CITATION: Seelster Farms Inc. v. ONTARIO, 2017 ONSC 4756
COURT FILE NO.: 272/14 (Guelph)
DATE: 20170804

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: SEELSTER FARMS INC. WINBAK FARM OF CANADA, INC, STONEBRIDGE FARM, 774440 ONTARIO INC., NORTHFIELDS FARM INC., JOHN MCKNIGHT, TARA HILLS STUD LTD., TWINBROOK LTD., EMERALD RIDGE FARM, CENTURY SPRING FARMS, HARRY RUTHERFORD, D10041NE INGHAM, BURGESS FARMS INC., ROBERT BURGESS, 453997 ONTARIO LTD., TERRY DEVOS, SONIA DEVOS, GLENN BECHTEL, GARTH BECHTEL, 496268 NEW YORK INC., HAMSTAN FARM INC., ESTATE OF JAMES CARR, deceased, by its executor Darlene Carr, GUY POLILLO, DAVID GOODROW, TIMPANO GAMING INC., CRAIG TURNER, GLENGATE HOLDINGS INC., KENDAL HILLS STUD FARM LTD., ANY KLEMENCIC, TIM KLEMENCIC, STAN KLEMENCIC, JEFF RUCH, BRETT ANDERSON, DR. BRETT C. ANDERSON PROFESSIONAL VETERINARY CORPORATION, KILLEAN ACRES INC., DECISION THEORY INC., 296268 ONTARIO LTD., DOUGLAS MURRAY MCCONNELL, QUINTET FARMS INC., KARIN BURGESS, BLAIR BURGESS, ST. LAD'S LTD., WINDSUN FARM INC., SKYHAVEN FARMS, HIGH STAKES INC., 1806112 ONTARIO INC., GLASSFORD EQUI-CARE, JOHN GLASSFORD, GLORIA ROBINSON and KEITH ROBINSON
v.
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and ONTARIO LOTTERY AND GAMING CORPORATION

BEFORE: EMERY J.

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

Robert Ratcliffe, Sandra Nishikawa and Chantelle Blom, for the Defendant, Her Majesty The Queen

H. Michael Rosenberg and Dharshini Sinnadurai, for the Defendant, Ontario Lottery and Gaming Corporation

HEARD: June 19, 2017 in Guelph

DECISION ON MOTIONS TO QUASH

[1] Litigation often resembles a chess match, with real life consequences. Just as often, the greater the significance a step or motion taken by one party or another in an action, the higher the stakes.

[2] In a strategic move, each of the defendants Her Majesty the Queen in right of Ontario ("Ontario") and Ontario Lottery and Gaming Corporation ("OLG") have brought parallel motions for summary judgment. Both defendants are asking the court to dismiss this action on liability alone. They are asking the court to find neither defendant has any liability under the various causes of action the plaintiffs have pleaded against them. The defendants take the position in their materials on the motions for summary judgment that there will be no genuine issue requiring a trial for the court to make the necessary factual findings on the evidentiary record. They anticipate those factual findings will be sufficient for the court to apply the law to grant the relief they seek.

[3] These motions for summary judgment are currently scheduled to be heard over three days on November 14, 15 and 16, 2017 in Guelph.

[4] After the plaintiffs had served their responding materials to the motions for summary judgment, counsel for the plaintiffs served, or arranged for service of a summons to witness on each of 15 persons. These persons were served for counsel for the plaintiffs to examine each of them as a witness before the hearing of the motion for summary judgment under Rule 39.03 for the purpose of having

a transcript of his or her evidence available for use at the hearing of the motions for summary judgment. Two of those persons, Rod Phillips, a former Chief Executive Officer of OLG, and Claire MacDougall Sadava, who is currently employed by OLG, have already been examined.

[5] The defendants now bring parallel motions to quash those summons to witness served on the 13 other proposed witnesses.

Background

[6] Seelster Farms Inc. and the other plaintiffs have brought this action against Ontario and OLG for their roles in cancelling the Slots at Race Tracks Program (SARP). SARP is a program of OLG in which a percentage of net-proceeds from slot machines placed at seventeen race tracks throughout Ontario are shared with a race track and horsepeople in the horseracing industry.

[7] SARP operated at Ontario racetracks through site holder agreements that OLG had with each race track between 1998 and 2012. A site holder agreement permitted OLG to locate and operate slot machines at a particular racetrack in exchange for 20% of the net-income from those slot machines (the "site holder payment"). The standard site holder agreement allowed the racetrack to keep one half of the site holder payment. The site holder agreement directed the racetrack to distribute the other half to horsepeople to enhance racing purses, and to provide other incentives for races held at that racetrack.

[8] The term "horsepeople" is defined under the site holder agreement. According to the affidavit of Larry Flynn, who was Senior Vice-President, Gaming, of OLG until March 31, 2015, the term "horsepeople" does not include horse breeders under the site holder agreements.

[9] OLG is a Crown Corporation owned entirely by Ontario and regulated by the *Ontario Lottery and Gaming Corporation Act*, 1999. OLG is mandated by its governing statute to act for the public good and in the best interests of the province. It cannot favour any one particular stakeholder group over another. The decisions made by ministers of the Crown and the Ontario cabinet are those decisions of OLG, or that direct OLG's officers and directors in the performance of their duties.

[10] OLG announced to the public on March 12, 2012 that it was terminating SARP through a report carrying the title "Modernizing Law and Gaming in Ontario." OLG gave notice when it had made that announcement that effective March 31, 2013, it would terminate or refuse to renew those site holder agreements it had entered with racetracks since 1998.

[11] The plaintiffs seek damages from Ontario and OLG for terminating SARP. Those claims are based on breach of contract, negligence, negligent and/or intentional misrepresentation waiver of tort and unjust enrichment as causes of action. The amended statement of claim contains 170 paragraphs, and spans

over 50 pages in which the plaintiffs set out their claims, issues and allegations of material fact. The plaintiffs allege, as breeders of standardbred horses, that Ontario and OLG made representations and commitments to share the net proceeds generated by slot machines placed at racetracks with participants in the horseracing industry when SARP was introduced in 1998. Those allegations include the claim that they relied on those representations and commitments when they made decisions to continue with their breeding programs that operate in cascading 5-year cycles.

[12] The plaintiffs claim that the cancellation of SARP, through the termination of the site holder agreements, or the exclusion of the site holder payment under those agreements, as the case may be, has and will cause them to suffer damages.

[13] In addition to those damages, the plaintiffs also claim punitive damages against Ontario. The plaintiffs allege that Ontario has excluded them as standardbred breeders from the additional funds dedicated to the Horse Improvement Program ("HIP") to compensate horse breeders generally for the cancellation of SARP. The plaintiffs claim they have been excluded from additional funding in retaliation for bringing this action.

[14] A substantial amount of disclosure has been made by the defendants in this action to date. Ontario has produced over 77,000 documents listed in

schedule A of its affidavit of documents. OLG has also produced over 1600 documents. These productions were disclosed and made pursuant to an order this court dated February 9, 2015.

[15] Ontario and OLG had examined 17 of the 49 plaintiffs for discovery by October 19, 2016. On January 11, 2017, counsel for the plaintiffs served notices of examination to examine representatives of Ontario and OLG. Those examinations for discovery were scheduled to commence on February 27, 2017.

[16] It was after receiving the notices of examination to examine representatives of each defendant for discovery that Ontario and OLG served their respective motions for summary judgment.

[17] Counsel for the plaintiffs subsequently informed counsel for Ontario and OLG of their intention to examine 15 witnesses under Rule 39.03 to obtain their evidence for use on the motions for summary judgment. Those witnesses were:

1. **Karim Bardeesy** – in February 2012, Mr. Bardeesy was the Director of Policy and Research in the Office of the Premier.
2. **Dwight Duncan** – Minister of Finance in 2012, and Minister responsible for OLG
3. **John Wilkinson** – Mr. Wilkinson was a panellist on the Horse Racing Industry Transition Panel starting around June of 2012.
4. **Rod Seiling** – Mr. Seiling was the Chair of the Ontario Racing Commission in 2012.
5. **Don Drummond** – Mr. Drummond is an author of a report commonly referred to as the "Drummond Report".

