister, the Minister of Finance, provided that the Minister was responsible for "informing and consulting with the Chair, as appropriate, on the government's priorities and broad policy directions"[7] The MOU also indicated that the ORC would provide "economic oversight of the horse racing industry", which required it to:

> Work collaboratively with industry stakeholders (including Ontario Lottery and Gaming Corporation (OLG), horse people, racetrack operators and industry associations) … to support the growth and sustainability of the sport of horse racing in Ontario over the long term. […]

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[6] Iannacito Affidavit, Exhibit "QQ" (Tab 3)(CR0000013).
[7] Iannacito Affidavit, Exhibit "QQ" (Tab 4)(CRE0028815).

> Report annually to the Minister on the industry's long-term sustainability plan, including the extent to which industry participants are implementing and/or supporting the plan ... This will include collaborating with the OLG to report on how funds generated through the *Slots at Racetracks* program are spent to support objectives identified in the plan.

28. Ontario and OLG also communicated with breeders directly through their own official channels and through individual conversations and correspondence between members of government and representatives of the industry.[8]

29. Utilizing these communications channels was the way by which Ontario and OLG communicated with the horse racing industry, which is dispersed across the Province in rural communities. The Letter of Intent itself, which is structured as an agreement with OHRIA "representing all segments of the Ontario horse racing industry",[9] demonstrates that it was understood, from the inception of SARP, that messaging between Ontario, OLG and individual participants in the horse racing industry, including breeders, was to be carried out through channels such as industry associations.

D) Addendum to the Letter of Intent in 2000

30. In 2000, the Letter of Intent was amended to direct a defined percentage of the horse racing industry's share of slots revenue into the Horse Improvement Program ("HIP"). HIP is a racing and breeding incentive program, which was overseen by the ORC.[10]

31. The purpose of the amendment to the Letter of Intent was to ensure that SARP revenue was directed, *to an even greater extent*, towards breeders as they were crucial partners in SARP. The

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[8] Amended Statement of Claim at paras. 58-60.
[9] Iannacito Affidavit, Exhibit "QQ" (Tab 1)(CR0020345).
[10] Iannacito Affidavit, Exhibit "QQ" (Tab 5)(CRE0022903).

continued success of the young programme required a steady supply of horses for racing and robust attendance at the tracks where slot machines were housed.

32. Minister Chris Hodgson delivered a letter to OHRIA in which he confirmed that the Addendum was "the government's response to provide stability" to horse racing.[11]

E) Years of Consistent Messaging to Breeders

33. From 1998 until its abrupt cancellation, the revenue sharing partnership between Ontario, OLG and the horse racing industry was lucrative for all. The consistent messaging from Ontario and OLG projected a sense of optimism and positivity, intended to project stability that encouraged long-term investments by the breeders.[12]

34. Examples of this positive messaging can be found across a range of communication channels utilized by Ontario and OLG:

(a) SARP had proven to be an "enormous success in creating jobs and economic spin-offs for their communities and the horse industry" and that the "horse racing industry was improving racing, breeding superior horses and stimulating local economies – purchasing millions of dollars in local goods and services" [OLG's 2003-2004 Annual Report];[13]

(b) SARP "preserved and enhanced over 60,000 jobs in Ontario's horse racing industry", which was a "key component of the Province's agricultural sector" [Ontario's 2004 Annual Budget];[14]

(c) There needed to be "[a] climate where customers and participants can invest and conduct their horse racing activities with trust and confidence" [Fall 2007 edition of the ORC's "Integrity Matters" newsletter];[15]

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[11] Iannacito Affidavit, Exhibit "QQ" (Tab 5)(CRE0022903).
[12] Amended Statement of Claim at para. 69.
[13] Iannacito Affidavit, Exhibit "QQ" (Tab 6)(OLGSB0000031).
[14] Iannacito Affidavit, Exhibit "QQ" (Tab 7)(SB0001012).
[15] Iannacito Affidavit, Exhibit "QQ" (Tab 8)(SB0001462).

(d) "[F]airness and confidence can also be secured with ongoing dialogue, consultation and cooperation among all parties. … The ORC is committed to doing its part to facilitate a healthy, productive relationship among all parties. And it begins with listening to each other" [June 2009 edition of the ORC's "Integrity Matters" newsletter];[16]

(e) The stated goals of the HIP included "quality improvements in Ontario breeding production, long-term returns to owners and indicators of a strong, sustainable live-racing product are measurable that will become apparent in the mid-to long-term" [HIP's 2010 Annual Report]; and[17]

(f) The "Founding Principles to Create an Acceptable Model for Racing in Ontario" would "[p]rovide a fair return on investment over the short term while protecting value for owners and communities over the long term" and "acknowledges that industry participants who make rational business decisions should expect a reasonable rate of return on that investment" [Spring 2010 edition of the ORC's "Integrity Matters" newsletter].[18]

35. The carefully drawn and extensively bargained Letter of Intent, the ongoing course of representations pursuant to which it was implemented, the continuing investments made in breeding in response to Ontario and OLG's encouragement to do so and the sustained sharing of revenue in accordance with the Letter of Intent created a proximate relationship and a duty of care.

36. SARP succeeded beyond Ontario and OLG's expectations. The revenue that flowed from simply installing slot machines at infrastructure built and maintained by someone else using a customer base generated through the efforts of others proved an irresistible temptation to Ontario and OLG. By 2003, confident in the success of their political and economic gamble, they began to look for ways to renegotiate the deal. While they continued a constant stream of positive messages to maintain stability, Ontario and OLG were growing increasingly resentful of their obligation to share the profits of the arrangement.

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[16] Iannacito Affidavit, Exhibit "QQ" (Tab 9)(SB0001474).
[17] Iannacito Affidavit, Exhibit "QQ" (Tab 10)(SB0000828).
[18] Iannacito Affidavit, Exhibit "QQ" (Tab 11)(SB0001482).

F) SARP Becomes Too Successful

37. Documents reveal that beginning in 2003, Ontario and OLG began to characterise the entirety of slot revenue as "their" money.

G) Ontario Recognizes It Is Bound by Contract; Contemplates Passing Legislation

38. In 2003, Ontario considered passing legislation in order to "amend" the revenue sharing agreement as an alternative to its ability to renegotiate its terms with the industry. A draft document prepared by Gaming Policy Branch from May 2003 records Ontario's consternation over the possibility, noting that amending through legislation "would send message [sic] to business community that government did not honour its contractual obligations".[19]

39. Ontario did not pass any legislation respecting SARP or any revenue sharing until the *Budget Measures Act, 2015*, S.O. 2015, c. 38, which amended the *Ontario Lottery and Gaming Corporation Act, 1999* to explicitly establish authority for OLG to participate in a grant program for the purpose of supporting live horse racing in Ontario.

40. This reflects the fallacy of Ontario and OLG's after-the-fact argument that SARP was the product of non-justiciable policy. The only time it ever considered the arrangement as such was when it was brought before this Court to answer for the way it unilaterally terminated the revenue share it negotiated after recognising for many years that it had no authority to do so.

41. Early consideration of altering the revenue sharing formula was properly approached as a renegotiation with an existing and equal partner. Speaking notes for the Attorney General dated June 25, 2003 state that "[m]y Ministry has been asked to explore and report back on specific

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[19] Iannacito Affidavit, Exhibit "QQ" (Tab 12)(CRE0039084).

gaming enhancements that might lead to new revenue streams for the Province."[20] The Attorney General said his Ministry had "looked into" negotiating a lower revenue sharing rate for future slot machines and relayed the results of that inquiry:

> *...The only way this can be done is if the horse racing industry voluntarily agrees to a lower rate.* But it appears highly unlikely the horse racing industry will be agreeable to any changes for new machines.
>
> Preliminary inquiries confirm that any reductions in the rate will provide returns on investment below an acceptable level.
>
> We could also expect *protracted negotiations* with the industry if we pursue this approach. (emphasis added)

42. In December, 2004, Ontario and OLG had begun to take a more negative view of the bargain they had struck. Cabinet speaking notes prepared for Premier Dalton McGuinty, reflect a desire to 'grow the gaming business' by expanding slots "at racetracks, in the context *of a renegotiation* of the 20% commission, which is giving the horse industry massive windfall profits ($300 annually)."[21] This resulted in a direction that OLG attempt to renegotiate the revenue-sharing partnership with the horse racing industry.[22]

43. Ontario and OLG well understood they had struck a commercial bargain that could only be changed through a bi-lateral re-negotiation.

H) Extensive ORC Consultations with Breeders

44. In 2006, the Governing Board of the ORC, by and on behalf of Ontario, mandated a review to determine if the HIP was effective for breeding and racing in Ontario.[23] As noted earlier, HIP

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[20] Iannacito Affidavit, Exhibit "QQ" (Tab 13)(CRE0042392).
[21] Iannacito Affidavit, Exhibit "QQ" (Tab 14)(CRE0358198) (emphasis added).
[22] Iannacito Affidavit, Exhibit "QQ" (Tab 15)(CR0027079).
[23] Iannacito Affidavit, Exhibit "QQ" (Tab 16)(CRE0314295).

funding was supported, in part, through SARP revenue by virtue of an Addendum to the Letter of Intent signed in 2000. The HIP review process involved broad-based industry consultations.[24]

45. As recorded in its Annual Reports, which were shared with the Ministry of Finance, the ORC envisioned "a phased implementation and long term planning strategy for HIP in order *to ensure adequate horse supply* for the intended Program participation and *sufficient time for participants to adjust their business models and breeding decisions* in order to take advantage of new opportunities."[25] It was also recognized that "[q]uality improvements in Ontario breeding production, *long-term returns to owners* and indicators of a strong sustainable live-racing product are measurable that will become apparent in the mid-to-long term (2013 and forward)."[26]

46. In developing its reports, recommendations and goals, members of the HIP Advisory Group – including a number of the Plaintiffs – received projected financial data for HIP provided by the ORC, which incorporated a five-year planning cycle. The 2012 Financial Plan for HIP projected slot revenues to 2016.[27] These projections provided comfort for breeders about Ontario and OLG's ongoing commitment to SARP revenue sharing.

I) Ontario and OLG's Growing Frustration With the Bargain They Struck

47. While they had quietly explored how to change the revenue sharing deal for many years, Ontario and OLG also found themselves unable to open new gaming facilities due to a provincial moratorium that was in effect. They wanted to expand gaming revenue at existing facilities but did not want to share 20% of any new revenue with the horse racing industry.

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[24] Iannacito Affidavit, Exhibit "QQ" (Tab 16)(CRE0314295).
[25] Iannacito Affidavit, Exhibit "QQ" (Tab 17)(SB0000752) and (Tab 10)(SB0000828) (emphasis added).
[26] Iannacito Affidavit, Exhibit "QQ" (Tab 17)(SB0000752) and (Tab 10)(SB0000828) (emphasis added).
[27] Iannacito Affidavit, Exhibit "QQ" (Tab 18)(SB0003969).

48. OLG became increasingly frustrated and, in 2007, started to push the government towards "decoupling" money paid to the horse racing industry from the net win derived from slot machines at each racetrack. Instead, money would be paid to the horse racing industry by OLG or by Ontario based on some formula not tied to the performance of a specific slot machine facility.[28]

49. From OLG's perspective, this would enable it to expand slot machines, either at existing facilities or new facilities, without having to (i) share even more revenue with the horse racing industry (in the case of an expansion of an existing facility); or (ii) requiring it to break its commitment to the horse racing industry (in the case of shutting down a facility or opening a new facility that would cannibalize the existing one).

