CITATION: Mila Hills Swine v. Ontario (Minister of Agriculture), 2024 ONSC 1914
CHATHAM COURT FILE NO.: CV-16-00006554-0000
DATE: 20240402

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
MILA HILLS SWINE LTD., URSULA VAN DEN HEUVEL O'NEIL, VEHOF FARMS INC., JOHANNES VEHOF, TINA VEHOF, PALM CREEK FARMS INC., WARREN CAUGHILL, JOANNE CAUGHILL, TOM MURRAY and CHERYL MURRAY	)	*Stuart R. Mackay*, for the Plaintiffs
Plaintiffs	)	
– and –	)	
HIS MAJESTY THE KING IN RIGHT OF ONTARIO, AS REPRESENTED BY THE MINISTER OF AGRICULTURE, FOOD AND RURAL AFFAIRS and AGRICORP	)	*Christopher P. Thompson* and *Jennifer Boyczuk*, for the Defendant His Majesty the King in right of Ontario, as represented by the Minister of Agriculture, Food and Rural Affairs
Defendants	)	
	)	**HEARD:** August 21, 2023

RULING ON SUMMARY JUDGMENT MOTION

HOWARD J.

Overview

[1] This is a motion for summary judgment brought by the defendant His Majesty the King in right of Ontario, as represented by the Minister of Agriculture, Food and Rural Affairs (the

"Crown") pursuant to rule 20.04 of the *Rules of Civil Procedure*[1] seeking an order that the plaintiffs' action be summarily dismissed.

[2] The plaintiffs' action arises out of the establishment and administration of a one-time Ontario government program that sought to provide financial assistance to Ontario hog farmers (and as well as other producers in the agricultural sector) in 2007-2008.

[3] The plaintiffs are Ontario hog farmers, each of whom was eligible for and actually received payments under the program. However, the plaintiffs received limited assistance under the Crown's program and remain dissatisfied with the amount of the payments made to them.

[4] The plaintiffs' claim sounds in negligence. The plaintiffs allege that the program was designed negligently because its payment formula relied on "allowable net sales" ("ANS") data from 2000-2004 that was "out-of-date" and taken from past government subsidy programs and did not reflect their circumstances in 2007-2008. The plaintiffs' farming operations had changed between 2000-2004 and 2007-2008, such that, the program's use of the 2000-2004 ANS data resulted in the plaintiffs receiving smaller subsidy payments that did not address their needs at the time of the program. The plaintiffs allege that it was negligent for the Crown's program to rely on the out-of-date data.

[5] The central issue on the motion for summary judgment is whether the decision in question was an operational or policy decision.

[6] The position of the moving party Crown is that the design of a payment formula for a subsidy program is squarely a core government policy decision, and such policy decisions are immune from tort liability under the *Crown Liability and Proceedings Act, 2019*[2] and at common law.

[7] The position of the responding party plaintiffs is that the decision to create a program to assist hog farmers in response to financial hardships was a policy decision, that the decision to allocate (ultimately) $139M to the program was a policy decision, but that the decision to use the 2000-2004 ANS data to calculate the quantum of assistance a hog farmer would receive was an operational decision.

[8] The Crown also submits that the plaintiffs' claim is barred by the applicable two-year limitation period under the *Limitations Act, 2002*.[3] The Crown maintains that the plaintiffs communicated with the Crown on numerous occasions as early as 2008, expressing their dissatisfaction with the payment formula under the program, and they therefore discovered their claim more than two years before commencing their action in 2016.

[9] The plaintiffs concede that there is no dispute that the program was administered in 2008, that the plaintiffs knew in 2008 that the program was based on the 2000-2004 ANS data,

---

1 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
2 *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17.
3 *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

that the plaintiffs challenged the program over an extended period beginning in 2008, and that this action was not commenced until 2016.