6. **Blair Stransky** – Mr. Stransky was a Senior Policy Advisor in the Ministry of Finance in 2011 and 2012.

7. **Tim Shorthill** – Mr. Shorthill was Chief of Staff to the Minister of Finance in 2011 and 2012.

8. **Darcy McNeill** – Mr. McNeill was the Director of Communications in the Ministry of Finance in 2012.

9. **John Snobelen** – Mr. Snobelen was a member of the Horse Racing Industry Transition Panel starting around June 2012, worked for Ontario Horse Racing in March 2014, and was a former Cabinet Member in Premier Mike Harris' government.

10. **Steve Orsini** – Mr. Orsini was Deputy Minister of Finance in 2012.

11. **Dalton McGuinty**, Premier of Ontario in February 2012

12. **Ted McMeekin**, former Minister of Agriculture, Food and Rural Affairs

13. The Honourable **Kathleen Wynne**, current Premier of Ontario.

[18] After a summons to witness had been served or arrangements made to serve each of those witnesses, Ontario and OLG brought this motion to quash the summonses served on 13 of those witnesses.

[19] Neither Ontario or OLG move to quash the summons served on either Rod Phillips or Claire MacDougall Sadava. Those two witnesses have now been examined under rule 39.03 by counsel for the plaintiffs. A transcript of the evidence given by Mr. Phillip's at that examination was available to the court on these motions to quash the summonses for the remaining witnesses. His evidence is now available for use at the hearing of the motions for summary judgment.

Analysis

[20] The first step in deciding whether the summons served on any witness is subject to challenge turns on the language of rule 39.03(1) itself.

[21] Rule 39.03(1) provides that a person may be examined as a witness before the hearing of a pending motion. The rule further provides that the examination would be held for the purpose of having a transcript of that person's evidence available for use at the hearing. It follows that the hearing where the transcript would be used would be the hearing of the pending motion. Therefore, the nature of the motion is relevant to the analysis of whether a person should be examined for the purpose of having a transcript of his or her evidence available.

[22] The motions for which the plaintiffs seek to examine non-party witnesses to have their evidence for use when they are heard are, of course, motions for summary judgment. The policy objectives behind the amendments to Rule 20 governing summary judgment were examined by Justice Karakatsanis in *Hryniak v. Mauldin*, 2014 SCC 7. The acceptance and use of the procedure for summary judgment to adjudicate civil disputes has evolved because of a developing consensus that extensive pre-trial processes and the conventional trial no longer reflect the modern needs in our civil justice system. Accordingly, the civil justice delivery system requires readjustment. This motivated the call of the Supreme Court of Canada for a shift in litigation culture.

[23] The Supreme Court in *Hryniak* further explained how the principles inherent in providing a fair and just process for the adjudication of a dispute apply when considering the efficiencies offered by the summary judgment procedure against the comprehensive nature of a conventional trial :

> [50] These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[24] The changes to Rule 20 that provide the court with enhanced fact finding powers and the call by the Supreme Court for a cultural shift require participants in the civil justice system to accept that a summary procedure is no less legitimate a means than a conventional trial for the court to adjudicate civil cases on their merits. The Supreme Court has observed that the call to accept summary judgment procedure where appropriate and proportional to the case will have an impact on the role of counsel and judges.

[25] The Court of Appeal recently held in *RBC v. Hussain*, 2016 ONCA 637, that a judge presiding on a motion for summary judgment must be viewed akin to a judge presiding at a trial. It follows that the function a judge with respect to making evidentiary rulings with respect to witnesses and the evidence they may give on a motion for summary judgment must be akin to the same decisions a

judge presiding at a conventional trial in the same action would be asked to make. I have therefore approached the process of deciding the two motions to quash as much as if the issues arose in the course of a trial. It is within this context that the decision whether any summons to witness should be quashed will be made.

Preliminary Issue- Standing to bring this motion to quash

[26] As a preliminary matter, the plaintiffs' challenge the standing of Ontario and OLG to bring their motions to quash the summons to witness served on any person they do not represent. Ontario only represents The Honourable Kathleen Wynne, Mr. McMeekin, Mr. Orsini and Mr. McGuinty. At the hearing of the motions to quash, the court was advised that counsel for Ontario was also representing Mr. Duncan on the motion. None of the other 13 proposed witnesses are represented by Ontario or OLG.

[27] The plaintiffs argue that the motions are an abuse of process that interferes with the plaintiffs' ability to gather evidence on the pending motions for summary judgment. They argue that Ontario and OLG do not have a sufficient, direct or personal interest in the evidence gathering process to bring motions to quash on behalf of persons neither of them represents. Counsel for the plaintiffs argue they are entitled to exercise their right to examine persons who are not represented by counsel for either Ontario or OLG represent, without interference by those parties.

[28] Ontario relies upon the decision of Master Davidson *Berger v. Berger* (1972), 3 O.R. 822 to answer this preliminary issue. In *Berger*, a party to the action brought a motion to quash a summons to witness served on a proposed witness without questioning the standing of that party to bring the motion to quash. OLG argues that the courts have frequently heard and decided motions brought by parties to an action to quash summonses served on non-parties. OLG gives *Airport Taxicab (Pearson Airport) Association v. Toronto (City),* [2009] O.J. 2144 (SCJ) and *Clarke v. Madill*, 2001 CanLII 28089 (SCJ) as examples.

[29] Ontario also refers to *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co*, 1995 CanLII 7258 (SCJ), in which the defendants brought a motion to quash a summons to witness served on a third-party under rule 39.03 in the context of a co-defendant's motion for summary judgment. In *Transamerica*, no dispute arose whether the defendants had standing to maintain an independent claim for relief. Justice Sharp therefore allowed the motion in part, narrowing the summons and its scope.

[30] Ontario also relies upon *Niagara-On-The-Lake Association of Rate Payers v. Niagara-On-The-Lake (Town Of),* 2003 CanLII 34791 as authority to permit defendants to resist compliance with a summons to witness served on a third party. Justice Quinn granted the motion of a moving defendants to strike the evidence of a former employee of the Town of Niagara-On-The-Lake on the basis that the examination was an abuse of process.

[31] From a review of the authorities provided, it would appear there is no case that has addressed the issue of standing for a party to bring a motion to quash a summons served on a person who is not a party and who is not represented by counsel for the moving party in the context of a pending motion for summary judgment. Even though the motion in the *Transamerica* case involved a motion by a defendant to quash a summons served on a third party in the context of a motion for summary judgment, it would appear that the standing issue was not raised or decided.

[32] A party to an action has a *prima facie* right to serve a summons to witness on a person to obtain their information for the purpose of having a transcript of their evidence available on the pending motion. There is a corresponding right of any other party with an interest in the motion for summary judgment to bring a motion to quash or to set aside that summons to witness if there are proper grounds to seek that order.

[33] In my view, it does not matter if the moving party does not represent the person for whom the motion is brought. The motion to quash is essentially an evidentiary motion that is heard in advance of the motion for summary judgment. It is a motion that is brought to determine the relevance of the evidence to be given by a proposed witness, or the basis to rule on an objection that the proposed witness is not in a position to give that evidence. It is a motion transported forward in time and location for the purpose of obtaining a ruling in

advance of the examination under rule 39.03 and the motion for summary judgment. As such, each party has the same rights to object to the evidence a witness might give, or to challenge a summons served on a non-party witness as those rights that party would have with respect to a non-party who is called as a witness at trial.

[34] Bringing an evidentiary motion of this nature before the examination under Rule 39.03(1) is not only practical, it is also an efficient and proportional approach to having issues decided in the context of the objectives summary judgment procedure is designed to meet.