50. OLG's desire to 'decouple' was kept very quiet for obvious reasons. It knew it had an agreement in place with the horse racing industry, and it knew that securing the industry's ongoing commitment to SARP remained necessary in order for it to continue to generate ever more gaming revenue for the Province. OLG's 2007-2008 Annual Report revealed that OLG was "committed to the establishment of an additional Slots at Racetrack operation … and the expansion of existing Slots at Racetracks operations in the Province."[29] In that same report, OLG promoted SARP as a "major economic stimulus for the overall agricultural industry in Ontario, with spin-off benefits to farmers supplying feed, stabling and care for horses".

J) The Search for an Outside Recommendation to Alter SARP Revenue Sharing

51. In 2007, Ontario engaged Stanley Sadinsky, a former chairman of the ORC and a professor of law at Queen's University to produce a government report on the horse racing industry and

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[28] Iannacito Affidavit, Exhibit "QQ" (Tab 19)(OLGSB0000219, p. 20).
[29] Iannacito Affidavit, Exhibit "QQ" (Tab 20)(SB0001082, p. 33, 44).

SARP. OLG wanted Mr. Sadinsky's report to include an independent endorsement of the plan to decouple funding of the horse racing industry from slot revenue earned at racetracks.[30]

52. To OLG's displeasure and frustration, the Sadinsky Report released in 2008 did not recommend decoupling.

53. In fact, Mr. Sadinsky was positive about the current arrangement and recommended that SARP be continued at a *minimum level of 20%*. He also recommended that SARP become more transparent and thereby more structurally entrenched.

54. OLG was frustrated with the Sadinsky Report. It wrote to its overseeing Minister, George Smitherman, to point out that SARP "exceeds all original forecasts" and "suggest you consider changing the underlying funding methodology".[31] OLG pointed out that it was "currently considering the expansion of the number of slots at existing tracks to meet unmet gaming demand, but lamented that adding these slots "would result in an incremental $40M flowing directly to purses … and track operators." Despite a signed Letter of Intent, OLG's plea to Ontario was that "funding of this magnitude … should not happen by default." OLG also urged decoupling, telling Minister Smitherman that Ontario should "re-structure funding to the horseracing sector so that a pre-determined level of monies flows directly from the Consolidated Revenue Fund rather than from OLG." Despite OLG's pleas, nothing was done to contradict the Sadinsky Report.

55. The Sadinsky Report encouraged the horse racing industry and provided an additional assurance that SARP would be maintained, if not improved, for the foreseeable future.

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[30] Iannacito Affidavit, Exhibit "QQ" (Tab 19)(OLGSB0000219) and (Tab 21)(OLGSB0000234).
[31] Iannacito Affidavit, Exhibit "QQ" (Tab 22)(CR0027783).

K) Renewal of the Siteholder Agreements in 2010

56. In 2009 and 2010, there were rumours that Ontario and OLG were re-evaluating whether to continue SARP in its current form.[32] These rumours began circulating because a number of existing site holder agreements with racetracks had expired and were being rolled over by Ontario and OLG for interim periods of only a few months.

57. As a result, OHRIA struck a committee headed by the principal of Plaintiff Glengate Holdings, Jim Bullock. Jim met with Dwight Duncan at Queen's Park on July 20, 2009 at 2:30 p.m. to discuss the industry's concerns and to seek Mr. Duncan's confirmation that Ontario and OLG were committed to the long-term revenue sharing partnership.[33]

58. Mr. Duncan assured Mr. Bullock that Ontario and OLG understood the need for a long-term commitment to SARP.[34] This was later reflected in a document listing "Strategic and Tactical Decisions" for a May 4, 2010 meeting between the OLG Chair and the Minister of Finance. The document includes the following statement: "Execute 5-year extension option under current terms and exercise existing clauses re. benchmarking … to … ensure long-term stability for the horse racing industry".[35]

59. Subsequently, in August 2010, Ontario directed OLG to renew all site holder agreements that were about to expire for no less than an additional five years. While the siteholder agreements were confidential, Ontario and OLG took steps to ensure that the renewals for five-year terms were communicated to the industry.

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[32] Amended Statement of Claim at para. 94.
[33] Amended Statement of Claim at para. 99.
[34] Amended Statement of Claim at para. 100.
[35] Iannacito Affidavit, Exhibit "QQ" (Tab 23)(CR0030882).

L) OLG's Strategic Business Review

60. Shortly after Paul Godfrey became the Chair of the OLG in 2010, OLG began a "strategic business review" (also known as the "modernization" or "land-based gaming" review) that included meetings with stakeholders in the horse racing industry.[36]

61. At these meetings, there was recognition by both the OLG and horse racing industry participants that the SARP partnership was working very well and – although it could always be tweaked – the partnership should be maintained and expanded upon.

62. OLG's meeting with Standardbred Canada on March 29, 2011 led that industry association to send a follow up letter to on April 6, thanking OLG for the opportunity to provide input into future gaming initiatives. Standardbred Canada's letter also indicated that it was "very pleased" to hear OLG indicate that would look to "minimize any changes to the relationship between the Racetracks and the OLG", and that OLG was "focused on implementing an expanded gaming model that improves upon what we have today for those who have been involved in our successful gaming partnership".[37]

63. There was no discussion whatsoever about the possibility that revenue sharing would be modified or terminated or even that OLG and Ontario had, for years, been looking for ways to better the bargain.[38]

64. Unbeknownst to the participants in the review, one key OLG recommendation to Ontario had been preordained before any consultations were conducted.

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[36] Amended Statement of Claim at para. 106.
[37] Iannacito Affidavit, Exhibit "QQ" (Tab 24)(SB0002084).
[38] Amended Statement of Claim at para. 109; see also Auditor General Special Report, Iannacito Affidavit, Exhibit "QQ" (Tab 25)(SB0005062 at p. 16).

65. In a document prepared for its Board prior to the stakeholder meetings, OLG had made it clear that its strategic business review would, again, recommend decoupling: "OLG will suggest ways to decouple government sectoral economic development[39] from business/operational decisions, and increase transparency and accountability of payments to third-party stakeholders."[40] Predictably, in its recommendations to Ontario in November 2011, OLG did, in fact, recommend its "decoupling" vision.[41]

66. A key recommendation of OLG's strategic business review was that it could earn greater revenue by moving gaming facilities from racetracks to urban centres. In order to accomplish this without breaching the commitment it recognised it had to the horse racing industry, OLG's "decoupling" envisioned maintaining the same level of revenue sharing even as the gaming facilities were moved.

67. OLG's November 2011 recommendation to decouple reflects its recognition of its obligations, the long-term investments the industry had made in reliance on them, and the harm that would be caused if the revenue share wasn't maintained or fairly re-arranged.

M) Ontario Rejects OLG's "Decoupling" Plan and Resolves to Break its Bargain

68. However, by November 2011, Ontario's mood had hardened and changed. It had grown frustrated with prior efforts to lawfully change the revenue sharing agreement. It had no time for another approach that would not result in a substantial tilting of the revenue bargain in its favour. It had no interest in OLG's decoupling proposal that would see revenue continuing to be shared.

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[39] Which, inaccurately, is how SARP had come to be characterized within OLG.
[40] Iannacito Affidavit, Exhibit "QQ" (Tab 26)(OLGSB0000477).
[41] Iannacito Affidavit, Exhibit "QQ" (Tab 27)(CR0000928).

69. OLG's decoupling recommendation to Ontario would have called for a significant, unilateral and structural change to the "historic partnership" of SARP revenue sharing with the horse racing industry; but it would not have eliminated revenue sharing. Drafts of OLG's modernization report" referred to horse racing's "historic partnership in gaming" and stated, for example, that "the horseracing sector should continue to receive direct support from gaming proceeds at the direction of the provincial government, however, this support should not depend on gaming facilities based at racetracks."[42] Decoupling would have the horse racing industry collecting further, and likely increased, revenue from slot machines across the Province. From Ontario's perspective, it was a move in the wrong direction and the governing Liberal party could not pass legislation to force a result because it lacked a majority.

70. Ontario, having determined that passing legislation to change the deal would be bad for business, unwilling to re-negotiate, gained no support for downward changes from Mr. Sadinsky, and presented with OLG's unsatisfactory proposal to decouple, resolved in November 2011 to unilaterally terminate the SARP revenue sharing partnership, without any consultation, notice or compensation to breeders. This was a decision to breach its agreement with breeders who had held up their end of the bargain for over a decade and who continued to make long-term investments on the strength of Ontario's word.

N) The First Secret Plan to Terminate: November 2011

71. Cognizant of the serious harm it knew would result from termination, Ontario initially thought about pursuing a radical reduction and eventual termination of revenue sharing. The contemplated four-year path to termination was: to continue SARP revenue-sharing for one year,

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[42] Iannacito Affidavit, Exhibit "QQ" (Tab 28)(OLGSB0000901, p. 17).

then implement a transfer payment program that would provide $250 million the next year, $150 million the year after that, and $100 million in the last year, with some possibility of an ongoing $100 million. This 'four year plan' was presented to individual Cabinet ministers in late January or early February 2012.[43]

72. This phased approached to termination, although unilateral and unlawful, recognized the five-year breeding cycle and the prior 13 years of persistent messaging that encouraged breeders to breed and the harm that an imposed, immediate termination would cause.

O) The Communications Plan is Developed

73. Ontario well understood that it had, for 13 years actively encouraged breeders to invest in their farms and operations and make long-term commitments in recognition of the breeding cycle. It knew it had to change the message it had consistently sent to the breeders and the public. It designed a dishonest propaganda campaign to lay the groundwork for unilateral termination and to turn opinion against the horse racing industry.

74. The communications plan developed by Ontario in November 2011 had four aspects:

(a) Mr. Duncan and Mr. McGuinty would begin making speeches hinting that excessive "secret" "subsidies" to the horse racing industry were a problem that their government needed to address.

(b) Finance Staff and OLG would provide a "a fleshed-out narrative *designed to be parachuted [sic] into the Drummond Report*, reflecting [OLG CEO Rod Phillips'] discussions with senior folks at [the Ministry of Finance]. The purpose is to pre-condition for change."[44]

(c) The Liberal Party would launch a radio attack ad campaign to recast SARP revenue sharing as a "secret subsidy" introduced by Tim Hudak to benefit rich race track owners; and

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[43] The presentation to Cabinet members can be found as Iannacito Affidavit, Exhibit "QQ" (Tab 29)(CRE0087520).
[44] Iannacito Affidavit, Exhibit "QQ" (Tab 30)(OLGSB0000995-0001) (emphasis added).

(d) Finance Staff would take over OLG's 'independent' reporting and draft relevant portions of OLG's Modernization Report in order to recommend the outright cancellation of SARP rather than decoupling.

75. The core objectives were two-fold: (i) identify a problem that Conservatives had created that was harming Ontario and which could only be "solved" with a dramatic reversal of course, and (ii) to make it appear to the public that that dramatic reversal was the result of Ontario acting on independent recommendations presented by Mr. Drummond and OLG.