[10] However, the plaintiffs contend that plaintiffs did not discover their cause of action until 2014, when one of the plaintiffs obtained, through a freedom of information request, a copy of the program's payment guidelines, which guidelines indicated that the purpose of the program was to assist hog farmers who were experiencing the effects of adverse economic pressures at the time of the program. The plaintiffs argue that this stated purpose was contrary to the Crown's previously-known messaging, which was that the program was to address longstanding hurt within the hog industry.

[11] For the reasons that follow, I conclude that the Crown's motion for summary dismissal must be allowed because there is no genuine issue requiring a trial.

Factual Background

[12] With few exceptions, there really is little dispute between the parties as to the chronology of events here. The relevant facts are summarized in the Crown's factum[4] at paras. 14-43 and in the plaintiffs' factum[5] at paras. 8-21. I highlight the following features of the factual background.

[13] The plaintiffs are a group of (what was referred to in the materials as) "young producers" or "young farmers" in the hog industry in Ontario.

[14] For example, the plaintiff Ursula van den Heuvel O'Neil ("Ms. O'Neil"), who functioned as the spokesperson for the plaintiffs' group of young producers, and her husband, Mr. Will O'Neil, operate a hog farm through their corporation, the plaintiff Mila Hills Swine Ltd. ("Mila Hills"). Mila Hills was originally established in 1995 by Ms. O'Neil and her first husband, Mr. Michael van den Heuvel; however, after Mr. van den Heuvel passed away in 1998, Ms. O'Neil sold their farm in 2000.

[15] In March 2003, Ms. O'Neil and her second husband, Mr. O'Neil, decided to rent a farm nearby, and they purchased the previous renter's hogs and feed, which they continued to rent until 2005. That operation was what is called a "farrow-to-wean" operation, meaning that they raised hogs only from when they were born until they were weaned and then sold them to other farmers who would raise them to market weight.

[16] In 2005, Ms. O'Neil and her husband purchased a farming business from another farmer (Mr. Harry van Roessel) and took over his operation, which was a "farrow-to-finish" operation, meaning that they raised hogs from when they were born until they are market weight.

---

[4] Factum of the Moving Party, His Majesty the King in right of Ontario signed July 14, 2023 ("Crown's Factum").
[5] Responding Parties' Factum signed July 28, 2023 ("Plaintiffs' Factum").

[17] The evidence of Ms. O'Neil was that when they purchased Mr. van Roessel's operation in 2005, their expenses increased because, as she explained, not only is the amount of feed required for a farrow-to-finish operation significantly greater than a farrow-to-wean operation, but also their operation went from having about 110 sows (in the pre-2005 farrow-to-wean operation) to around 210 sows (in the post-2005 farrow-to-finish operation).

[18] In or about 2007-2008, there were various federal and provincial business risk management programs in place for agriculture producers, including hog farmers, to protect them against income and production losses.

[19] However, it is common ground that in 2007, the Ontario cattle, pork, and horticultural sectors faced particular financial difficulties – indeed, a liquidity crisis – caused by increased input costs (e.g., feed and hay), decreased market prices for their product, and an increase in the value of the Canadian dollar.

[20] In response, the Crown established the Ontario Cattle, Hogs and Horticulture Payment ("OCHHP") program to financially assist eligible cattle, hog, and horticulture producers.

[21] I will explain in further detail, below, how the OCHHP program was established and designed; however, in short, the payment formula for the OCHHP program used the average uncapped "allowable net sales" ("ANS") data from the then-existing federal Cost of Production Payment program ("COP"), implemented in 2007, which was the same as the average uncapped ANS data used by the existing Ontario Cost Recognition Top-Up program ("OCRT"), also implemented in 2007.

[22] The payment calculation for the federal COP program was based on the average uncapped ANS as calculated from the average net sales for 2000-2004 of eligible commodities, as reported to the Canada Revenue Agency. Producers that started farming in 2005 or 2006 could apply for a COP payment, and for those producers, their COP payment calculation was based on the average uncapped ANS as calculated from their average net sales of eligible commodities for 2005-2006, as reported to the CRA (or only for 2006 if the farmer began farming in that year).