[35] For these reasons, I conclude that Ontario and OLG have standing to bring these motions to quash the summons served on any person who is a non-party, despite the fact that counsel for neither of those defendants represents that person.

Grounds of The Moving Defendants On The Motion To Quash

[36] I do not propose to determine the scope of any examination that the parties may conduct of a witness if the summons to witness on that person is not quashed. Nor do I propose to determine what areas of that person's evidence may be relevant to the motion for summary judgment, and those areas that may not. It would be difficult, if not impossible to forecast the nature and the extent of those examinations before they take place. I seek only to determine whether the summons served on one or more particular persons should be quashed if there is

a legal basis to do so. Any summons to witness that is not quashed would compel the person served to attend and be examined, subject to the *Rules* and the laws of evidence.

[37] The applicable law for deciding whether the examinations of a person having information on a pending motion to which a witness to summons relates is now well-settled. If a non-party may have evidence to give that is relevant on the pending motion or application, a party has a *prima facie* right to examine that party. The right to examine that person should be enforced by the court, unless that person is not in a position to be examined, or there are circumstances where the examination would constitute an abuse of process. See *Canwest Media Works Inc. v. Canada (Attorney General)*, 2007 ONCA 567 and *Canada Metal Co. v. Heap* (1975), 1975 CarswellOnt 870 (C.A.) in this regard.

1. Relevance

[38] The party seeking to examine the non-party has the onus to satisfy the court on a reasonable evidentiary basis that the non-party has possibly relevant evidence to the underlying proceeding, and that the proposed witness is in a position to offer relevant evidence: *Fontaine v. Canada (Attorney General)*, 2015 ONSC 1435, and *Ontario Federation of Anglers and Hunters (OFAH) v. ONTARIO (Ministry of Natural Resources and the Honourable John Snobelen*, 2002 CanLII 41606 (Ont. C.A.).

[39] To satisfy the onus of the party seeking to conduct the examination of a non-party, the party seeking the examination need only show that the proposed examination is about an issue relevant to the pending motion and that the party to be examined is in a position to offer possible evidence that is relevant. It is sufficient to show that the evidence of a witness to be given at an examination before a hearing of a pending motion under rule 39.03 is potentially relevant to the issues on the motion: *Abou-Elmaati v. Canada (Attorney General)*, 2013 ONSC 3176 (SCJ). See also *Manulife Securities International Ltd. v. Société Générale* (2008), 2008 CarswellOnt 1721 (SCJ).

[40] The onus on the party serving the summons to satisfy the relevance threshold is twofold:

(a) to show on a reasonable evidentiary basis that the proposed witness has evidence that is possibly relevant to the pending motion. It is not necessary for this party to show that the proposed examination will produce evidence that could be helpful to that parties case: *Airport Taxicab (Pearson Airport) v. Toronto*; and

(b) to satisfy the court that the proposed examination will not be a fishing expedition, or that the requirements of the summons for the proposed witness to bring documents to the examination is not overbroad. Either instance would amount to an abuse of process: *Lauzon v. Axa Insurance*, 2012 ONSC 6736 (SCJ).

[41] If the party intending to conduct the examination satisfies its onus, the burden shifts to the party challenging the summons to witness to show that the examination or the underlying application is an abuse of process: *Konstan v.*

Berkovits, 2013 ONSC 6169. See also *Lauzon v. Axa Insurance*; and *Abou-Elmaati v. Canada (Attorney General)*.

[42] The court must be careful not to set the relevance threshold too high. A party seeking to examine a non-party on relevant information should not have to prove his or her case when providing evidence on a motion to quash that the information a proposed witness may have to give is relevant. That would be antithetical to the very process designed by the *Rules of Civil Procedure* to gain access to that evidence: *Payne v. Ontario (Human Rights Commission)* (2000), 2000 CarswellOnt 2717 (Ont.H.C.). While an examination under Rule 39.03 may not be used to embark on a fishing expedition or to conduct examinations for discovery, a party has a *prima facie* right to examine a person possible having relevant information to collect evidence for use on the pending motion.

[43] I would distinguish the decision of this court in *Dunphy v. Peel Housing Corporation*, 2009 CanLII 21760 because the case did not turn on the application of the test that Justice Daley expressed in his reasons. The plaintiff in *Dunphy* who had served a summons upon a Minister of the Crown to testify at trial had provided no evidence whatsoever about what evidence he proposed to have the Minister give. Justice Daley stated in the course of the decision that the plaintiff who served the summons has the burden to satisfy the court that is "likely and probable" that the proposed witness has relevant evidence to give. However, the decision to quash the summons in *Dunphy* was based not on the prospect of

what relevance the Minister's evidence might have, but rather on the absence of an evidentiary foundation to assess what evidence the Minister might give altogether. This amounted to an abuse of process.

[44] I also distinguish *Dunphy* from the present case because the court found that the Minister was entitled to parliamentary privilege. As the motion was dismissed on other grounds, the question of whether it was "likely and probable" that the proposed witness had relevant evidence to give is *obiter dicta*.

[45] Ontario has brought its motion for summary judgment in which it asks the court to dismiss the action on the basis that there is no genuine issue requiring a trial because Ontario has no liability on the following grounds:

(a) There was no contract or quasi-contractual obligation between Ontario and the Plaintiffs;

(b) None of the statements alleged to constitute misrepresentations are actionable. Moreover, none of the statements were untrue, inaccurate or misleading and any alleged reliance by the plaintiffs upon such statements was not reasonable;

(c) With respect to the negligence claim, Ontario did not owe the Plaintiffs a duty of care, and the decision to cancel SARP was a core policy decision which negates any *prima facie* duty of care which may be found to exist;

(d) The Plaintiffs' claims for unjust enrichment and waiver of tort raise no genuine issue for trial because, *inter alia* (i) the retention of any revenues generated by the slots at racetracks is justified pursuant to the terms of the *Ontario Lottery and Gaming Corporation Act*; (ii) the Plaintiffs did not suffer any direct deprivation as a result of SARP's termination; (iii) the Plaintiffs' claim is a pass-through claim, which is not actionable; and (iv) the

Plaintiffs have no juristic entitlement to the indefinite continuation of a subsidy.

[46] Similarly, OLG brings its motion for summary judgment to ask the court to dismiss the action on the basis that there is no genuine issue for trial on liability, on the grounds that:

(a) There was no contract of quasi-contract between OLG and any of the plaintiffs;

(b) OLG owed no duty of care to the plaintiffs;

(c) OLG made no actionable misrepresentations to the plaintiffs;

(d) OLG was not unjustly enriched by the plaintiffs' horse breeding or the termination of SARP;

(e) OLG did not owe the plaintiffs any fiduciary duty;

(f) OLG was not bound by promissory estoppel;

(g) The decision to cancel SARP was a core policy decision made by Cabinet, was not taken in bad faith, and was not irrational; and

(h) OLG acted at the direction of Cabinet when terminating the Site Holder Agreements pursuant to OLG's termination rights.

[47] The plaintiffs submit that the examinations under Rule 39.03 will focus on gathering evidence relevant to three issues in particular:

1. Proximity/Foreseeability. This evidence will be relevant to the issue of whether either defendant owed a duty of care to the plaintiffs;

2. The assertion that the cancellation of SARP was a "true" and or a "core" policy decision. This evidence will be relevant to determine any privilege, immunity or other basis for either defendant to deny liability; and

3. Bad Faith/Rationality.

[48] The plaintiffs have characterized the following issues as questions to be determined on the motion for summary judgment of each defendant:

- **Contract Formation / Contract Terms**. Whether a commercial contract or agreement was formed for the sharing of slot machine revenue and what notice is required for termination;
- **Proximity / Foreseeability**. Whether there was a relationship of proximity and reasonable foreseeability between Ontario and OLG and the Plaintiffs;
- **Misrepresentations**. Whether the pleaded representations of Ontario and OLG, were or became untrue, inaccurate or misleading;
- **Reasonable Reliance**. Whether the representations were reasonably relied upon;
- **"True" or "Core" Policy**. Whether the cancellation of SARP revenue sharing is a non-justiciable policy decision;
- **Bad Faith / Irrationality**. Whether the SARP decision was made in bad faith, irrationally or implemented negligently;
- **Breach of Contract**. Whether the SARP decision is a breach of contract; and
- **Unjust Enrichment**. Whether Ontario and/or OLG were unjustly enriched by the SARP decision.