76. While this communications plan was being formulated, the public messaging projected by Ontario and OLG, including through the ORC, continued to signal a long-term commitment to SARP. For example:

(a) Dalton McGuinty sent an email to the Ontario Harness Horse Association on September 15, 2011,[45] which was publicized on OHHA's webpage and via a news release[46], in which he said:

> "We value the impact that the horse racing industry has on the agricultural sector in the province, and *we believe in working closely with the industry to ensure that it remains strong and prosperous in the future*"; and
>
> "Ontario Liberals are strongly committed to the responsible implementation of gaming programs, and will make any future changes with a view to supporting this principle."

(b) The ORC, the agency responsible for economic oversight of the horse racing industry and which had a Memorandum of Understanding indicating that it would be informed and consulted by the Minister of Finance on the government's priorities,[47]

(i) Put out its June 2011 Integrity Matters newsletter for the industry, in which it emphasized the principles of the new Ontario Racing Program, including: "*Enhance live racing* and provide benefit to the agricultural sector in Ontario"; and "*Provide a fair return on investment over the short term*

[45] Iannacito Affidavit, Exhibit "QQ" (Tab 31)(SB0000150).
[46] Iannacito Affidavit, Exhibit "QQ" (Tab 32)(SB0004506), Iannacito Affidavit, Exhibit "QQ" (Tab 33)(SB0003173).
[47] Iannacito Affidavit, Exhibit "QQ" (Tab 4)(CRE0028815).

while protecting value for owners and communities over the long term";[48] and

(ii) Distributed its 2012 HIP Financial Plan dated October 24, 2011[49] to the horse racing industry, where it indicated that that:

> "The [ORC] Administration has provided for the potential reduction in slot revenues due to IFRS in their 2012 projection ... *this will be a one time reduction in revenues in 2012 and is not expected to impact the Program further in subsequent years*" (page 2); and
>
> The HIP Financial Plan attached a financial document containing "5 year Financial Projections" for the standardbred component of HIP, which indicates that "*Slot Revenue is projected to decrease at a rate of 3% in 2012 ... and remain flat from 2013-2016*".

(c) OLG, was putting our news releases celebrating the longevity of the slot machines at Georgian Downs, indicating on November 30, 2011 that it "look[s] forward to *many more successful years* serving this community and the region and providing great entertainment".[50] (emphasis added)

P) Ontario Decides to "Go to $0" in February 2012

77. While this messaging was ongoing, and before publicly rolling out the communications plan that was being developed, McGuinty, Duncan and their most senior aides next decided to make a decision that would eviscerate the Plaintiffs' livelihoods.

78. In early 2012 OLG's modernization plan contained Ontario's initially desired four year phased termination of the revenue share. This too, would have been a breach of the Defendants' duties but it recognised the industry's reliance on the agreement that had been in place for 14 years, the breeding cycle and the harm that would be caused.

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[48] Iannacito Affidavit, Exhibit "QQ" (Tab 34)(SB0001490).
[49] Iannacito Affidavit, Exhibit "QQ" (Tab 18)(SB0003969).
[50] Iannacito Affidavit, Exhibit "QQ" (Tab 35)(SB0001927).

79. In early February 2012, a week before Ontario's presentation to Cabinet respecting OLG's modernization plan that included the four-year plan to terminate revenue sharing, McGuinty, Duncan and their closest aides met and decided to unilaterally change the proposal.

80. In the course of 48 hours between February 2nd and 3rd, McGuinty and Duncan completely changed course and decided to "go to $0" for horse racing". In an email at 4:26 p.m. on February 2, Karim Bardeesy, McGuinty's Director of Policy and Research, wrote to top-level staffers in the Ministry of Finance and the Premier's office: "Hi all -- meeting with Premier just ended. *He was inclined to go to $0 for horse racing.* … For Cabinet dynamics, he wants the reality of the need for revenues to be clear."[51] (emphasis added)

81. Then, in a string of emails exchanged with the Cabinet Office on the morning of February 3, Bardeesy writes at 10:18 a.m. that "one more thing to land – transition time to $0 for horse racing". Subsequently, at 11:30 a.m., Bardeesy writes that "Comms page will have to change to represent emerging key messages … In meeting with P now, more when done." [52] Almost simultaneously, Susan Ampleford in the Cabinet Office writes Bardeesy: "I just heard from the MOF that they've been directed by their MO to remove the transition support (so the 1 year notice period is the transition). We will run with it…"[53]

82. Cabinet members – who had previously been briefed on the earlier four-year plan – including the Minister of Agriculture, Ted McMeekin, and Kathleen Wynne, then Minister of Municipal Affairs and Housing, do not appear to have been alerted to this last-minute change when the OLG modernization proposal was discussed and agreed at Cabinet on February 8.

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[51] Iannacito Affidavit, Exhibit "QQ" (Tab 36)(CRE0360917).
[52] Iannacito Affidavit, Exhibit "QQ" (Tab 37)(CRE0360998).
[53] Iannacito Affidavit, Exhibit "QQ" (Tab 38)(CRE0361000).

Q) The Communications Plan Goes Live

83. With the decision made, Ontario and the Liberal Party launched their 4-point communications plan. Finance Staff tasked with implementation of this plan did so with glee.

84. Internal emails amongst the team members responsible for creating the false narrative and justifying the breach of the agreement emailed each other about how "the only thing that keeps me going is that I might still be here when the entire *Slots at Racetracks* program is … slashed brutally" and that "99% of Ontarians don't care about horse racing".[54]

85. The rollout began with carefully scripted public attacks on the horse racing industry with a February 13, 2012 speech by Duncan. In that speech, Ontario publicly vilified the horse racing industry as the recipient of a $345 annual government subsidy. Duncan stated:

> And we're eager to move forward, because working hard and solving problems is the Ontario Liberal way … Our plan is fair. Our plan is reasonable. Our plan ensures everyone plays a role. We will continue to review all of our assets to ensure that they are delivering the greatest value to taxpayers …
>
> And we will continue to slow down government spending. … Here are three examples. …
>
> Third: Since 1998, Ontario taxpayers have been subsidizing horse racing in Ontario to the tune of $345 million a year through OLG's Slots at Racetracks Program.
>
> To put that annual subsidy in perspective, it's more support than we provide for water protection or road safety to protect our families … That kind of money would pay for over 9 million hours of home care … Or insulin pumps and supplies for five years for almost 17,000 people.
>
> We are reviewing every program, every asset and every function of government. We are considering if government should be in a

[54] Iannacito Affidavit, Exhibit "QQ" (Tab 39)(CRE0094799).

> specific line of business or service delivery. If not, then we will get out of that business. …
>
> Later this week, we look forward to receiving the Drummond Report.[55]

86. With phase one of the communications plan out of the gates, Ontario next released the Drummond Report on February 15. It continued the completely disingenuous "subsidy" narrative:

> [Chapter 11] The horse racing industry is another area where subsidies to racetracks and horse people require a review and adjustment to realign with present-day economic and fiscal realities. … Ontario's approach is unsustainable and it is time for the industry to rationalize its presence in the gaming marketplace. For more on the horse racing and breeding industry, please see Chapter 17, Government Business Enterprises.
>
> Recommendation 11-11: Review and rationalize the current provincial financial support provided to the horse racing industry so that the industry is more appropriately sustained by the wagering revenues it generates rather than through subsidies or their preferential treatments.
>
> [Chapter 17] [A] number of questionable [OLG] business practices should, at a minimum, be reviewed from a value-for-money perspective. … The Slots at Racetracks Initiative, which allows slot machines to be co-located at racetrack facilities only, earmarks a share of revenues generated from slots for racetrack owners and horse breeders.
>
> Recommendation 17-4: Re-evaluate, on a value-for-money basis, the practice of providing a portion of net slot revenues to the horse racing and breeding industry … in order to substantially reduce and target that support.[56]

87. In the weeks and months before this report was released, the Ministry of Finance had written this narrative and recommendations for inclusion in the Drummond Report.[57] Far from being the independent by-product of wide-ranging mandate to "delve into almost every corner of

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[55] Iannacito Affidavit, Exhibit "QQ" (Tab 40)(CRE0297789).
[56] Drummond Report, Iannacito Affidavit, Exhibit "QQ" (Tab 41)(CRE0215738, at pp. 57, 408-9).
[57] Iannacito Affidavit, Exhibit "QQ" (Tab 42)(CRE0079890).

the government's activities and to think long and hard about how government can work better for the benefit of everyone in the province",[58] the Drummond Report was – at least as far as SARP was concerned – a scripted contrivance.

88. The SARP language in the Drummond Report was, in its material parts, written by Ministry of Finance functionaries entirely devoid of independent analysis or thought to justify a preordained result. It was the opposite of independent and thoughtful. It was a political cover up for a formed intention to breach an agreement knowing great harm would result to a politically expedient rural Ontario.

89. The Liberal Party, sensing a political winner, next unleashed a prepared campaign of radio ads describing SARP as a "secret subsidy" for "wealthy race-track owners" established by Tim Hudak's PCs. The radio ads explicitly contrasted "very wealthy racetrack owners" with full-day kindergarten and home care for seniors:

> Radio Ad One: "Did you know that Tim Hudak's PCs started a secret subsidy for a few, very wealthy racetrack owners? And now in these times of restraint, Tim Hudak says these rich payouts should be protected. He'd cancel full day kindergarten, leaving 50,000 four and five year olds stranded. Are we really going to spend more on horse racing than full day kindergarten? The PCs should do what's right. Tell Tim Hudak his priorities aren't your priorities."
>
> Radio Ad Two: "Did you know that Tim Hudak's PCs started a secret subsidy for a few, very wealthy racetrack owners? And now in these times of restraint, Tim Hudak says these rich payouts should be protected. But when it comes to our seniors, he voted against new supports to help them stay in their homes longer. Are we really going to protect horse racing over our parents and

[58] Iannacito Affidavit, Exhibit "QQ" (Tab 41)(CRE0215738, vii).

> grandparents? The PCs should do what's right. Tell Tim Hudak his priorities aren't your priorities."[59]

90. These misleading attack ads attracted the attention of John Snobelen, who was Ontario's (Conservative) Minister of Natural Resources at the time SARP was introduced in 1998. In an article he penned for the Toronto Sun on March 3, 2012 entitled "Ontario Liberals are the sultans of spin," Mr. Snobelen responded to the "secret subsidy" ads:

> Brilliant! In the first line the Liberals invent a 'secret subsidy'. In truth, the revenue sharing agreement isn't secret. Finance Minister Dwight Duncan has included details of the contract in every one of his budgets. And it isn't a subsidy. Unless you consider paying rent to be a subsidy.

91. Weeks earlier, on February 16, Snobelen had criticized Duncan's February 13 speech in which it had been suggested that Ontario was reviewing the $345 million per year SARP "subsidy". In a video he recorded and posted to www.ontarionewswatch.com,[60] Snobelen explained that cancelling SARP revenue sharing would "kill [the horse racing] industry in Ontario." Mr. Snobelen recounted the history of the SARP in the following terms:

> Now, I'm sure Dwight Duncan can remember back to the Harris government when we put slot machines in all of those racetracks across Ontario. Slot machines obviously draw a lot of revenue away from the gambling that would happen with horse racing, and so the effect on the purses for horse racing is pretty dramatic. To make up for that, the government allowed a percentage of the slot revenue to go to the horsemen, so that the race horse industry in Ontario would not be affected by the imposition of slot machines on their tracks. All sounds kind of fair to me.