[23] The provincial OCRT program, implemented by the Ontario Ministry of Agriculture, Food and Rural Affairs (the "Ministry") in June 2007, provided a 40 per cent matching provincial contribution to the federal COP program.

[24] The OCHHP program was announced to the public on December 14, 2007.

[25] In February 2008, the Ministry and the defendant AgriCorp entered into a payment delivery agreement, pursuant to which AgriCorp administered the OCHHP program.[6] The payment delivery agreement included, as an appendix, the OCHHP program Guidelines.

[26] The Guidelines spoke of the purpose of the OCHHP program in the following terms:

> **Purpose**
>
> The Ontario Cattle, Hogs and Horticulture Payment (OCHHP) is a one time program designed to assist cattle, hog and horticultural producers who have experienced steep losses as a result of a number of economic pressures that have led to higher input costs and lower market prices.

[27] Under the Guidelines, there was no application process required of producers to receive payments. Rather, eligibility and payment amounts were generated from the existing average uncapped ANS information used to administer the federal COP payment and the OCRT payment. If a producer met the eligibility criteria, then AgriCorp processed a payment.

[28] For hog producers, payment amounts under the OCHHP program amounted to 12 per cent of the producer's average uncapped ANS, as shown on the producer's one-time federal COP payment statement.

[29] It is common ground that, ultimately, the Ministry distributed approximately $139,000,000 through the OCHHP program to some 13,000 producers.

[30] That said, the plaintiffs here received only the following OCHHP payments:

a. Ms. O'Neil and Mila Hills received $3,750 in February 2008.

b. The plaintiffs Vehof Farms Inc., Johannes Vehof, and Tina Vehof received $267 in February 2008.

c. The plaintiffs Palm Creek Farms Inc., Warren Caughill, and Joanne Caughill received $89,770 by way of two payments made in February 2008 and September 2008.

d. The plaintiffs Tom Murray and Cheryl Murray received $340 in February 2008.

[31] Not surprisingly, given the modest amounts they received, the plaintiffs were dissatisfied with the quantum of the OCHHP payments made to them.

[32] For example, while Ms. O'Neil does not dispute that the payment she received was correctly calculated based on Mila Hills' 2000-2004 ANS data, she voiced her objection –

---

[6] Pursuant to the order of Cook J. dated July 30, 2023, the plaintiffs' action against AgriCorp was dismissed without costs.

that the payment based on 2000-2004 ANS data did not address the needs of her expanded, post-2005 operation – in the following terms:

> The problem is that Mila Hills' ANS data from 2000 to 2004 did not reflect Mila Hills' operation in 2007. As I described before, I had sold my first farm in 2000, and in 2003 and 2004 Will and I were only engaged in a one hundred and ten sow farrow-to-wean operation. In 2005, we switched to a significantly larger two hundred and ten sow farrow-to-finish operation. Like other pork producers, Mila Hills needed assistance in 2007, but, because payment under OCHHP was calculated based on data from 2000 to 2004, the payment we received did not address the level of assistance that was needed.

[33] I would pause to note that just because any individual plaintiff did not receive a significant portion of the $139M total moneys distributed does not mean that the OCHHP program was negligently designed.

[34] That said, it would seem plain that there were certain deficiencies or undesirable outcomes produced by the OCHHP program. For example, the evidence indicates that, in contrast to the mere $3,750 that was received by Ms. O'Neil and the going concern of Mila Hills in February 2008, in that same month Mr. van Roessel – the farmer from whom Ms. O'Neil and her husband purchased their farming operation in 2005 – received an OCHHP payment of $38,426, despite having moved to British Columbia and retired from farming altogether.