[49] The plaintiffs submit that all of these issues are fact-driven, in whole or in part. They argue that these causes of action are matters alleged and disputed in the pleadings. The plaintiffs further submit that sufficient evidence on the matters

at issue are contained in the affidavits and other evidence filed in response to these motions and the motions for summary judgment to provide a reasonable evidentiary basis to sustain their intention to examine all of the proposed witnesses.

[50] Ontario relies upon the decision of Justice Lax in *Schreiber v. Mulroney* (2007), 87 O.R. (3rd) 643 as authority to expect direct evidence from the party seeking to uphold the right to examine a proposed witness in order to discharge his or her burden. In *Schreiber*, Justice Lax found that "no matter how low the threshold may be under rule 39.03, it surely cannot be met by a solicitor's affidavit, based on information and belief, which is speculative and does not explain why [the plaintiff] has not sworn an affidavit himself." In the absence of evidence that the proposed witness was prepared to offer relevant evidence, Justice Lax found that the proposed examination was being used "either to conduct third-party discovery or it is a "fishing expedition" to gather evidence for the pending motion". Accordingly, she found that the proposed examination was an improper use of rule 39.03.

[51] The plaintiffs bear the onus of satisfying the court on the evidence that the proposed witnesses may or likely have relevant evidence to give on the motions for summary judgment. None of the plaintiffs have sworn an affidavit to give evidence toward meeting that onus of proof. Instead, the plaintiffs rely upon the

affidavit given by Lilly Iannacito, a law-clerk at Lax O'Sullivan Scott Lisus, counsel for the plaintiffs in this action.

[52] I consider the views expressed by Justice Lax in *Schreiber* to afford a certain latitude for exceptions to the general rule that a party must file an affidavit about the possible evidence a proposed witness may have to establish relevance. Her decision was directed at an affidavit that a party in that case could have given but did not give, and that was speculative in nature. I consider those facts to be a totally different from the circumstances here.

[53] The plaintiffs in this action are standardbred horse breeders who own and operate farms and businesses far removed from the corporate boardrooms and government offices that intersect with each other around Queen's Park in Toronto. In all likelihood, the plaintiffs would not have direct evidence to give. Instead of offering an affidavit on information of belief, their counsel has chosen to file an affidavit from Ms. Iannacito, who is in a position to give evidence derived from documents obtained through the disclosure process.

[54] Mr. Lisus has made the submission that much of the plaintiffs' case will be proven through evidence to be given by, or on behalf of the witnesses related to the defendants. Many of the documents that have been disclosed to date may be hearsay if they cannot be properly introduced into evidence. I consider the

caveats implicit in the reasons of Justice Lax in *Schrieber* to permit indirect evidence of relevance where necessary.

[55] Every such motion should be determined on a case by case basis, according to prevailing circumstances. Frankly put, it is a question of access to justice. On the motion before this court, I do not view the failure of any individual or corporate plaintiff to give direct evidence about what information a proposed witness may have to give on an examination, or what a particular document may or may not show. The plaintiffs in this case may not have that ability. That is why they have retained lawyers to represent them.

[56] Ms. Iannacito's affidavit is therefore necessary and reliable to bring the documents obtained through disclosure to the attention of the court. Ms. Iannacito has described many of those documents and connected them to one or more of the proposed witnesses for the purpose of showing the relevance of what evidence that witness may have to give. In my view, providing this evidence through a law clerk's affidavit is entirely appropriate. Where there is a perceived power imbalance and one side wields control over information that could be relevant to the action, it only seems just to allow some latitude in favour of the party who does not.

[57] It is clear from Ms. Iannacito's affidavit and the documents to which she makes reference that the information contained in the documents show that each

of the proposed witnesses is in a position to provide evidence that is possibly relevant to one or more of the issues of proximity/foreseeability, "true" or "core" policy, or on the bad-faith/irrationality issue. The evidence the proposed witnesses may have to offer could be relevant to other issues on the motions for summary judgment. In their factum, the plaintiffs have summarized the important features of each of the proposed witnesses' possible evidence in the following way:

Karim Bardeesy

- The Director of Policy and Research in the Office of Premier McGuinty in 2012; he was "in the loop" on the recommendations OLG was making in 2011. Appears to have been the point person in the Premier's office on horseracing/OLG.

- Documents show Bardeesy: (i) participated in "go to $0" and other meetings with Premier; (ii) revised the Cabinet presentation materials after the "go to $0" decision; was the person approving the Cabinet 'minute' on behalf of Premier's office; and spoke to Wilkinson about giving Finance input into the Horse Racing Industry Panel's report in August 2012 (which made a "finding" that continuing SARP would be 'poor public policy') (Iannacito Affidavit, Tab C)

- He will have evidence of the decision making, which bears directly on issues of policy, bad faith and irrationality. He will also have evidence regarding the communications campaign and dealing with the aftermath, including the views of Wynne and McMeekin.

Dwight Duncan

- Ontario's Minister of Finance in 2012.

- Documents show Duncan: (i) sent letters lauding SARP and the Ontairo's commitment to it; (ii) met with Rod Seiling to discuss SARP and its revenue share; (iii) met with the Chair of OLG in 2010 to discuss extending the siteholder agreements; (iv) notes from November 2011 meeting discussing OLG's strategic review appear to say "Min excited + supportive ... realizes stakeholder and political risk"; (v) presented the OLG "recommendations" to Cabinet; (vi) gave a speech vilifying the horse racing industry as the recipient of a "secret subsidy" in February 2012; (vii)

publicly announced the cancellation of SARP revenue sharing in March 2012 (Iannacito Affidavit, Tab E).

- Evidence of Jim Bullock on summary judgment details a meeting with Duncan in July 2009 regarding the renewal of siteholder agreements, where assurances were given by Duncan that he understood the need for a long-term commitment to SARP for all industry participants, including the breeders.

- Evidence of Tammy McNiven on summary judgment details that, on February 16, 2012, Duncan told the President of Standardbred Canada that he would have an opportunity to have a consultation meeting with OLG "about any changes that might be made to SARP revenue sharing."

John Wilkinson

- A panellist on the Horse Racing Industry Transition Panel beginning in June 2012.

- Documents show Wilkinson: (i) communicated about the content of the Panel's report ("Politically, our report will say that the gov't was right to cancel the status quo") and other political motivations (this will 'give us an advantage in the byelections by wedging both tim and andrea"); (ii) was "having calls with Prem" in September 2012 that appear to relate to horseracing (Iannacito Affidavit, Tab G).

- Wilkinson's evidence will clarify whether the Panel's criticisms of SARP were genuine, or whether it exaggerated its criticisms for politically-motivated reasons.

Rod Seiling

- The Chair of the Ontario Racing Commission in 2012.

- Documents show: (i) Seiling and the ORC were blindsided by the cancellation (recall ORC had economic oversight of horseracing) (ii) Ontario had an obligation to consult with Seiling pursuant to the memorandum of understanding with the ORC; (iii) Seiling reported to the Board of ORC that "[o]ur offer to provide information so that informed decisions might be made was declined"; (iv) Seiling met with OLG as part of its strategic review, where he was told that "OLG will not take anything to its board or government without first meeting with ORC again" (Iannacito Affidavit, Tab I).

- The ORC was the conduit through which many of the representations alleged by the Plaintiffs were delivered. 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.

Don Drummond

- An author of a report commonly referred to as the Drummond Report.

- He met with OLG CEO Rod Phillips prior to the release of the Drummond Report to discuss SARP, including OLG's "decoupling" plan.