92. Mr. Snobelen specifically warned of the economic impact that would inevitably follow from any precipitous cancellation of SARP revenue sharing:

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[59] Iannacito Affidavit, Exhibit "QQ" (Tab 43)(CRE0081193).
[60] Iannacito Affidavit, Exhibit "QQ" (Tab 44)(SB0016989).

> There are a lot of people who make a living making hay, and growing oats, and raising horses, and doing all of the other things that are involved with putting on horse races. Pretty important industry in lots of parts of Ontario. [...] I'm not so sure those folks will be really excited to hear that horse racing will now end in Ontario because it's a lot more efficient to put money in a slot machine than it is to wager on horse racing. Good thinking, Dwight, just kill another industry in Ontario, and pretty soon we can all work for the government.

93. Given the dire warnings of Mr. Snobelen, one would have expected the Ministry of Finance to have considered the economic implications of the hastily made decision to "go to $0". But, as explained below, these implications had been ignored.

R) Ontario's Duplicity in the Lead Up to the Cancellation Announcement

94. Astonishingly, after McGuinty and Duncan had decided to "go to $0", write the contents of the Drummond Report regarding SARP and prepare for the release of attack ads characterizing SARP as a "secret subsidy" for rich friends of Tim Hudak, Duncan continued to send messages to the horse racing industry suggesting no final decision had been made.

95. On February 16, Duncan met leaders of the horse racing industry at a fundraiser and promised that there would be a consultation process before any changes were made.

96. Weeks later, Duncan's staff continued to suggest to reporters that no decision had been made. In a March 1 email to a member of the Toronto Star editorial board asking for "answers/rebuttals" to some of the statements being made in the media by members of the horse racing industry, Duncan's Communications Director Darcy McNeill indicated (after asking not to be quoted):

> As for [SARP] being a profitable venture – that's probably a fair point in the context of the expansion of gaming that took place in the

> 1990s. … the acceptance of slots grew because they were located at tracks in the 1990s. But it's now almost 15 years later and they are way more acceptable and understood with fewer concerns for impact on society. The point today isn't whether it is profitable for the government. The point is that the government is doing a top to bottom review. What worked in 1998 might not work today. I think that's fair.[61]

97. Contrary to their promises, there was never an intention or effort to consult with anyone connected to the horse racing industry. In fact, even though the Ministry of Finance's Memorandum of Understanding with the ORC charged the ORC with economic oversight of the horse racing industry and required the Minister to consult with the ORC,[62] the ORC was deliberately excluded from this process and would only find out about the decision on the day of its public announcement.

S) No Economic Analysis Supporting the Decision to "Go to $0"

98. Following the launch of Ontario's communications plan in mid-February, Minister of Agriculture Ted McMeekin had a call with Assistant Deputy Minister of Finance Barry Goodwin. Goodwin's February 17 email to Steve Orsini, the Deputy Minister of Finance, reports:

> Discussed issues on a call with Minister McMeekin this afternoon – as Agriculture Minister he was hoping that there was a more in-depth economic impact analysis that had been done of the strategy of one year withdrawal of subsidy. We clarified some direct employment numbers with him on the phone and said the ORC was doing a few scenarios next week – but frankly we do not have a detailed study of the sort that he was hoping that we had.[63]

99. As events galloped, staff in the Minister of Finance's office realised that the narrative they were now spinning contradicted many prior public statements they had made.

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[61] Iannacito Affidavit, Exhibit "QQ" (Tab 45)(CRE0208937).
[62] Iannacito Affidavit, Exhibit "QQ" (Tab 4)(CRE0028815).
[63] Iannacito Affidavit, Exhibit "QQ" (Tab 46)(CRE0082134).

100. Goodwin, Duncan's Assistant Deputy Minister, apologized to Finance staffers for the "panic" in a February 16 email: he explained that that his "MO [Duncan] [was] clearly spooked a bit" by horse racing industry media statements that the industry was responsible for 60,000 jobs.[64] Far from being job numbers contrived by the horse racing industry, nearly ten years earlier the 2004 Ontario budget – presented by (Liberal) Minister of Finance Greg Sorbara – had indicated since 1998, SARP had "preserved and enhanced over 60,000 jobs in Ontario's horse racing industry".[65]

101. In an effort to backfill, Deputy Minister Orsini commissioned the Office of Economic Policy ("OEP") to create a report retroactively justifying the decision to cancel SARP revenue sharing and to dispel these job figures.

102. The Ministry of Finance provided the OEP with the assumptions and data for its report. The Ministry pushed OEP to provide its report and analysis on an expedited basis as they knew that the announcement respecting cancellation was imminent. The OEP report, however, was completed on March 14, two days after cancellation was announced.[66]

103. Subsequently, the OEP report was produced as part of a freedom of information request. The author of the report appears to have been so uncomfortable with his report – it was released with his name on it – that research was undertaken whether his name should have been redacted from the report before it was released.[67]

104. Although the OEP report suggested that there were only 13,540 jobs in the horse racing industry, the author of the report knew that Ontario's public messaging had, for years, said that

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[64] Iannacito Affidavit, Exhibit "QQ" (Tab 47)(CRE0061380).
[65] Iannacito Affidavit, Exhibit "QQ" (Tab 48)(CRE0214850, p. 46).
[66] Iannacito Affidavit, Exhibit "QQ" (Tab 49)(SB0003302).
[67] Iannacito Affidavit, Exhibit "QQ" (Tab 50)(CRE0214930).

SARP created and sustained 60,000 jobs in the horse racing industry.[68] If the decision to cancel SARP was a policy decision (which is denied) rather than a hasty decision to breach a host of commercial obligations, it was made in bad faith and irrationally, and/or operationalised negligently as it lacked any reasonable analysis of the impact of the decision.

T) The SARP Announcement

105. Without warning and without any consultation, on March 12, 2012 Dwight Duncan and OLG Chair Paul Godfrey announced the abrupt end to the SARP revenue sharing partnership. The occasion for the announcement was the public release of OLG's "Modernization" report providing "Advice to Government", which recommended that SARP be "drawn to a close".[69]

106. A few days prior to the public release of OLG's report, however, Blair Stransky, Duncan's Senior Policy Advisor, had written to Rod Phillips, OLG's CEO, copying Duncan's Chief of Staff Tim Shortill. In his March 8 email with the subject line "Paragraph replacement", Stransky provided the following language to Phillips for inclusion in OLG's "Modernization" Report, to be released days later:

> The Slots at Racetracks Program limits OLG's flexibility to locate gaming facilities near OLG customers. Furthermore, the formula restricts OLG's ability to maximize revenues for key government priorities. As such, the Slots at Racetracks Program should be drawn to a close.

107. This recommendation subsequently appeared, verbatim, on page 13 of OLG's Modernization Report. Like the SARP language in the Drummond Report, this too was not an

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[68] Iannacito Affidavit, Exhibit "QQ" (Tab 50)(CRE0214930).
[69] Iannacito Affidavit, Exhibit "QQ" (Tab 51)(SB0017959).

independent recommendation to government. It was the next bad faith step in Ontario's communications plan.

108. The March 12 SARP announcement was the realization of Ontario's long-held desire to divert SARP revenue to itself. This was the ambition first articulated around 2003. It is important to understand that SARP was not cancelled. A material term of the agreement was unilaterally changed. The slot machines remain in racetracks generating billions of dollars for OLG and Ontario. The revenue share with the horse people was discontinued – a function of their expediency as a result of the success of slot machine gaming.

109. Rod Seiling, the Chair of the ORC, wrote a scathing letter on May 31, 2012 to OLG Chair Paul Godfrey explaining the harm the decision had already caused and lamenting the fact that it had not been consulted about the SARP announcement:

> …[W]e have not had the opportunity to speak about OLG's decision to end the Slots at Racetracks Program. […] It has led to a confused and uncertain state in the horse racing industry. The breeding sector is in a tailspin […]
>
> The ORC is disappointed that an opportunity was not afforded to jointly work through an approach to implementation of this critical decision to the horse racing community. The result could have been a process that would have provided some certainty to an industry that is now in dire straits and, through no fault of its own, has had a process imposed on it by the OLG that inhibits it for planning for its future.[70]

110. As reports of significant harm to breeding sector mounted, reports of wide-spread euthanasia of horses was met by Finance staff with callous indifference.

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[70] Iannacito Affidavit, Exhibit "QQ" (Tab 52)(CRE0024236).

111. Duncan was quoted as saying "stop breeding horses" in response to reports of foals being euthanized to avoid paying fees for horses that may never race.[71]

112. Both opposition parties also announced their support for SARP, a dangerous position for a minority government. When Ontario's Liberals realized that the crisis that they had created was too large to cover up with narrative they had constructed, it struck a panel to give the SARP announcement additional political cover.

113. Recognizing that John Snobelen had been an outspoken and dangerous critic of what had occurred, the Liberal party decided to the best way to bring him onside was to offer him a job on their panel.

U) The Horse Racing Industry Transition Panel

114. The tri-partisan Horse Racing Industry Transition Panel was comprised of John Wilkinson, John Snobelen and Elmer Buchanan. They were given an impossible task: addressing the crisis in the horse-racing industry with a $50 million budget, one-tenth the sum contemplated in the abandoned four-year plan.

115. The Premier's Office had a direct channel of communication with the Liberal Panel member of the Panel, John Wilkinson. Finance had already written the key SARP ingredients of the Drummond Report and the OLG language recommending its termination. It had overseen an after-the-fact OEP study that was rightfully identified as a "sham" that was "done on the back of a napkin".[72]

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[71] Iannacito Affidavit, Exhibit "QQ" (Tab 53)(CRE0298520).
[72] Iannacito Affidavit, Exhibit "QQ" (Tab 49)(SB0003302).

116. The Premier's Office, following Finance's lead, used back channels with Mr. Wilkinson to ensure that the Panel's report would reach the conclusion it desired. Mr. Wilkinson, a political veteran, engaged in his own political horse-trading.

117. In an August 3, 2012 email to Dave Gene (then Dalton McGuinty's deputy chief of staff) not sent over official Ontario email accounts – and which was only captured in this lawsuit because the email was subsequently forwarded by Mr. Gene to Duncan's chief of staff, Tim Shortill – Mr. Wilkinson set out the *quid pro quo*: more money for the panel in exchange for political cover and a "wedge" in the upcoming by-election:

> Dave, we met with mckinsey, hired by finance. They confirmed under their wildly optimistic best case scenario (ie no collapse of the industry), we are looking at 13,000 job losses and 16,000 euthanized horses between sep 4 and dec 31. Collapse (which we think is what will actually happen) is 23,000 job losses and 27,000 dead horses. The lawsuits coming our way will add up to $500 million and you will be lucky to settle for $250 million.
>
> … I will lay out the plan b and timelines we need to avoid the consequences of plan a (fiscal, legal and political) and give us an advantage in the byelections by wedging both tim and andrea. It has been the most complex problem you guys have given me but 3 former cabinet ministers and a former deputy minister working together do have a pretty good sense of good public policy and what is doable, process wise and politically. […]
>
> Politically, our report will say the gov't was right to cancel the status quo. SARP had become, over time, bad public policy, with horse racing being subsidized by home care, no accountability, a lack of transparency, a culture of entitlement, a fractious industry and a disregard for the betting customer. Just as importantly, the panel confirmed that without a supportive gov't the industry would collapse, something the panel was mandated to prevent.[73]

[73] Iannacito Affidavit, Exhibit "QQ" (Tab 54)(CRE0029291).