[35] While the extent of the problem is not clearly established in the evidence before me, it appears that there may have been some (significant?) moneys paid to former producers who, as of the time of payment, had either retired from farming or were deceased.[7]

[36] There is no doubt that the Ministry received numerous complaints about the OCHHP program. The position of the Crown is that, in total, the Ministry received complaints from 22 hog producers about the OCHHP program, which, the Crown states, represents about 1 per cent of the roughly 2,000 eligible hog producers. Generally speaking, those complaints were to the effect that the eligibility of the OCHHP program did not account for or include

---

[7] In a letter dated December 17, 2024, from Ms. O'Neil to the Director of the Audit Service Team within the Ontario Ministry of Finance, Ms. O'Neil claimed that she was made aware, through a freedom on information request, that "at least 1,753 retired producers (not experiencing the crisis of 2007) received OCHHP to the value of [$]13.5 million" and that "29% of all OCHHP hog sector cheques went to retired hog producers that were no longer in the industry and did not experience the 2007 crisis." Copies and/or the text of the actual freedom of information request and answer were not presented in evidence before me. As such, the claims set out in Ms. O'Neil's letter are hearsay, and the court is not in a position to assess the accuracy of her stated interpretations of that information or accept same at face value. Moreover, as an officer of the court, Ms. Boyczuk advised that, although not in the record, the question that was posed through the access to information request was: what were the number of producers who, no longer having 50 per cent or more of their income from the cattle, hog, or horticulture industry in 2007, received an OCHHP payment? Ms. Boyczuk allowed that some of those recipients might be retired or deceased. Mr. Mackay objected to Ms. Boyczuk's statements being relied upon by the court. For present purposes, it is not necessary for the court to determine the issue, and it is not in a position to do so, given the state of the record. I simply note that this is an unanswered question and remains in issue.

new producers or farmers that had changed or expanded their production – like the plaintiffs here.

[37] In particular, the Crown concedes that, beginning in 2008, the plaintiffs made numerous complaints to the Ministry and AgriCorp about the OCHHP program. The evidence before the court plainly establishes that Ms. O'Neil and the plaintiffs engaged in substantial political action to attempt to persuade Ministry and other government officials to expand the OCHHP program or create a new program to better address the needs of the young producers and/or excluded farmers. The Crown points out that those complaints and efforts started in 2008, a full eight years before the plaintiffs' action was commenced in 2016 in respect of those same complaints.

[38] The evidence of the plaintiffs is that they served notice of their intended claims on the Crown on July 5, 2016, as required under the *Proceedings Against the Crown Act*,[8] which was then in effect.

[39] The plaintiffs served separate statements of claim on September 7, 2016. It appears that the actions remained dormant for several years, but then in March 2022, the claims were all consolidated by order of Carey J. dated March 29, 2022, and a consolidated statement of claim was subsequently issued on April 21, 2022.

[40] In short, the plaintiffs' claim alleges that the Crown was negligent to use "out-of-date data from 2000-2004" for the OCHHP program because such data did not reflect the circumstance of the plaintiffs in 2007. As the Plaintiffs' Factum puts it:

> *The design of the program* was such that the calculation of a hog farmer's assistance was based on data from the years 2000-2004. The Plaintiffs' farming operations had changed between 2000-2004 and 2007/2008. Consequently, the assistance provided to the Plaintiffs did not match their need at the time of the program.
>
> *The Plaintiffs' claim sounds in negligence*, … the decision to use data from 2000-2004 to calculate the quantum of assistance a hog farmer received was an operational decision.
>
> The Plaintiffs' case boils down to this: *the decision to use 2000-2004 data was negligent* because this decision did not align with the program's objectives set by the Ontario government. … Because it used 2000-2004 data and reflected a hog farmer's operation at that time, the program's design did not align with the program's objectives, which was to address challenges in 2007/2008.[9] [Emphasis added.]

---

[8] *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27.

[9] Plaintiffs' Factum, at paras. 2-4.