- Mr. Drummond's evidence is critical to ascertaining whether his report was indeed independent, or whether he was part of an orchestrated strategy by Ontario and OLG to market changes to SARP revenue sharing they had already decided to implement.

- There are several specific references to Drummond and his report in the motion material of the Crown (Yeigh Affidavit 51, 65-69) and OLG (Flynn Affidavit at 60-63). Generally, the 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.

- Documents show: (i) Ministry of Finance staff provided Drummond with language to use in his report relating to the horse racing "subsidy" and encouraged the use of stronger language in his report (Iannacito Affidavit, Tab J).

Blair Stransky

- A Senior Policy Advisor to Minister of Finance Dwight Duncan. Described as the "policy assistant who worked on the [horseracing/OLG] file". Stransky and Shortill were "the two top guys in Minister Duncan's office with respect to this file" and "Blair would have been the lead."

- Documents show Stransky: (i) was the recipient of documents sent to the Minister's Office such as OLG consultation memos and Horse Improvement Program annual reports; (ii) appears to have taken the lead on briefing other Cabinet ministers on the proposal to cancel the revenue sharing aspect of SARP; (iii) was involved in framing language for Mr. Drummond's report and sent the language "recommending" cancellation to OLG for inclusion in its modernization report; (iv) was deeply involved in the strategy to market the cancellation and respond to the criticisms following the cancellation (Iannacito Affidavit, Tab L).

- 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

- The Chief of Staff to Minister of Finance Dwight Duncan in 2011-12. He and Stransky were "the two top guys in Minister Duncan's office with

respect to [the horseracing/OLG] file." As chief of staff, he was likely the main conduit to Duncan.

- Documents show Shortill's involvement extended to: (i) oversight of presentations about OLG modernization and the cancellation of SARP revenue-sharing to Cabinet members and discussions with Liberal Party staff; (ii) discussions concerning the content of Cabinet materials regarding OLG's modernization plan; (iii) oversight of media communications strategy in response to horse racing industry statements; (iv) recommendations regarding which horse racing industry organization to meet with following the announcement of the cancellation of SARP revenue sharing; and (v) discussions regarding the Transition Panel (Iannacito Affidavit, Tab N).

Darcy McNeill

- The Director of Communications in the Ministry of Finance in 2012.

- Document show McNeill (i) 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; (ii) was involved in developing messaging and communicating with reporters. (Iannacito Affidavit, Tab P).

- 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. By virtue of his position, McNeill will likely have been involved in all aspects of the Ministry of Finance's messaging on SARP, both pre-and post-announcement of the cancellation of SARP revenue sharing.

John Snobelen

- A panellist on the Horse Racing Industry Transition Panel with Mr. Wilkinson in 2012; also a former Cabinet member from the Harris government.

- Documents show Snobelen (i) publicly criticized Dwight Duncan for the attack ads on horse racing in February 2012, warned Duncan of the consequences of abrupt termination of revenue sharing, and offered his own account of the genesis of SARP revenue sharing based on his role as a Cabinet minister at the time SARP was introduced; (ii) participated in the Horse Racing Industry Transition Panel with Wilkinson; and (iii) communicated with the Plaintiffs regarding enhanced breeders' rewards that the Plaintiffs have pleaded were withheld in retaliation for the Plaintiffs bringing this lawsuit (Iannacito Affidavit, para. 54 and Tab R).

Ted McMeekin

- An MPP who was the Minister of Agriculture, Food and Rural Affairs in 2012.

- Documents show McMeekin, who was Agriculture Minister when key decisions about SARP were being considered and announced in 2012: (i) made inquiries about whether any economic impact analysis had been done about the consequences of abruptly terminating SARP revenue sharing; (ii) took the lead in creating the Horse Racing Industry Transition Panel; (iii) admitted that the government "dropped the ball" on horse racing; (iv) approved ORC business plans; (v) sent an email stating that "[t]o be clear the decision to end the SAR program was made by the Ministry of Finance not the Ministry of Agriculture Food and Rural Affairs"; (vi) made a statement on August 16, 2012 in which he told industry participants that "we, like you, learned about this decision [to cancel SARP revenue sharing] when it was made" (Iannacito Affidavit, para. 59 and Tab S).

Dalton McGuinty

- The Premier of Ontario in 2012.

- Documents show that McGuinty: (i) made the "go to $0" decision in a meeting with Bardeesy (ii) sent an email to the horseracing industry in September 2011 in which he committed to "working closely with the industry"; (iii) had direct input into the messaging regarding OLG modernization / horseracing; (iv) had calls with "JW" [Wilkinson?] about the Horse Racing Industry Transition Panel; (v) sent letters to industry participants in March 2012 discussing the Drummond Report; and (vi) sent a letter to OHRIA in February 2012 lauding the industry's "efforts and commitment" to SARP (Iannacito Affidavit, Tab V).

Steve Orsini

- The Deputy Minister of Finance in 2012.

- Will be familiar with Ontario's sustained efforts to re-negotiate the revenue share and then ultimately to confiscate revenue from breeders; would have approved the compensation to racetrack owners but not breeders.

- Documents show that Orsini: (i) commissioned the after-the fact economic analysis to show "the net impact of cutting horseracing subsidies and investing in health care and education"; (ii) was involved in the strategy and content of Minister Duncan's February 13 speech disparaging horseracing as recipients of a "secret subsidy"; (iii) was actively involved in briefing the Horse Racing Industry Transition Panel members (iv) was directly involved in the horse racing-related language that was being formulated by Finance and inserted into the Drummond Report; (v)

presented "messaging and positioning" regarding OLG modernization/horseracing to McGuinty and others at a "Fiscal Prep" meeting; (vi) participated in the "go to $0" decision and emails with Bardeesy (Iannacito Affidavit, Tab W).

- Based on Minister Duncan's speaking points for the Cabinet meeting of February 8, 2012 where OLG/horseracing was discussed, it also appears that Orsini attended and made a presentation.

Kathleen Wynne

- She was the Minister of Municipal Affairs and Housing in 2012 and, in 2013, became Premier of Ontario and Minister of Agriculture and Food.

- Documents show that Wynne: (i) was briefed on an early iteration of the OLG modernization/horseracing approach and was "sceptical"; (ii) November 30, 2011 notes discussing OLG modernization and the end of SARP appear to record that "Liz will call Wynne as well"; (iii) made a significant number of public statements expressing regret with the manner in which SARP revenue sharing was cancelled; and (iv) wrote directly to the standardbred breeders in 2014 telling them that an "enhanced breeders program" was available to them but which was then withheld in retaliation for this lawsuit (Iannacito Affidavit, para. 74, and Tabs X, Y).

- Public statements of Wynne regarding cancellation of SARP revenue sharing include: changes "not as well thought through as they needed to be"; (ii) "needed to be a sober second look at the process"; (iii) "not necessarily in the best interests of the industry or rural communities"; (iv) "the way the SARP program was cancelled was not thoughtful"; (v) there was "not due consideration of the impacts"; (vi) changes "not made with enough thoughtfulness ... there wasn't enough background, people didn't have enough information ... In the initial decision, there was not thought about the whole industry, and by that I mean the supply chain ... you know, every – every aspect of the industry" (Iannacito Affidavit, para. 74, and Tabs X, Y).

Evidence on the Start and End of SARP

[58] The evidence that a proposed witness has to give at particular times during the conception, introduction, implementation, lifetime and the end of SARP is not restricted for the purpose of liability to the events surrounding the decisions to terminate the program prior to February 8, 2012. The allegations of material fact

supporting the claims of the plaintiffs are broad, and issues on the motions for summary judgment to dismiss those claims are correspondingly broad.

[59] On the motions for summary judgment, evidence to make the necessary findings of fact on foreseeability and proximity to determine whether one party owed a duty of care to one or more others is relevant to the plaintiffs' claim in negligence.

[60] To determine whether there was a breach of contract, there must be evidence about whether a contract was formed at all. Witnesses from OLG and from the Ministry of Finance to whom officers of OLG reported would have possibly relevant evidence to give on this cause of action.