118. Lo and behold, weeks later, the Panel released an Interim Report that included the following "findings":

(a) "Though it is outside our mandate to comment on the merits of the government's decision to cancel SARP, we will nevertheless do so because so many people we spoke with advocated reinstatement of the program. It is the panel's view that continuing SARP would be poor public policy. The program has contributed to a fractious industry that has lacked accountability, transparency, a common vision and a proper focus on the consumer. It would be possible for the government to simply reduce the share of slots revenue going to the industry, but this would not solve the underlying problems. Further investment in this program would not be a wise use of public funds, and in the long run would not benefit the industry. Continuation of SARP would allow the industry to keep evading the competitive challenges of today's entertainment marketplace."

(b) "Without slots revenue or a new revenue stream, the horse racing industry in Ontario will cease to exist."[74]

V) The Aftermath

119. On or about January 25, 2013, the Ontario Minister of Agriculture, Food and Rural Affairs Ted McMeekin admitted that the "government dropped the ball" on the horse racing issue.[75]

120. In or about February 7, 2013, Minister Duncan announced his resignation from politics. Days later, Kathleen Wynne replaced Dalton McGuinty as Premier of Ontario.

121. In a speech delivered on March 2, 2013 in Flamborough, detailed in the Flamborough Review on March 4, 2013, Premier Wynne (who was also Minister of Agriculture and Food) made the following comments in relation to SARP: "I think you know that some of the decisions that were made were possibly not as well thought through as they needed to be".[76]

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[74] Iannacito Affidavit, Exhibit "QQ" (Tab 55)(SB0003784).
[75] Amended Statement of Claim at para. 158; Iannacito Affidavit, Exhibit "QQ" (Tab 56)(SB0003346).
[76] Amended Statement of Claim at para. 163; Iannacito Affidavit, Exhibit "RR".

122. Premier Wynne later admitted in the Legislature on September 16, 2013, that "the original changes to the Slots at Racetracks Program were not as well thought through as they needed to be." She also admitted "there needed to be a sober second look at the process".[77]

123. On or about September 17, 2013, Premier Wynne admitted that the cancellation of the revenue sharing partnership was "not necessarily in the best interests of the industry or rural communities."[78]

124. On October 14, 2013, Premier Wynne admitted that she sided with then-Minster of Agriculture, Food and Rural Affairs Ted McMeekin regarding the manner in which SARP was changed: "I can remember sitting in Cabinet meetings with Ted saying: 'We've got to take a second look at this' … The way the SARP program was cancelled was not thoughtful."[79]

125. On November 13, 2013, Premier Wynne admitted in the Legislature that in the "cancellation of the [SARP] program, there was not due consideration of the impacts."[80]

W) The Report of the Auditor General

126. On April 28, 2014, Ontario's Auditor General, following an extensive investigation into the cancellation of the revenue-sharing aspect of SARP and the OLG's Modernization Plan, released a special report entitled "Ontario Lottery and Gaming Corporation's Modernization Plan" (the "AG Report").[81]

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[77] Iannacito Affidavit, Exhibit "QQ" (Tab 57)(SB0003718).
[78] Amended Statement of Claim at para. 164; Iannacito Affidavit, Exhibit "QQ" (Tab 58)(SB0003405).
[79] Iannacito Affidavit, Exhibit "QQ" (Tab 59)(SB0003434).
[80] Iannacito Affidavit, Exhibit "QQ" (Tab 60)(SB0003765).
[81] Iannacito Affidavit, Exhibit "QQ" (Tab 25)(SB0005062).

127. The AG Report confirmed that OLG did not "properly consult or consult various industries, businesses and municipalities impacted by the cancellation of the Slots at Racetracks Program." It stated, among many other shortcomings, that the "decision to terminate the Slots at Racetracks Program can hardly be considered to have been open and transparent."

128. In addition to identifying shortcomings of the Modernization Plan, the AG Report provided a high-level assessment of the damage wrought on the horse racing industry by the decision to terminate the revenue sharing partnership:

> "[T]he impact has been especially significant for horse people. Horse people initially lost 53% of their total funding when they lost their share of slots revenue."
>
> "The Ontario Horse Racing Industry Association estimated in July 2013 that 3,000 owners had left the horse-racing industry since 2011; 9,000 jobs had been lost, primarily in rural Ontario; and breeders' activities had dropped by about 60%. The Ministry of Finance and the Ministry of Agriculture and Food have not prepared an analysis on the actual job losses in the industry since the cancellation of the Slots At Racetracks Program"
>
> "Horse people, particularly those involved in standardbred and quarter-horse racing, were hit hardest by the Slots at Racetracks Program's cancellation. [The Auditor General was] advised that they had assumed in 2010, when OLG extended site-holder agreements for another five years, that program funding was stable, and so, they told us, they had planned for growth, investing in their farms and in the multi-year horse-breeding process."
>
> "OLG and the government were fully aware that the decision to cancel the program would have a significant impact on the horse-racing industry in Ontario [...] This would mean fewer race dates, less breeding, less employment and fewer economic benefits to the agricultural industry."

X) Ontario's Attempt to Retaliate Against Breeders for this Lawsuit

129. In early 2014, Ontario was given notice of this claim by standardbred breeders.

130. On March 11, 2014, John Snobelen, having finished his stint on the Transition Panel and having been now appointed to "Ontario Live Racing", a newly-created arm of the ORC – wrote to Premier Wynne to announce enhancements to the HIP breeder support programs. He withheld enhancements for standardbred breeders as punishment for going to Court.[82]

131. In an interview he gave to *Trot Insider* the following morning, Mr. Snobelen referenced this lawsuit when asked about why no HIP enhancements were made available for standardbreds."[83] However, on April 4, Premier Wynne wrote to the Plaintiffs and stated that there was an "enhanced breeders program that is available for all racing breeds – Standardbred, Thoroughbred and Quarter Horse."[84]

132. When the Plaintiffs sought to understand the discordance between Mr. Snobelen's statement and Premier Wynne's letter, Mr. Snobelen refused to comment because he asserted that the matter was "before the courts".[85]

133. When the Plaintiffs' lawyers wrote to Ontario's lawyers asking why enhanced breeders' awards for standardbred breeders were being withheld, they were told that by Crown counsel that "these issues do not form part of the litigation and, accordingly, we cannot assist with this inquiry".[86]

134. Subsequently, representatives of the Plaintiffs were invited to meet with Elmer Buchanan, another former panellist of the Horse Racing Industry Transition Panel, along with Steve Lehman of the ORC on September 4, 2014.

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[82] Iannacito Affidavit, Exhibit "QQ" (Tab 61)(SB0004508).
[83] Amended Statement of Claim at para. 152; Iannacito Affidavit, Exhibit "QQ" (Tab 62)(SB0004297).
[84] Iannacito Affidavit, Exhibit "QQ" (Tab 63)(SB0004516).
[85] Iannacito Affidavit, Exhibit "QQ" (Tab 64)(SB0005153).
[86] Iannacito Affidavit, Exhibit "QQ" (Tab 65)(SB0005138).

135. At the September 4 meeting, Mr. Buchanan and Mr. Lehman offered to release breeders' awards to standardbred breeders if the lawsuit was discontinued. .

Relevant Procedural History

136. Pleadings have been closed since May 26, 2014. Since then, there have been a number of contested discovery-related motions, a theme of which, from the Plaintiffs' perspective, has been ensuring that the evidence they believe is required to prove their pleaded claims at trial is elicited. These motions have included:

(a) Plaintiffs' motion regarding the discovery plan (reported as 2015 ONSC 908);

(b) Plaintiffs' motion for production of documents from the personal email accounts of certain OLG custodians (decided together with an OLG motion for a form of advanced discovery from the Plaintiffs, reported as 2015 ONSC 3529);

(c) Ontario and OLG's motions to sustain redactions made to documentary productions challenged by the Plaintiffs (endorsement of October 30, 2015); and

(d) Plaintiffs' motion for a further and better affidavit of documents from OLG (decided together with motions by Ontario and OLG to impose a timetable *en route* to proposed summary judgment motions, reported as 2016 ONSC 97).

A) Ontario and OLG Commit to Full Discovery

137. During the argument of the October 27, 2015, hearing of the motions by Ontario and OLG to impose a timetable leading to summary judgment, the Defendants committed to not bringing a motion for judgment until after *all* examinations for discovery were complete.[87]

138. The transcript of the October 27 appearance records the position of counsel for OLG:

> Having gone through a significant portion of the production process, at this juncture it's clear to the Ontario Lottery and Gaming

[87] See transcript of the October 27, 2015 hearing; Iannacito Affidavit, Exhibit "NN".

> Corporation -- and I think, as Mr. Kelly will add, clear to Her Majesty the Queen, that there will be benefit in the ability to bring a summary judgment motion. *Once the plaintiffs have had the benefit of full production and of full discovery rights – no one seeks to curtail those rights* -- but we can see what's on the horizon. And an obligation comes upon us to advise the plaintiffs, counsel and the court that we will be seeking to proceed in a summary fashion.
>
> So while we respect the process, and respect the claim that my friends have carefully put forward, *and understand that we need to go through a process of production and discovery*, we wanted to provide as much notice as possible to my friends and to the court, that we will be seeking summary judgment or summary trial based on the direction of Your Honour…[88] (emphasis added)

139. For its part, counsel for Ontario told the Court:

> I'll put it that way. If the evidence discloses there was no communication between Ontario and the breeders with respect to contractual matters with respect to alleged misrepresentations, and if the documentary production shows that to be the case, *the most effective way of dealing with that issue is after full discovery, to have a motion for summary judgment*, because there'd be nothing else to be decided.[89] (emphasis added)

140. Similar assurances had already been given during an October 15, 2015 case management conference. Rodney Kort, an articling student for Ontario, swore an affidavit on October 22, 2015 reciting what Ontario advised the Court and the parties at the case conference:

> During a Case Management Conference on October 15, 2015 to which I was a party, Crown counsel advised Justice Emery and parties to this action of the Crown's intention to join with [OLG] in bringing a ... motion for summary judgment … *following completion of examinations for discovery*."[90] (emphasis added)

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[88] Transcript, pp. 8-9, 12-13.
[89] Transcript, p. 18.
[90] Affidavit of Rodney Kort, sworn October 22, 2015 at para. 8, reproduced in Iannacito Affidavit, Exhibit "OO".