Issues

[41] On the material filed before me, the central question is whether the Crown has established that there is no genuine issue requiring a trial with respect to the following issues:

a. Whether the decision to design the OCHHP program so as to base the amount of payments using 2000-2004 ANS data was a policy decision or an operational decision?

b. In the alternative, whether the Crown owed the plaintiffs a private law duty of care and, if so, whether there was a breach of the standard of care?

c. Whether the plaintiffs' claim is barred by the two-year limitation period?

Analysis

Principles governing motions for summary judgsment

[42] Subrule 20.04 of the *Rules of Civil Procedure* provides, in part, that:

> *General*
>
> (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.
>
> *Powers*
>
> (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.

[43] As Rady J. remarked in her decision in *TD v. Testa*,[10] the law respecting motions for summary judgment is well settled and understood following the landmark decision of the

[10] *TD v. Testa*, 2022 ONSC 1576 (S.C.J.), at paras. 41-43.

Supreme Court of Canada in *Hryniak v. Mauldin*.[11] Summary judgment must be granted where there is no genuine issue requiring a trial. *Hryniak* establishes that there will be no genuine issue requiring a trial where the motion judge is able to reach a fair and just determination on the merits on a motion for summary judgment.

[44] In *Hryniak*, the Supreme Court directed that the summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely, and just adjudication of claims.[12] On the standard of fairness, the Court held 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."[13]

[45] Writing for the unanimous Court in *Hryniak*, Karakatsanis J. summarized the proper approach on a summary judgment motion, as follows:

> On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.[14]

[46] As our Court of Appeal has repeatedly held, "[i]t is trite law that both parties on a summary judgment motion are required to put their best foot forward. Summary judgment motions are decided by evidence of the facts and by inferences drawn from those facts. Not by speculation about the facts."[15] As such, a party is not entitled to sit back and rely on the possibility that more favourable facts may develop at trial. The summary judgment motion judge is entitled to assume that the evidence contained in the motion record is all the evidence the parties would rely on if the matter proceeded to trial. A responding party cannot rely on unsupported allegations in the pleadings or unfounded assertions that there is a genuine issue requiring a trial.

---

[11] *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 [*Hryniak*].
[12] *Ibid.*, at para. 5.
[13] *Ibid.*, at para. 50.
[14] *Ibid.*, at para. 66.
[15] *Chernet v. RBC General Insurance Company*, 2017 ONCA 337, at para. 12.

[47] In short, a responding party must "lead trump or risk losing."[16]

[48] At the same time, as the Court of Appeal said in *Baywood Homes Partnership v. Haditaghi*, the summary judgment motion judge must "assess the advisability of the summary judgment process in the context of the litigation as a whole."[17]

[49] The authorities are also clear that the onus is on the moving party – here, the Crown – to establish that there is no genuine issue requiring a trial with respect to a claim or defence.[18]

Whether the decision to design the OCHHP program so as to base the amount of payments using 2000-2004 ANS data was a policy decision or an operational decision?

[50] The onus is on the Crown to satisfy the court that there is no genuine issue requiring a trial with respect to its claim that the decision to design the OCHHP program using the 2000-2004 ANS data was a policy decision.

[51] For the reasons that follow, in the circumstances of the instant case, I am satisfied that the Crown has met its onus in this case.

[52] As reviewed above, and as expressly reflected in the Plaintiffs' Factum,[19] it is clear that the plaintiffs' claim sounds in negligence. The plaintiffs challenge the Crown's decision to use the 2000-2004 ANS data and say that OCHHP program was designed negligently by reason of its use of that data.