[61] Similarly, to adjudicate a claim for misrepresentation, there must be evidence of what the representation was, who made it and to whom, when it was made and under what circumstances to properly assess all elements of the tort. Ms. Iannocito's affidavit provides uncontradicted evidence that Rod Seiling, Chair of the Ontario Racing Commission, is a person who has relevant information to give about what representations were made to the horseracing industry about SARP, and the reliance those in the horseracing industry placed on those representations.

[62] The plaintiffs have filed certain evidence, and rely on other evidence provided by the affiants for Ontario and OLG, that the following persons have

possibly relevant evidence to give on the issues to be argued for summary judgment:

1. According to Larry Flynn's affidavit filed in support of Ontario's motion for summary judgment, OLG held consultations with stakeholders and others from January to May 2011. This consultation process was undertaken with a view to develop policy recommendations for the government of Ontario to consider. OLG subsequently proposed alternate funding models for horseracing that would "de-couple funding for purses from location of slots", and to "administer funds through a central dedicated body".

2. From the evidence filed by the plaintiffs, the following persons would possibly have relevant evidence of those recommendations and funding models at Ontario:

    a. Karim Bardeesy

    b. John Wilkinson

    c. Don Drummond

    d. Dalton McGuinty

3. In particular, OLG made presentations to Dwight Duncan, Deputy Premier and Minister of Finance. The following persons within the Ministry of Finance would have possibly relevant information about the process leading up to the cancellation of SARP starting or before OLG made its presentation about how the decision was made:

    a. Dwight Duncan, Minister

b. Blair Stranksy, Senior Policy Advisor

c. Tim Shortill, Chief of Staff

d. Darcy McNeill, Director of Communications

e. Steve Orsini

4. The following people in decision making roles to terminate SARP would possibly have relevant information:

   a. Dalton McGuinty, Premier

   b. Dwight Duncan, Minister of Finance

   c. Kathleen Wynne, the Minister of Municipal Affairs and Housing in 2012, and Premier in March, 2013

5. Finally, the following people possibly have relevant evidence to give about the implementation of the plan to terminate SARP and its aftermath:

   a. John Wilkinson, Horse Racing Industry Transition Panelist

   b. John Snobelen, Horse Racing Industry Transition Panelist

   c. Ted McMeekin, Minister of Agriculture, Food and Rural Affairs at the time.

[63] It is only in the fullness of time after the examination of a proposed witness that the court be able to determine what part of the fact pattern a particular witness has evidence to give within his or her personal knowledge relevant to the questions the court must answer on the motion for summary judgment. In view

of the breadth of those questions, it would be difficult, if not impossible to delineate which witnesses have relevant evidence to give, and which do not when most, if not all have a connection to the chronology of events one way or another.

[64] The court may be required to make findings of facts about SARP from beginning to end. Evidence to enable the court to make those findings of fact to decide whether there is no genuine issue requiring a trial on the motion for summary judgment to dismiss those claims is therefore relevant.

[65] In view of the purpose for which the plaintiffs seek to examine witnesses to question them on documents about which they have personal knowledge, the evidence of those witnesses is also possibly relevant to the questions before the court on the motion for summary judgment. The use of documents and their instrumentality on the motions not only refute any objection to the examination of those proposed witnesses, those documents all but mandate those examinations as though those witnesses were called at trial.

Claim for Punitive Damages

[66] The plaintiffs have served summons on certain persons to examine them on the allegations made in the statement of claim that Ontario has excluded standardbred breeders from additional funding through the Home Improvement Program ("HIP") as retaliation for bringing this action. This allegation underpins the plaintiffs claim for punitive damages.

[67] It is beyond dispute that the plaintiffs have claimed punitive damages in their action. Even though the defendants bring their motions for summary judgment to dismiss the action on questions of liability alone, the claim for punitive damages carries with it an inherent allegation of liability that an independent wrong has been done: *Whiten v. Pilot Insurance co.*, [2002] 1 S.C.R. 595.

[68] The claim for punitive damages is therefore a loaded claim. Not only does the claim for punitive damages require proof of a wrong independent of the main claim to support an actionable cause of action, the quantum of the damages sought must be proportionate to the harm done. These elements are strikingly broad. They make the evidence of proposed witnesses such as John Wilkinson, John Snobelen, Ted McMeekin, Steve Orsini and Kathleen Wynne as to the circumstances surrounding the termination of SARP, and the events that followed possibly relevant to the defendants' motions.

Relevance – Discussions with Cabinet Ministers

[69] Counsel for the plaintiffs consider it necessary to explore all aspects of the decision-making process behind the cancellation of SARP to determine whether it was a policy decision with those witnesses who have relevant information to give. This is particularly so in a case where the information is of a contentious nature.

[70] Ontario further submits that the views of cabinet ministers about whether the decision to cancel SARP was sound, or whether it was "wise or unwise" is not relevant. Both Ontario and OLG rely upon the decision of the Court of Appeal in *Ontario Federal of Anglers and Hunters v. Ontario (Ministry of Natural Resources).* In that case, the plaintiff and moving party had served a summons on then Premier McGuinty, and on cabinet minister John Snobelen. The summons was served to question each of them about the decision-making process that led to enacting a regulation that cancelled the annual spring bear hunt, despite an earlier government decision that the spring bear hunt would proceed.

[71] In the *OFAH* case, the Court of Appeal defined what was relevant or not with respect to the motivations behind a government decision in the following terms:

> 52. [49] The wisdom of government policy through regulations is not a justiciable issue unless it can be demonstrated that the regulation was made without authority or raises constitutional issues. Neither is the case here. (See 'Challenging Government Policy', Sara Blake, presented on October 20, 2000 to the Canadian Bar Association Ontario Continuing Legal Education Meeting; *A & L Investments Ltd. et al. v. The Queen* (1997), 1997 CanLII 3115 (ON CA), 36 O.R. (3d) 127 at 134-135 (C.A.), application for leave to appeal to the Supreme Court of Canada dismissed (1998), S.C.C. File No. 26395; *Cosyns v. Canada (Attorney General)* (1992), 1992 CanLII 8529 (ON SCDC), 7 O.R. (3d) 641 at 655-656 (Div. Ct.); *Gustavson Drilling (1964) Ltd. v. M.N.R.*, 1975 CanLII 4 (SCC), [1977] 1 S.C.R. 271 at 282-283.)
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> 53. [50] The majority in the Divisional Court said that the proposed examination was justified by the allegation that the government changed its policy based on political expediency rather than as a response to public concerns. With respect, it seems to me that there is no discernible difference between the two. There is nothing inappropriate, let alone unlawful, about the government consulting with and considering the public's reaction to a policy

> measure. To be politically expedient is to be politically responsive to selected and discrete public concerns. That is what governments do.
>
> 54. [51] In any event, it is irrelevant whether the Premier and/or the Minister were influenced by political expediency, this being a consideration which is an accepted, expected, and legitimate aspect of the political process. Whether one characterizes taking public opinion into account as political expediency or political reality, taking it into account is a valid function of political decision making.
>
> ...
>
> 56. [53] Governments are motivated to make regulations by political, economic, social or partisan considerations. These motives, even when known, are irrelevant to whether the regulation is valid.

[72] The Court of Appeal concluded that, in the absence of an evidentiary record to establish the relevance of the proposed evidence, to permit the applicants to examine the Premier and a cabinet minister on the impugned decision would amount to a fishing expedition. Ontario and OLG argue that to permit the plaintiffs to question current or former cabinet ministers who made the decision to cancel SARP as to the motivations, and where it is alleged that the decision was "wise or un-wise", would amount to a fishing expedition for the same reason.

[73] I do not consider the evidence that the plaintiffs are expecting the proposed witnesses to give will be a question of whether the decision to cancel SARP was wise or un-wise, but rather whether it was contrary to any contract for which breach is alleged, or to representations that Ontario or OLG made to them over the lifetime of SARP.