141. Ontario and OLG examined seventeen Plaintiffs between June 27 and October 19, 2016.[91]

142. On January 11, 2017, the Plaintiffs delivered notices of examination for discovery to representatives of Ontario and OLG, scheduling their discoveries for the week of February 27.[92]

B) Ontario and OLG Pre-empt Examinations for Discovery with Summary Judgment

143. Before examinations of their representatives could occur, OLG and Ontario served motions for judgment on January 16, 2017 and February 16, 2017, respectively.[93]

C) Plaintiffs Issue Fifteen Summonses in Response to Summary Judgment

144. In mid-February 2017, the Plaintiffs advised Ontario and OLG of their intention to examine fifteen witnesses pursuant to Rule 39.03 on Ontario and OLG's motions for judgment.[94]

145. The parties attended a case management conference with the Court on Friday, February 24 in Brampton. At that case conference, June 19 was reserved as a placeholder date for any motion to quash summonses that may be brought by Ontario or OLG.[95]

146. On March 2, the Plaintiffs issued the summonses. Thirteen of these witnesses are the Ontario witnesses; the other two witnesses are current and former OLG employees (whose summonses have not been challenged).[96]

147. On March 3, 2017, the Plaintiffs sent a letter to Ontario and OLG confirming that they had "issued a Summons for each of the following fifteen witnesses", and listed these witnesses. The

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[91] Iannacito Affidavit, para. 77.
[92] Iannacito Affidavit, para. 78 and Exhibit "PP".
[93] Iannacito Affidavit, para. 79.
[94] Affidavit of Ian Matthews, Plaintiffs' Motion Record, Tab 1 ("Matthews Affidavit"), at para. 2.
[95] Matthews Affidavit, at para. 3.
[96] Matthews Affidavit, at paras. 2, 6.

Plaintiffs' letter recorded Ontario's confirmation that it was accepting service of the summonses to Ms. Wynne, Mr. McMeekin and Mr. Orsini. These three summonses were served on Ontario via email *in lieu* of personal service on the named witnesses.[97]

148. Around this same time, the Plaintiffs engaged private investigators to locate the other Ontario witnesses, a process that took weeks.[98]

D) Ontario Announces its Motion to Quash Thirteen Summonses

149. On Tuesday, March 7, the Plaintiffs were advised by Ontario that it had instructions to seek to quash all of the summonses directed to the Ontario witnesses. By this time, personal service of the summonses on the remaining witnesses was well underway.[99]

150. Shortly after learning that that Ontario had instructions to quash all of the summonses, Mr. Matthews for the Plaintiffs received a call from counsel for Ontario, Eunice Machado.

151. Ms. Machado advised Mr. Matthews that it had come to her attention that some of the summonses served on witnesses contained dates that were prior to the June 19 placeholder date for the motion to quash.[100] This immediately signalled to Mr. Matthews that the witnesses who had received summonses had contacted Ontario after being personally served with their summons.[101]

152. Ms. Machado repeated that Ontario had instructions to seek to quash the summonses for all of the Ontario witnesses.[102] She further explained that, in light of these instructions, she wanted to write to the witnesses to explain that the Plaintiffs would not seek to examine them on the dates

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[97] Matthews Affidavit, at para. 11.
[98] Matthews Affidavit, at para. 13.
[99] Matthews Affidavit, at paras. 14 and 15.
[100] Matthews Affidavit, at para. 19.
[101] Matthews Affidavit, at para. 18.
[102] Matthews Affidavit, at para. 20.

and times in their summonses. Mr. Matthews understood her to have the email addresses of the witnesses and she remarked that she wished to inform the witnesses that because Ontario was moving to quash their summonses they need not attend on the dates in the summons.[103]

E) The Courtesy Extended by Plaintiffs' Counsel

153. Mr. Matthews acknowledged to Ms. Machado that this made sense. However, his understanding at all times in having this conversation with Ms. Machado was that he was being asked, *for the benefit of witnesses who did not want to testify*, to confirm for them that the Plaintiffs would not expect them to show up in light of Ontario's announced motion to quash.[104]

154. It was Mr. Matthews' understanding that each of the thirteen witnesses whose summons Ontario was seeking to quash had indicated to Ontario that they did not want to testify on the date in their summons and was supportive of an effort by Ontario to quash their summons.[105]

155. Mr. Matthews' intention was to be courteous to Ontario witnesses that he believed did not want to testify and who had begun receiving legal documentation requiring them to attend an examination under oath.[106]

F) Plaintiffs Discover that an Ontario Witness is Willing to Testify

156. On March 15, the Plaintiffs learned that Rod Seiling, the former Chair of the ORC, had been served with his summons. This prompted Mr. Matthews to call Mr. Seiling.[107]

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[103] Matthews Affidavit, at para. 21
[104] Matthews Affidavit, at para. 22.
[105] Matthews Affidavit, at para. 23.
[106] Matthews Affidavit, at para. 28.
[107] Matthews Affidavit, at para. 30.

157. Mr. Seiling was very willing to speak to Mr. Matthews. Mr. Seiling informed Mr. Matthews that he was quite prepared to testify about the events surrounding the cancellation of SARP revenue sharing and that he was willing to attend his examination as scheduled in his summons and testify, but that he had received a communication from Ontario telling him that he need not attend on the date set out in his summons.[108]

158. Mr. Seiling's comments led the Plaintiffs to realize that, instead of Mr. Seiling having indicated to Ontario that he did not wish to testify, which was Mr. Matthews' belief, the opposite had occurred: Ontario had written to Mr. Seiling to tell him that he did not need to attend on May 4 because Ontario (and OLG) were seeking to quash his summons.[109]

159. This immediately gave the Plaintiffs concern that the witnesses that had been summonsed and who had been contacted by Ontario did not in fact object to testifying and did not ask Ontario to quash their summons.[110]

160. The Plaintiffs wrote to Ontario on March 20 seeking copies of the correspondence Ontario sent to the Ontario witnesses regarding their summonses.[111]

161. The email exchanges between the Plaintiffs and Ontario ultimately led to the Plaintiffs taking the position that Ontario does not have standing to seek to quash the summonses issued to the Ontario witnesses who they do not represent and who do not object to testifying. This led to a

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[108] Matthews Affidavit, at para. 31.
[109] Matthews Affidavit, at para. 32.
[110] Matthews Affidavit, at para. 33.
[111] Matthews Affidavit, at para. 34.

disagreement between the parties that resulted in a March 31, 2017 case conference with Justice Emery and supplemental written submissions to the Court.[112]

G) The Court's April 11 Endorsement

162. On April 11, 2017, the Court released an endorsement. It stated at paragraph 14 that the Court had "not been provided with any authority that prevents or precludes any party from taking a step authorized by the *Rules* that any pending motion seeks to prevent or preclude before that motion is heard." This Court observed further that:

> [15] If a witness is compellable to attend at an examination pursuant to a properly served Summons to Witness under Rule 39.03, that witness must attend as required unless there is an order relieving the witness from that attendance. I know of no motion either defendant has brought to stay any Summons to Witness or examination under Rule 39.03, nor any order granted or obtained to date in that regard.[113]

H) Plaintiffs Decide to Proceed with Examinations and Ontario Seeks a Stay

163. On April 12, the Plaintiffs advised Ontario and OLG that they intended to proceed with the examinations of witnesses who are not represented by either Ontario or OLG on the dates and times specified in their respective summonses.[114] Ontario subsequently advised that it represented Dalton McGuinty,[115] leaving nine Ontario witnesses that are not represented by Ontario or OLG.

164. Later on April 12, Ontario responded to inform the Plaintiffs that it would be seeking instructions to bring a motion for an interim stay of these nine witnesses' examinations.[116]

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[112] Matthews Affidavit, at para. 35.
[113] Iannacito Affidavit, Exhibit "A".
[114] Iannacito Affidavit at para. 4, Exhibit "B" and Matthews Affidavit at paras. 37-38.
[115] Matthews Affidavit, at para. 39.
[116] Iannacito Affidavit at para. 5, Exhibit "C".

165. The nine witnesses are key players in the lead up to and implementation of the cancellation of the revenue sharing aspect of SARP. The factual narrative above is based substantially on their evidence including documents and emails they composed, received, authored or which describe events in which they were directly involved. Again, they are:

(a) Karim Bardeesy, former Director of Policy and Research for Dalton McGuinty;

(b) Dwight Duncan, the former Minister of Finance;

(c) John Wilkinson, a former Liberal cabinet minister and member of the Horse Racing Industry Transition Panel;

(d) Rod Seiling, the former Chair of the ORC;

(e) Don Drummond, author of the Drummond Report;

(f) Blair Stransky, who was the point person in Minister Duncan's office on the horse racing and gaming files;

(g) Tim Shortill, the former Chief of Staff for the Minister of Finance;

(h) Darcy McNeill, the former Director of Communications for the Minister of Finance; and

(i) John Snobelen, a member of the Horse Racing Industry Transition Panel who was subsequently appointed by Premier Wynne to negotiate enhanced breeders' awards with the horse racing industry.

PART III – STATEMENT OF ISSUES, LAW & AUTHORITIES

166. There are two issues for this Court to decide in relation to the nine witnesses:

(a) Whether this Court should construe a litigation accommodation made as a courtesy to be a 'binding agreement' to postpone Ontario witnesses' rule 39.03 examinations pending disposition of Ontario's motion to quash; and

(b) Whether this Court should grant an interim stay of the examinations of the nine witnesses pending disposition of Ontario's and OLG's June 19 motions to quash.

Ontario's Request Accommodated a Courtesy; No 'Litigation Agreement'

167. There is no reason to preclude Plaintiffs' counsel from withdrawing a courtesy to accommodate a set of facts which are quite different from what was understood when the courtesy was extended. Cooperation among counsel is undoubtedly important but it does not transform a gratuitous courtesy into a binding obligation.

168. There is no dispute that Plaintiffs' counsel sent an email indicating that, pending disposition of the June 19 motions to quash summonses, "the examinations of [...] witnesses will not go forward on the dates specified in their respective Summonses."[117]

169. The evidence of Plaintiffs' counsel on this motion is that, in sending this email, he was "trying to be courteous to Ontario witnesses that [he] believed did not want to testify and who had begun receiving legal documentation requiring them to attend an examination under oath."[118]

170. The March 7 email was sent by Plaintiffs' counsel in a context where he thought, "based on the manner in which Ontario's instructions to quash the summonses were conveyed to [him], coupled with the timing of [Crown counsel's] phone call",[119] that he was being asked to agree to defer examinations "*for the benefit of witnesses who did not want to testify*".[120]

171. There was no benefit to the Plaintiffs in agreeing to defer these examinations until after a motion to quash. The Plaintiffs always intended to gather evidence from these witnesses in order to

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[117] Matthews Affidavit, para. 27.
[118] Matthews Affidavit, para. 28.
[119] Matthews Affidavit, para. 25.
[120] Matthews Affidavit, para. 22.

respond to summary judgment. The March 7 email extended a courtesy on the understanding that the witnesses in question supported the motion to quash.

172. After speaking to Rod Seiling on March 15, Plaintiffs' counsel understood that although Ontario has all of the contacts of the Ontario witnesses (which it declined to provide in order to facilitate service of the summons) it had been in communication with them and they did not all support the motion to quash.[121] Significantly, as soon as this became apparent the matter was immediately raised with Ontario and the Court.

173. For the Plaintiffs' indulgence to be enforced as a binding agreement there must be some form of consideration passing between parties - Ontario did not change its position or rely in any material way on the courtesy.[122] There is no suggestion from Ontario that Plaintiffs' counsel gave an undertaking to Ontario and no such undertaking was in fact given.[123] In this regard, the March 7 email from Plaintiffs' counsel speaks for itself.