[53] It is common ground that a government's core policy decisions are shielded from liability in negligence.[20]

[54] "The primary rationale for shielding core policy decisions from liability in negligence is to maintain the separation of powers. Subjecting those decisions to private law duties of care would entangle the courts in evaluating decisions best left to the legislature or the executive."[21] "Core policy decisions are immune from negligence liability because the

---

[16] *790668 Ontario Inc. v. D'Andrea*, 2014 ONSC 3312 (S.C.J., per Rady J.), at pars. 72 and 117, affirmed 2015 ONCA 557; *Gold Leaf Garden Products Ltd. v. Pioner Flower Farms Ltd.*, 2015 ONCA 365, at para. 14; *Ramdial v. Davis (Litigation guardian of)*, 2015 ONCA 726, 68 R.F.L. (7th) 287, at para. 28, citing *Corchis v. KPMG Peat Marwick Thorne*, [2002] O.J. No. 1437 (C.A.), at para. 6; and *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.), at para. 35. See also *Spencer (Litigation guardian of) v. Switzer*, 2014 ONSC 2344, 37 M.P.L.R. (5th) 286 (S.C.J.), at paras. 11-12.

[17] *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438 [*Baywood*], at paras. 33-37.

[18] *Lang v. Kligerman*, [1998] O.J. No. 3708 (C.A.), at para. 9, cited in *Hi-Tech Group Inc. v. Sears Canada Inc.* (2000), 52 O.R. (3d) 97, 4 C.P.C. (5th) 35 (C.A.), at para. 30 per Morden J.A. [cited to O.R.], quoted in *Great America Leasing Corp. v. Yates* (2003), 68 O.R. (3d) 225, (C.A.), at paras. 33-35 per Borins J.A. See also *Chao v. Chao*, 2017 ONCA 701, 99 R.F.L. (7th) 281, at para. 16.

[19] Plaintiff's Factum, at para. 3.

[20] See *Nelson (City) v. Marchi*, 2021 SCC 41, 463 D.L.R. (4th) 1 [*Nelson*], at paras. 2-3 and 67.

[21] *Ibid.*, at para. 42.

legislative and executive branches have core institutional roles and competencies that must be protected from interference by the judiciary's private law oversight."[22]

[55] Subsection 11(4) of the *Crown Liability and Proceedings Act, 2019* ("*CLPA*") bars any cause of action in negligence against the Crown in the making of a decision in good faith respecting a "policy matter," as follows:

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

[56] Pursuant to ss. 11(7) and 11(8) of the *CLPA*, no action may be brought against the Crown in respect of a policy matter as defined in s. 11(4), and any such proceeding is deemed to be dismissed without costs, as follow:

> **Proceedings barred**
>
> (7) No proceeding may be brought or maintained against the Crown or an officer, employee or agent of the Crown in respect of a matter referred to in subsection (1), (2), (3) or (4).
>
> **Proceedings set aside**
>
> (8) A proceeding that may not be maintained under subsection (7) is deemed to have been dismissed, without costs, on the day on which the cause of action is extinguished under subsection (1), (2), (3) or (4).

[57] Subsection 11(5) of the *CLPA* provides an extensive definition of a "policy matter," which includes the design of programs, including their terms and, in particular, their funding terms, as follows:

> (5) For the purposes of subsection (4), a policy matter includes,
>
> (a) the creation, design, establishment, redesign or modification of a program, project or other initiative, including,
>
> (i) the terms, scope or features of the program, project or other initiative,
>
> (ii) the eligibility or exclusion of any person or entity or class of persons or entities to participate in the program, project or other initiative, or the requirements or limits of such participation, or

[22] *Ibid.*, at para. 67.

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

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

(i) providing or ceasing to provide such funding,

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

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

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

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

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

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

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

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

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

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

(f) any other policy matter that may be prescribed.

[58] There is no doubt that under s. 11(5) of the *CLPA*, the definition of a "policy matter" includes the "design" of a program (clause 11(5)(a)), the "terms" of the program (paragraph 11(5)(a)(i)), the "funding" of a program (clause 11(5)(b)), etc.