[74] Ontario relies upon *R v. Imperial Tobacco Ltd.*, 2011 SCC 42 as authority that the cancellation of SARP was a policy decision that negates that Ontario owed the plaintiffs a *prima face* duty of care. Ontario argues that core-policy decisions of government that are based on public-policy considerations are protected from legal action, provided they are neither irrational or taken in bad faith.

[75] Ontario also relies upon *Trillium Wind Power Corp. v. Ontario (Natural Resources),* 2013 ONCA 683 as authority for the argument that neither knowledge of harm that a policy decision will cause, nor a political expediency for making that decision will constitute bad faith. Ontario argues that to adduce evidence about the nature of the decision and the purpose of a cancellation should not come from a non-party witness, but rather by cross-examining the affiant of Ontario's affidavit in support of its motion for summary judgment.

[76] Mr. Lisus asks this court to consider the true nature of the decision Cabinet was to decide in February 2012. He refers to a Cabinet Briefing Note authored by Jobs and Economy Policy Committee, Ministry of Finance dated February 7, 2012 that was prepared for the Cabinet meeting on February 8, 2012. In that Briefing Note, the Committee makes a proposal to modernize OLG in a socially responsible manner to deliver an additional $1 billion annual net profit to the Province by 2017/18 through various initiatives the Briefing Note goes on to discuss.

[77] In the reasons justifying changes to Ontario's gaming industry, the Committee states that "Additionally, the current horse-racing industry support of $345 million annually through SARP is not aligned with the government's overall economic development approach".

[78] I understand the plaintiffs' position to be that this Briefing Note is a graphic example of what subject matter counsel for the plaintiffs propose to examine witnesses about to identify and define the true character and motivation behind the decision to terminate SARP.

[79] The affiant, Matthew Howe, swore the affidavit in support of Ontario's motion. Mr. Howe describes himself as a articling student at the Ministry of the Attorney General, Crown Law Office – Civil Law who has worked on the file under the supervision of counsel. Mr. Howe can only give evidence within his knowledge, except where he properly gives the source of his information and expresses that facts are based on his information and belief in the manner required under Rules 4.06(3) and 39.01(4). His evidence is essentially fact based and non-contentious, which is understandable. The affidavit itself does not provide any evidence about how any decision was policy driven, or made by Ministers at the cabinet level.

[80] The affidavit of Elizabeth Teigh, Director of Strategic Engagement with the Alcohol and Gaming Commission of Ontario is attached to Matthew Howes'

affidavit as an exhibit. Ms. Teigh swore this affidavit in support of OLG's motion for summary judgment. This affidavit provides further background evidence that is informative, but not determinative of the issues that will be in front of the court on that motion.

[81] In my view, Ontario has not filed evidence that explains the nature of the decision to cancel SARP. While the defendants may have filed evidence in support of the motions for summary judgment about the decision making process, I heard argument but no evidence about whether the decision to cancel SARP was a policy decision, or a core decision that attracted privilege from disclosure or immunity from liability. The court will require relevant evidence from those witnesses who have it to give in order to make determinations of this nature. If adduced, this evidence will be available for all parties to use as evidence and in argument directed to relevant issues on the motions for summary judgment.

Conclusion on the Relevance of Proposed Evidence

[82] I am satisfied that the evidence given Ms. Iannacito's affidavit and the six volumes of exhibit material in the responding motion record provides an evidentiary basis to conclude that the evidence of each of the proposed witnesses under summons may possibly be relevant to one or more issues on the pending motions for summary judgment.

[83] If any examination is conducted and issues of relevance and scope are raised at that examination, those issues will have to be addressed on motion and on that particular evidentiary record at a later time.

2. Are the summonses an abuse of process?

[84] The burden now shifts to the moving parties to show that the examination would be an abuse of process, or that the proposed witness is not in a position to be examined.

Would the Proposed Examinations circumvent other limitations?

[85] Ontario advances an argument that the number of summonses to witness served on proposed witnesses amounts to an abuse of process. I have been given no authority for the proposition that the number of summons served and examinations proposed in and of itself would be a ground to impugn any one of them.

[86] Ontario also objects to the documents that each proposed witness is required to bring under the summons to witness. A party serving a summon is permitted by rule 34.10 to require that the witness bring the "documents and things relevant to any matter in issue in the proceeding that are in his or her possession, control or power and are not privilege". The use of this rule and the documents required under each summons to witness is quite different from the summonses to witness at issue in the *Transamerica* case. As Justice Sharpe determined in that case, the required documents would "require the production of

all information provided by the defendants to OSFI from approximately 1974 to the present (1975)". This requirement was found to be exceedingly broad, and amounted to an abuse of process on those facts.

[87] Ontario argues that the summons to witness is an attempt to circumvent the right of the Crown to designate the representative it will produce for examinations for discovery under section 8 of the *Proceedings against the Crown Act*. Ontario argues that the plaintiffs who are not entitled to examine 13 witnesses of their choosing in their action against the Crown. If this were permitted, it would amount to a form of third-party discovery that is much broader in scope otherwise permitted under the *Proceedings against the Crown Act* or the *Rules of Civil Procedure*.

[88] This argument would have merit if it were not for the fact that the plaintiffs seek to examine those witnesses on the motion Ontario has brought for summary judgment. The examinations that the plaintiffs propose to conduct under rule 39.03 are not examinations for discovery and therefore not covered by section 8 of the *Proceedings against the Crown Act*. As they are not examinations for discovery, neither do the rules with respect to producing one representative from a party for examination for discovery purposes apply.

[89] When Ontario brought its motion for summary judgment, it unleashed a set of rights, including the right to examine a non-party for relevant information on a

pending motion into play. The plaintiffs are exercising rights they are entitled to exercise in responding to Ontario's motion for summary judgment. It is not an abuse of process to do so. Now that Ontario and OLG have brought motions to drive the plaintiffs from the judgment seat, it is not only open, but necessary for the plaintiffs as responding parties to put their best foot forward and to produce all evidence that could or should be available at trial.

[90] Ontario also argues that the summonses require that the proposed witnesses provide all documents or communications sent or received from any "non-Ontario email accounts". If those emails are relevant, they must be produced pursuant to the summons to witness, unless an objection is made to producing those emails, at which time a further motion may be necessary.

[91] The documents that each proposed witness is to produce at the examination is specific to that person, and described in the particular summons that has been served on that person. All means available under the Rules to obtain a document through the examination process would be appropriate where that document is relevant, and the defendants cannot show that an abuse of process. As I explained in *1870553 Ontario Inc. v. Kiwi Kraze Franchise Co.*, 2015 ONSC 1632 at paragraph 45:

> [45] Justice Perell noted in *Fehr* that a responding party has a right to cross-examine affiants and to summons witnesses who could be in a position to produce relevant documents. I would add that responding parties to a motion have full recourse to all means available under the *Rules of Civil Procedure* to seek relevant documents that would enable them to put their best foot forward on

> the motion for summary judgment. Such means would include not only 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 under Rule 34.10 and the various applications of a request to inspect documents under Rule 30.04. In my view, the benefit of timely and affordable justice relies upon the exercise of information gathering rights that are proportionate to the issues on the motion and the case itself. To default back to the traditional means of disclosure that are *de riguer* for the conventional trial process seems contrary to the policy direction mandated by the Supreme Court in *Hryniak.*

Cabinet Confidentiality

[92] Ontario also makes the argument that various proposed witnesses, including the Honourable Kathleen Wynne, former Premier Dalton McGuinty, former Minister Finance Dwight Duncan, and former Minister of Agriculture of Food and Rural Affairs, Ted McMeekin were members of cabinet when the decision was made to cancel SARP. Ontario submits that what was discussed at cabinet, its deliberations and discussions are confidential. Ontario relies upon the following passage from *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at paragraph 18 in this respect:

> The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions. The reasons are obvious. Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny: see *Singh v. Canada (Attorney General)*, 2000 CanLII 17100 (FCA), [2000] 3 F.C. 185 (C.A.), at paras. 21-22. If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect. The rationale for recognizing and protecting Cabinet confidences is well summarized by the views of Lord Salisbury in the *Report of the Committee of Privy Counsellors on Ministerial Memoirs* (January 1976), at p. 13:
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> . . . .