174. Finally, there is nothing at all untoward in re-visiting an accommodation granted on a mistaken set of facts or misapprehension especially when neither party has changed their position and no prejudice will result. This is the stuff of litigation, particularly hard fought, complex litigation where issues of profound importance to the Plaintiffs are at play.

175. Indeed, this is the very position that Ontario and OLG take in defence of their position to move for summary judgment after having represented that they would only do so after the completion of discovery to ensure that the Plaintiffs had 'full' discovery rights'

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[121] Matthews Affidavit, para. 31.
[122] *Harkema v. Hutchison*, 2004 CanLII 53534 (ON SC), para. 29, BoA at Tab 2; see also *Deitrich-Collins Equipment Co v General Motors of Canada Ltd*, (1981) 31 OR (2d) 687 at p. 6, BoA at Tab 3.
[123] *Hudson v* Andros, 2010 ONSC 3417 at paras. 20-26, BoA at Tab 4.

176. There is no prejudice to Ontario resulting from the examination of the witnesses Ontario does not speak for and who do not object to giving their evidence. Notably, OLG's witnesses are being examined.

The Stay Should be Refused

177. There is no dispute that the test for the interim stay of the nine witnesses' summonses sought by Ontario on this motion is the well-known tripartite test set out in *RJR MacDonald Inc v Canada (AG)*. Ontario fails to satisfy all three branches of the test.

A) There is No Serious Issue to be Determined on Ontario's Motion to Quash

178. Ontario must convince this Court that there is a serious issue to be determined on the motion to quash. The words "a serious question to be determined" are equivalent to saying that the motion is not frivolous or vexatious.[124]

179. Ontario's motion to quash is frivolous and does not present a serious issue to be determined, particularly in light of the Plaintiffs' obligation to respond to summary judgment.

180. Ontario's main argument on the motion to quash boils down to "whether the Plaintiffs can establish a reasonable evidentiary basis for examining the Proposed Witnesses in the context of the Defendants' motions for summary judgment."[125]

181. The threshold that the Plaintiffs must meet on a motion to quash a summons is quite low. As held by Justice Perell: "Once a party seeking to examine a witness pursuant to Rule 39 shows that the proposed examination is about an issue relevant to the pending motion or proceeding and

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[124] *RJR-MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311 at para 44, BoA at Tab 5.
[125] Ontario's Factum at para. 31.

that party to be examined is in a position to offer possibly relevant evidence, it is not necessary for the party to go further and show that the proposed examination will yield evidence helpful to the party's cause."[126]

182. It is clear from the sampling of the highly probative documents presented on this motion that the Plaintiffs well exceed this threshold. The record to date ought to dispel any suggestion that these examinations are, as Ontario asserts in its factum, a "fishing expedition".[127]

183. It is obvious that these witnesses are not, as Ontario argues, "tangentially involved in the cancellation of SARP."[128] They are the central characters at the core of this case:

Karim Bardeesy	The documents reveal that Mr. Bardeesy was involved in meetings with Premier McGuinty where key decisions were made on the proposal to replace/eliminate the revenue sharing aspect of SARP. Mr. Bardeesy is in a position to give evidence with respect to issues raised in the pleadings and in Ontario's motion for summary judgment.[129] Mr. Bardeesy was also directly involved in directing the hasty rewrite of the materials for Cabinet to reflect these changes in early February. Mr. Bardeesy's evidence will be relevant in ascertaining what happened in that critical 2-day period in which the decision to "go to $0" was made and what materials, facts, and other contextual information that were being considered.[130]
Dwight Duncan	The pleadings allege and the documents indicate that Mr. Duncan and/or staff in his office: met with horse racing industry participants; directed the renewal of the siteholder agreements; sent letters to various correspondents promoting/defending SARP revenue sharing; defended SARP revenue sharing to the Legislature's estimates committee; presented the OLG modernization plan, including the recommendation for immediate cancellation of SARP revenue sharing, to his Cabinet colleagues; and defended the decision to cancel SARP revenue sharing. [131]

[126] *Taxicab (Pearson Airport) Ass. v Toronto (City)*, [2009] OJ No 2144 at para. 30, BoA at Tab __.
[127] Ontario's Factum at para. 8.
[128] Ontario's Factum at para. 31.
[129] Plaintiffs' Reply to Ontario at para. 11; Ontario's Notice of Motion for Summary Judgment at paras. 6 and 10; Iannacito Affidavit, Exhibits "HH" and "JJ".
[130] Iannacito Affidavit, Exhibit "N" (see CRE0360917 and CRE0360998).
[131] Amended Statement of Claim at paras. 72, 99-100, 210, 130.

	Mr. Duncan's evidence is critical on all of those points. Mr. Duncan is also specifically referenced in the summary judgment motion material of Ontario and OLG.[132]
John Wilkinson	The documents suggest that Mr. Wilkinson carefully drafted portions of the Transition Panel's report in order to provide political cover for the Liberal Government. A particularly revealing document is an August 3, 2012 email in which Mr. Wilkinson discusses the political framing of the Panel's report.[133] The Panel's report, including the Panel's finding that continuing SARP would be poor public policy, is specifically referred to by OLG[134] and Ontario[135] in their summary judgment motion material.
Rod Seiling	The documents demonstrate that Mr. Seiling and the ORC were blindsided by the cancellation.[136] Ontario had an obligation to consult with Mr. Seiling pursuant to the MOU with the ORC. The ORC was the conduit through which many of the representations alleged by the Plaintiffs were delivered.[137] Mr. Seiling, the only representative of the ORC summonsed, will be able to provide evidence about the ORC's efforts to encourage breeding investment and to promote an atmosphere of stability for those investments.[138] Mr. Seiling will also provide evidence about the interplay between the ORC's oversight of the horse racing industry and SARP.
Don Drummond	The documents indicate that the Ministry of Finance staff provided Mr. Drummond with language to use in his report relating to the horse racing "subsidy" and encouraged the use of stronger language in his report.[139] The Drummond Report is quoted in the defences of both OLG[140] and Ontario.[141] There are also several specific references to Drummond and his report in the summary judgment motion material of Ontario[142] and OLG.[143] Generally, the

[132] Affidavit of Larry Flynn at paras. 56 and 66; Affidavit of Elizabeth Yeigh at paras. 70-75; Iannacito Affidavit, Exhibits "LL and "MM".
[133] Iannacito Affidavit, Exhibit "R" (see CRE029291).
[134] Affidavit of Larry Flynn at paras. 67-69, Iannacito Affidavit, Exhibit "LL".
[135] Affidavit of Elizabeth Yeigh at paras. 79-82, Iannacito Affidavit, Exhibit "MM".
[136] Iannacito Affidavit, Exhibit "T" (see CRE0085407).
[137] Amended Statement of Claim at para. 58. See also OLG's Notice of Motion at para. "FF".
[138] See for example, Iannacito Affidavit, Exhibit "QQ" (Tab 8)(SB0001462).
[139] Iannacito Affidavit, Exhibit "U" (see CRE0079884, CRE0361127 and CRE0079889).
[140] Statement of Defence of OLG at paras 33-35, 75 and 80; Iannacito Affidavit, Exhibit "GG".
[141] Statement of Defence of Ontario at paras. 28, 33 and 34; Iannacito Affidavit, Exhibit "FF".
[142] Affidavit of Elizabeth Yeigh at paras. 65-69, Iannacito Affidavit, Exhibit "MM".
[143] Notice of Motion for OLG's Motion for Summary Judgment at paras. "w", "x"; Flynn Affidavit at paras. 60-63; Iannacito Affidavit, Exhibits "KK" and "LL".

	Crown and OLG have presented the Drummond Report as an impartial, objective, independent study that prompted the review and subsequent cancellation of SARP revenue sharing.
Blair Stransky	The documents indicate that Mr. Stransky was the Minister of Finance's point person on horse racing. Mr. Stransky was the recipient of documents sent to the Minister's Office such as OLG consultation memos and Horse Improvement Program annual reports.[144] Mr. Stransky appears to have taken the lead on briefing other Cabinet ministers on the proposal to cancel the revenue sharing aspect of SARP.[145] Mr. Stransky was involved in framing language for Mr. Drummond's report [146] and sent the language "recommending" cancellation to OLG for inclusion in its modernization report.[147] In addition, Mr. Stransky was deeply involved in the strategy to market the cancellation and respond to the criticisms following the cancellation.[148] Mr. Stransky's evidence will therefore directly address the decision-making process that led to the cancellation of SARP revenue sharing, what information he shared with the decision-makers, and how Ontario and OLG communicated that decision.
Tim Shortill	Mr. Shortill appears to have been the main conduit from the civil servants to Minister Duncan. The documents suggest that Mr. Shortill's involvement extended to: oversight of presentations about OLG modernization and the cancellation of SARP revenue-sharing to Cabinet members and discussions with Liberal Party staff;[149] discussions concerning the content of Cabinet materials regarding OLG's modernization plan;[150] oversight of media communications strategy in response to horse racing industry statements; [151] recommendations regarding which horse racing industry organization to meet with following the announcement of the cancellation of SARP revenue sharing; and[152] discussions regarding the Transition Panel;[153]
Darcy McNeil	Mr. McNeill wrote Minister Duncan's February 13, 2012, speech that is alleged to have been the first public statement by Ontario that it intended to revisit SARP revenue sharing.[154]

[144] Iannacito Affidavit, Exhibit "W" (see OLGSB0000526 and CRE0085421).
[145] Iannacito Affidavit, Exhibit "W" (see CRE0028775).
[146] Iannacito Affidavit, Exhibit "W" (see CRE0080543).
[147] Iannacito Affidavit, Exhibit "W" (see CRE0032142).
[148] Iannacito Affidavit, Exhibit "W" (see CRE0209541, CRE0029183).
[149] Iannacito Affidavit, Exhibit "Y" (see CRE0105863/CRE0028653).
[150] Iannacito Affidavit, Exhibit "Y" (see CR0001885/CR0012973).
[151] Iannacito Affidavit, Exhibit "Y" (see CR0001851).
[152] Iannacito Affidavit, Exhibit "Y" (see CRE0028857).
[153] Iannacito Affidavit, Exhibit "Y" (see CRE0028984, CRE0029291, CRE0032576, CRE0032691).
[154] Iannacito Affidavit, Exhibit "AA" (see CRE0050473).

	Mr. McNeill was also involved in developing messaging and communicating with reporters.[155] Mr. McNeill's evidence will clarify the manner in which the decision to cancel SARP was communicated and to what extent criticism of SARP was exaggerated for political reasons. His evidence is relevant to the issue raised by the Defendants that the decision to terminate the revenue sharing aspect of SARP was made in good faith.[156]
John Snobelen	Mr. Snobelen was involved in communications with the Plaintiffs regarding enhanced breeders' rewards that the Plaintiffs have pleaded were withheld in retaliation for the Plaintiffs bringing this lawsuit.[157] Mr. Snobelen's evidence will address this alleged retaliation, which is set out in the pleadings.[158]

184. The involvement of these witnesses is manifest from documents produced, in large part, by Ontario and OLG. Ontario's factum claims that "[i]t is not clear what evidence the [above-mentioned nine] witnesses could provide that would be relevant to the summary judgment motions" beyond the "documents produced by Ontario" and the "cross-examin[ation] of Ontario's affiant."[159]

185. The suggestion that it is "not clear" whether these witnesses are in a position to provide possibly relevant evidence is overwhelmingly contradicted by the documentary record. The Plaintiffs ought not to be hamstrung by the Ontario and OLG narratives of events in responding to summary judgment.