[59] That said, the Ontario Court of Appeal has held that the enactment of the *CLPA* served only to codify the existing common law with respect to the Crown's liability for negligence

and "did not give the government broader immunity to that which it enjoyed for core policy decisions at common law."[23]

[60] However, distinguishing between a policy decision (which cannot give rise to Crown liability in negligence) and an operational decision (which may give rise to Crown liability) is admittedly a distinction that out courts have found "notoriously difficult to decide."[24]

[61] In *Nelson*, the Supreme Court held that "the key focus must always be on the underlying purpose of the immunity and the nature of the decision."[25] The Supreme Court in *Nelson* identified four factors that help in assessing the nature of a government's decision:

> (1) the level and responsibilities of the decision-maker; (2) the process by which the decision was made; (3) the nature and extent of budgetary considerations; and (4) the extent to which the decision was based on objective criteria. The underlying rationale – protecting the legislative and executive branch's core institutional roles and competencies necessary for the separation of powers – serves as an overarching guiding principle for how to weigh the factors in the analysis. Thus, the nature of the decision along with the hallmarks and factors that inform its nature must be assessed in light of the purpose animating core policy immunity.[26]

[62] I would also remind myself that the question of whether the impugned design of the OCHHP program involved a policy decision is a question of mixed law and fact, which depends on a factually-sensitive, contextual analysis.

[63] As such, it is instructive to consider the evidence concerning the impetus leading up to the establishment of the OCHHP program and the design of the program.

[64] The financial difficulties facing Ontario pork producers in 2007 prompted the Ontario Pork Producers Marketing Board ("Ontario Pork"), which represents "the 3,600 producers who produce and market hogs in Ontario," to ask the provincial government to provide some financial assistance. In support of its request, Ontario Pork submitted a document in October 2007 entitled "Ontario Pork Producer Transitional Assistance Program Request," which presented the rationale for the request, in part, as follows:

> Ontario's pork producers are experiencing a severe and damaging liquidity crisis owning to low market prices, high and rising corn prices, and an appreciating dollar. In addition, competing provincial jurisdictions have moved quickly to help their producers deal with the liquidity problem. … The consequence is that Ontario, viewed by experts .as the most competitive province, in Canada for pork

---

[23] *Leroux v. Ontario*, 2023 ONCA 314, 166 O.R. (3d) 321, 481 D.L.R. (4th) 502, at para. 70. See also *Francis v. Ontario*, 2021 ONCA 197, 154 O.R. (3d) 498, 463 D.L.R. (4th) 99 [*Francis*], at paras. 127-129.

[24] See *Francis*, at para. 133, quoting *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 78.

[25] *Nelson*, at para. 66.

[26] *Ibid.*, at para. 68.

> production and processing, is at risk of permanently losing its competitive advantage.
>
> Ontario Pork has estimated that, based on projected losses to market hog producers, a new program allocation of $150 million would be required. …
>
> This funding would provide for only a portion of the total loss/hog experienced by Ontario's pork production industry. However, this assistance would allow producers the time to properly evaluate their respective situations, change their operations and in many cases prevent foreclosures and personal financial ruin[.]

[65] Based on its own forecasts, Ontario Pork predicted "a gradual and orderly decline in production of between 400,000 and 500,000 hogs per year" from 2007 to 2009. However, Ontario Pork warned:

> But this managed decline assumes that government can act to help producers weather the current financial crisis. *There is a risk that without adequate government support at this critical point, production could decline precipitously and our industry permanently damaged, with the resulting negative impacts on suppliers and rural communities*. This situation existed in the 1997/98 period when prices fell to very low levels and it took many years for the industry to come back. Our industry is inherently cyclical, but the current situation goes beyond what producers can manage. [Emphasis added.]

[66] Ontario Pork went on to identify two possible approaches for its proposed transitional assistance program. The first identified option suggested providing "a top-up based on the 2006 Canadian Agricultural Income Stabilization (CAIS) program." The second option – which Ontario Pork said was "perhaps the more preferable approach" – was described as follows:

> Another, perhaps *more preferable approach, would be to advance the funds to producers as soon as possible to deal quickly and decisively with the liquidity crisis*. Ontario pork could play a role in verifying the payment amount by using its producer data base. The payment would be viewed as an advance against a future, to be determined, CAIS payment. *This approach would allow producers to deal with the liquidity issue and make appropriate business decisions*. It would also give time for the program amounts and CAIS funds to be accurately adjusted at some future time based on actual. experience and prevent double counting of program funds. In our view this option would also be trade neutral. [Emphasis added.]