> The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly. In addition to ensuring candour in Cabinet discussions, this Court in *Carey v. Ontario*, 1986 CanLII 7 (SCC), [1986] 2 S.C.R. 637, at p. 659, recognized another important reason for protecting Cabinet documents, namely to avoid "creat[ing] or fan[ning] ill-informed or captious public or political criticism". Thus, ministers undertake by oath as Privy Councillors to maintain the secrecy of Cabinet deliberations and the House of Commons and the courts respect the confidentiality of Cabinet decision-making.

[93] Ontario also argues that courts have found the discussions at cabinet, including individual views and statements by various cabinet ministers, are irrelevant because the best evidence of what cabinet actually decides is best expressed by Orders in Council. The courts have also held that a direction to breach a cabinet member's oath of secrecy "be made only in the rarest circumstances where the information sought is most relevant, reliable and precise, and absolutely necessary for the determination of the matters under inquiry." See *Nova Scotia v. Nova Scotia* (1988), 54 DLR (4th) 153 (NSCA).

[94] From the evidence they have gathered to date, the plaintiffs have shown, on a *prima facie* basis, that the decision to cancel SARP was made in meetings between cabinet ministers and their aides in early February, 2012 before the cabinet meeting on February 8, 2012. These earlier meetings were not Cabinet meetings. The plaintiffs submit that it was on this occasion that the real decision to cancel SARP was made. They are therefore entitled to explore what was discussed, and what was behind the discussions at those meetings.

Parliamentary Privilege

[95] Finally, Ontario relies upon parliamentary privilege as the basis for the court to quash or set aside the summons to witness on the Honourable Kathleen Wynne and Ted McMeekin, who are currently members of the legislature.

[96] Parliamentary privilege is, as pointed out in the Ontario factum, "necessary immunity that the law provides for members of parliament, and for members of the legislatures for each of the 10 provinces...in order for these legislators to do their legislative work." This privilege and its effect was recognized by the Court of Appeal in *Telezone Inc. v. Canada (Attorney General)* (2004), 69 O.R. (3rd) 161. It is generally accepted as the authority that a member of the legislature cannot be compelled to attend as a witness before any court while the legislature is in session, or during 40 days before it commences or after it ends.

[97] Parliamentary privilege extends immunity to a sitting member of the legislature whenever the legislature is in session, and extends 40 days after the prorogation or dissolution of parliament, and 40 days before the commencement of a new session. It is a privilege founded in constitutional convention, and applies regardless of whether the attendance of the sitting member is sought to give evidence at a trial, or to attend at examinations for discovery. This privilege is absolute and applies even where a member has been named personally as a party to an action. It is a cloak that is worn by the sitting member that affords the legislator its benefit. The legislator need not claim that privilege to enjoy its

protection against outside elements, unless it is thrown off by express or implied waiver.

[98] The affidavit of Matthew Howe sworn in support of Ontario's motion explains the distinction between a season, which extends from September of one year to June of the next year, and a session of the legislature which lasts for the duration of the government. The 41st Parliament of Ontario began on June 12, 2014 and is currently in session.

[99] The Honourable Kathleen Wynne and Ted McMeekin are sitting members of the 41st Provincial Parliament in Ontario. Each of them are immune from any process that would otherwise compel them to testify pursuant to rule 39.03 (1). The summons to witness served or the plaintiffs have arranged to be served on each of them cannot compel them to attend and be examined because of this parliamentary privilege.

Conclusion

[100] In the net result, the respective motions brought by Ontario and OLG is dismissed, except with respect to the Honourable Kathleen Wynne and Ted McMeekin, wherein it is granted. The summons to witness against Premier Wynne and Mr. McMeekin are therefore quashed.

[101] If questions are asked and refused on those examinations that are permitted to go forward, those questions may be the subject of a further motion.

Should that regretful event occur, the parties are directed to bring one motion for all examinations where any witness or counsel objecting for that witness has refused to answer a proper question, or where a question has been taken under advisement and has not been answered within 10 days. I give this condensed period of time to answer questions because of the short time the parties have to examine witnesses, bring motions and prepare facta for the motions for summary judgment if they are to be heard in November 2017.

[102] One final point. Although not part of the motions to quash that have now been decided, I call the attention of counsel to the provisions of Rule 37.15 (2). Rule 37.15(2) provides that the judge appointed to hear all motions in a proceeding shall not preside at a trial of the action, except with the written consent of all parties. I am of the view that this rule, when combined with the effect of Justice Simmon's decision in *RBC v. Hussain* that the role of a judge hearing a motion for summary judgment is akin to the role of a trial judge, requires counsel for all parties to provide the court with their consent in writing if counsel remain in agreement that I am to hear the motions for summary judgment in Guelph this fall. See *Trade Capital Finance Corp. v. Cook*, 2017 ONSC 3606 in this regard.

[103] If costs are sought on these motions, the parties seeking costs may make written submissions by August 14, 2017. The responding parties to any claim for costs shall then file responding submissions by August 28, 2017. No reply

submissions may be filed without leave. All written submissions shall consist of no more than 3-pages, not including any Offer to Settle or supporting material. Those submissions may be made by fax to my judicial assistant, Ms. Kim Williams, at 905-456-4834 at Judge's Chambers in Brampton.

Emery J.

Date: August 4, 2017

CITATION: Seelster Farms Inc. v. ONTARIO, 2017 ONSC 4756
COURT FILE NO.: 272/14 (Guelph)
DATE: 20170804

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SEELSTER FARMS INC. WINBAK FARM OF CANADA, INC, STONEBRIDGE FARM, 774440 ONTARIO INC., NORTHFIELDS FARM INC., JOHN MCKNIGHT, TARA HILLS STUD LTD., TWINBROOK LTD., EMERALD RIDGE FARM, CENTURY SPRING FARMS, HARRY RUTHERFORD, D10041NE INGHAM, BURGESS FARMS INC., ROBERT BURGESS, 453997 ONTARIO LTD., TERRY DEVOS, SONIA DEVOS, GLENN BECHTEL, GARTH BECHTEL, 496268 NEW YORK INC., HAMSTAN FARM INC., ESTATE OF JAMES CARR, deceased, by its executor Darlene Carr, GUY POLILLO, DAVID GOODROW, TIMPANO GAMING INC., CRAIG TURNER, GLENGATE HOLDINGS INC., KENDAL HILLS STUD FARM LTD., ANY KLEMENCIC, TIM KLEMENCIC, STAN KLEMENCIC, JEFF RUCH, BRETT ANDERSON, DR. BRETT C. ANDERSON PROFESSIONAL VETERINARY CORPORATION, KILLEAN ACRES INC., DECISION THEORY INC., 296268 ONTARIO LTD., DOUGLAS MURRAY MCCONNELL, QUINTET FARMS INC., KARIN BURGESS, BLAIR BURGESS, ST. LAD'S LTD., WINDSUN FARM INC., SKYHAVEN FARMS, HIGH STAKES INC., 1806112 ONTARIO INC., GLASSFORD EQUI-CARE, JOHN GLASSFORD, GLORIA ROBINSON and KEITH ROBINSON
v.
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and ONTARIO LOTTERY AND GAMING CORPORATION

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

Robert Ratcliffe, Sandra Nishikawa and Chantelle Blom, for the Defendant, Her Majesty The Queen

Neil Finkelstein, Awanish Sinha and H. Michael Rosenberg and Dharshini Sinnadurai, for the Defendant, Ontario Lottery and Gaming Corporation

HEARD: June 19, 2017

DECISION ON MOTIONS TO QUASH

Emery J.

DATE: August 4, 2017