186. Given the evidence on this motion and the low bar for the Plaintiffs to meet to sustain the summonses to the nine witnesses, it is apparent that Ontario's motion to quash these summonses on the ground that there is no "reasonable evidentiary basis" to examine these nine witnesses discloses no serious issue to be determined.

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[155] Iannacito Affidavit, Exhibit "AA" (see CRE0210752, CRE0091986).
[156] Notice of Motion for Ontario's Motion for Summary Judgment at paras. 6 and 10; Iannacito Affidavit, Exhibit "JJ".
[157] Iannacito Affidavit, Exhibit "CC" (see SB0005137).
[158] Amended Statement of Claim at para. 152.
[159] Paragraph 31 of Ontario Factum.

187. It is equally apparent that Ontario's argument that the Plaintiffs' summonses to these nine witnesses "are an abuse of process" because of "[t]he sheer number of summonses issued and the broad scope of documents requested of the Proposed Witnesses[160] is a frivolous argument that does not disclose a serious issue to be decided at the motion to quash.

188. While it is the onus of the party seeking to examine a witness to establish relevance, the onus is on the party moving to quash to establish that the summonses are an abuse of process.[161]

189. Ontario suggests that the *number* of summonses is a sufficient basis for this court to conclude that *all* summonses are abusive. In a case of this complexity, and having elected to try and drive the Plaintiffs from the judgment seat before examinations, there is no merit to Ontario's suggestion and no basis to believe that fifteen summonses is inappropriate, let alone an abuse of this Court's process.

190. Ontario's related argument that the "broad scope of the documents requested … are indicative of a fishing expedition" ought to be dismissed out of hand. There is no evidence in either Ontario or OLG's records on their motions to quash that the summonses for the nine witnesses make "broad requests". Neither Defendant has even bothered to include the summonses to the nine witnesses—which contain tailored and specific document requests—in their records on the motion to quash.[162] Ontario's assertion that the summonses to the nine witnesses are too broad is an argument made in the air without any evidentiary basis. It is frivolous.

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[160] Ontario's Factum at para. 32.
[161] *Ramos and Karbar v The Independent Police Review Director*, 2012 ONSC 7347 (Div. Ct.) at para. 19, BoA at Tab 7.
[162] Iannacito Affidavit at paras. 22, 27, 32, 37, 42, 47, 52, 57, 62.

B) Ontario Will Not Suffer Irreparable Harm as a Result of the Examinations

191. Ontario must establish that *it*, not the witnesses to be examined, will suffer irreparable harm as a result of the examinations of the nine witnesses going forward.[163] It cannot do so.

192. Irreparable harm is harm that "either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."[164] Evidence of irreparable harm must be clear and not speculative. Simply asserting loss is insufficient—clear evidence of irreparable harm that cannot be met with damages is required.[165]

193. Ontario's argument is that if the examinations of these nine witnesses go forward, it will render their motion to quash moot in respect of these nine witnesses.[166] Even if this is the case, it does not follow that Ontario will be irreparably harmed by having the examinations of any of the nine witnesses go forward. That is a question that will depend on the circumstances of a case and requires evidence. Ontario has not presented any.

194. In paragraph 35 of its factum, Ontario cites *Canada (Attorney General) v. Canada (Information Commissioner)*,[167] for the proposition that "a party would suffer irreparable harm if its pending application to quash a subpoena was rendered 'moot or futile'." However, the Federal Court of Appeal subsequently *overturned this decision on the issue of irreparable harm.*[168] The Federal Court of Appeal held:

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[163] *Monsanto Canada Inc. v. Novopharm Ltd.*, [1996] FCJ No 1533 at para. 38, BoA at Tab 8.
[164] *RJR-MacDonald* at paras. 58-59.
[165] *Iskin Inc v Sa*, 2005 CanLII 19766 at para. 7, BoA at Tab 9.
[166] Ontario's Factum at para. 36.
[167] *Canada (Attorney General) v. Canada (Information Commissioner)*, 2000 CarswellNat 2626 (FC TD), BoA at Tab 10.
[168] *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 26, BoA at Tab 11.

> ... the fact that irreparable harm may arguably arise does not establish irreparable harm. *What the respondents had to prove, on a balance of probabilities, is that irreparable harm would result from compliance with the subpoenas* issued on behalf of the Commissioner. ... The alleged harm may not be speculative or hypothetical. (emphasis added)

195. In the result, the Federal Court of Appeal ordered the subpoena complied with.

196. Ontario also cites *Bisaillon c. R.*[169] There, the Federal Court of Appeal was asked to stay execution of the requirement of production of documents to Revenue Canada by the applicants until judgment was rendered by the Court of Appeal on appeal from the order below, which had required that the documents be produced. There, it was held that there was irreparable harm as the applicants' appeal would "become moot or futile if Revenue Canada obtains the material requested before the appeal is decided on its merits."[170]

197. There is no general principle that having a motion rendered moot will always constitute irreparable harm. Each case turns on its own facts. This is precisely the point made in *Canada (Attorney General) v. United States Steel Corp*:[171]

> In relation to the allegation of mootness, U.S. Steel's position is that, if the very procedure that is the subject of the appeal is implemented ... the appeal as to process is rendered moot. ...
>
> [E]ven if, for the purposes of this motion, I were to accept U.S. Steel's position as correct, it assumes that an appeal rendered moot automatically gives rise to a finding of irreparable harm. That is not so. As Rothstein J.A. (as he then was) explained in *El Ouardi v. Canada (Solicitor General)*, 2005 FCA 42, 332 N.R. 76 (Fed. C.A.), if such a proposition were adopted, it would apply to virtually all circumstances in which a stay is sought and would essentially deprive the court of the discretion to decide questions of irreparable harm on the facts of each case.

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[169] *Bisaillon c. R.*, 1999 CarswellNat 2578 (Fed. C.A.), BoA at Tab 12.
[170] Ibid., para. 33.
[171] *Canada (Attorney General) v. United States Steel Corp.*, 2010 FCA 200, at paras. 15, 17, BoA at Tab 13.

198. It is impossible to see how examinations of nine witnesses it does not represent will cause irreparable harm to Ontario. It is not even required to attend these examinations. If the evidence adduced is truly irrelevant the examinations will be irrelevant – a very clarifying outcome for subsequent motions. Ontario retains the ability to argue against its use on the motion for summary judgment.

199. The "harm" Ontario is really concerned about is the likelihood that the Plaintiffs will bring to light additional evidence that reveals Ontario and OLG's conduct and which deconstructs the double and triple hearsay narrative put forward in their summary judgment records.

C) The Balance of Convenience Favours the Plaintiffs

200. The balance of convenience on this motion favours the Plaintiffs. The Plaintiffs have an obligation to fully respond to the motions for judgment.

201. Parties on a motion for summary judgment must put their "best foot forward." In *Hino Motors v Kell*, the court described what is meant by the phrase:

> [9] The new Rule does not change the burden in a summary judgment motion. The moving party bears the evidentiary burden of showing that there is no genuine issue requiring trial. The moving party must prove this and cannot rely on mere allegations or the pleadings. Pursuant to Rule 20.02(2), a responding party 'may not rest solely on the allegations or denial in the party's pleadings but must set out in affidavit material or other evidence, specific facts showing there is a genuine issue requiring a trial.' In other words, consistent with existing jurisprudence, each side must 'put its best foot forward' with respect to the existence or non-existence of material issues to be tried. The Court is entitled to assume that the record contains all the evidence which the parties would present if there were a trial.[172]

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[172] *Hino Motors Ltd v Kell*, 2010 ONSC 1329 at para. 9, BoA at Tab 14.

202. The Plaintiffs are entitled—and are required—to gather evidence to answer the motions for judgment. The Plaintiffs have exercised their right under the *Rules* to do so.[173] If the stay is granted the Plaintiffs ability and right to collect evidence will be unnecessarily impeded.

203. If the stay is not granted, Ontario will suffer no harm or inconvenience, other than the prospect of a meritless motion rendered moot in respect of nine witnesses it does not speak for.

204. This court should favour the collection of evidence pursuant to the *Rules* over Ontario's meritless attempt to prevent the examination of witnesses with relevant evidence.

PART IV – ORDER REQUESTED

205. The Plaintiffs request that Ontario's motion be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of April, 2017.

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[173] *1870553 Ontario Inc. v. Kiwi Kraze Franchise Co. Ltd.*, 2015 ONSC 1632, at para. 45, BoA at Tab 1.

SCHEDULE "A" - LIST OF AUTHORITIES

1. *1870553 Ontario Inc. v. Kiwi Kraze Franchise Co. Ltd.*, 2015 ONSC 1632
2. *Harkema v. Hutchison*, 2004 CanLII 53534 (ON SC)
3. *Deitrich-Collins Equipment Co v General Motors of Canada Ltd*, (1981) 31 OR (2d) 68
4. *Hudson v Andros*, 2010 ONSC 3417
5. *RJR-MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311
6. *Taxicab (Pearson Airport) Ass. v Toronto (City)*, [2009] OJ No 2144
7. *Ramos and Karbar v The Independent Police Review Director*, 2012 ONSC 7347 (Div. Ct.)
8. *Monsanto Canada Inc. v. Novopharm Ltd.*, [1996] FCJ No 1533
9. *Iskin Inc v Sa*, 2005 CanLII 19766
10. *Canada (Attorney General) v. Canada (Information Commissioner)*, 2000 CarswellNat 2626 (FC TD)
11. *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 26
12. *Bisaillon c. R.*, 1999 CarswellNat 2578 (Fed. CA)
13. *Canada (Attorney General) v. United States Steel Corp.*, 2010 FCA 200
14. *Hino Motors Ltd v Kell*, 2010 ONSC 1329

SCHEDULE "B" - STATUTES, REGULATIONS & BY-LAWS

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194**

EVIDENCE BY EXAMINATION OF A WITNESS

Before the Hearing

39.03 (1) Subject to subrule 39.02 (2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing. R.R.O. 1990, Reg. 194, r. 39.03 (1).

(2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination. R.R.O. 1990, Reg. 194, r. 39.03 (2).

(2.1) Subrules (1) and (2) do not apply to an application made under subsection 140 (3) of the *Courts of Justice Act*. O. Reg. 43/14, s. 12.

To be Exercised with Reasonable Diligence

(3) The right to examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of an examination where the party seeking the adjournment has failed to act with reasonable diligence. R.R.O. 1990, Reg. 194, r. 39.03 (3).

At the Hearing

(4) With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial. R.R.O. 1990, Reg. 194, r. 39.03 (4).

Summons to Witness

(5) The attendance of a person to be examined under subrule (4) may be compelled in the same manner as provided in Rule 53 for a witness at a trial. R.R.O. 1990, Reg. 194, r. 39.03 (5).

SEELSTER FARMS INC. et al.
Plaintiffs

-and-

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO et al.
Defendants

Court File No. 272/14

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
GUELPH

PLAINTIFFS' RESPONDING FACTUM
(Ontario's Motion for Stay of Rule 39.03 Examinations)

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