[67] The following month, Ministry officials prepared a slide deck entitled "2007-2008 Opportunities for Ontario to Support the Hog, Cattle and Horticultural Sectors," dated November 26, 2007, which was marked as "Confidential Advice to the Minister," to consider financial assistance options for producers. Again, two options were identified as providing a basis for additional assistance to Ontario Farmers, as follows: (1) "2005 CAIS [Canadian Agricultural Income Stabilization] Reference Margins including BSE [bovine spongiform encephalopathy] Payments" and (2) "Allowable Net Sales used for the Federal Cost of Production (FCOP) Payment and the Ontario Cost Recognition Top-Up (OCRT)."

[68] The advice to the Minister noted in respect of the second option based on ANS that "FCOP/ORCT was based on average of ANS for 2000-2004, up to a maximum of $450,000".

[69] The advice to the Minister also noted, *inter alia*, that both options were "[r]elatively simply to calculate and could be delivered by AgriCorp by March 31, 2008 (e.g. Late February)", both options simply take a predetermined amount of funds and distribute it to a predetermined group of farmers, and both options "raise some trade policy concerns regarding the potential to attract attention from the U.S. regarding countervailing duty action."

[70] The advice to the Minister set out certain identified advantages and disadvantages for each of the two options, as follows:

> **1. 2005 CAIS Reference Margins including BSE Payments**
>
> Pros
>
> - Data is readily available
> - Including BSE payments would help cattle producers
> - Reinforces CAIS/AgriStability as main support vehicle
> - Producers should be able to calculate their benefits, although inclusion of BSE payments would make this more difficult for cattle producers
>
> Cons
>
> - Not all producers participate in CAIS – there would be demands to allow an application process that would run into the next fiscal year
> - Some cattle producers have very low or negative reference margins – meaning low payments
> - BSE only affects 2004 in this case so impact is minimal
> - Requires recalculation of reference margins to include BSE payments
> - Inclusion of BSE payments makes it less bankable and not WTO compliant
>
> . . . .
>
> **2. Allowable Net Sales Used for the FCOP and OCRT payments**
>
> Pros
>
> - Data is readily available

- Would provide payments to a larger group of producers, so fewer would argue that they were missed
- Likely simpler administratively than option 1 since no recalculation of data require (i.e. inclusion of BSE payments)
- Producers should be able to take information from the FCOP/OCRT payments to calculate their payment under this program

Cons

- Cattle & hog producers have had concerns with ANS
- No way to include BSE payments to further help cattle producers

[71] Ultimately, the Minister determined to design the OCHHP program using the second option, based on the COP/OCRT ANS data, instead of the CAIS option as the basis for the financial support. As an internal Ministry email dated December 10, 2007, put it: "[t]he minister decided to go the way of ANS instead of CAIS." A draft Treasury Board Minute was prepared and was attached to that same email.

[72] At a meeting of the Treasury Board/Management Board of Cabinet "(Treasury Board") held on December 13, 2007, the Treasury Board approved the program. The minutes of the Treasury Board meeting that day record the decision to establish the program, the program details and funding formula design, and reflect the directive that all funds were to be distributed by March 31, 2008, as follows:

Agriculture, Food and Rural Affairs

a) *Approved $130,000,000 for the Ontario Cattle, Hogs and Horticulture Payment to support livestock ($100,000,000) and horticulture ($30,000,000) producers to manage low commodity prices and escalating input costs*, in the Agri-Food Sector. In this regard, the Board:

i. Approved the creation of a new transfer payment line entitled "Assistance for Ontario Cattle, Hogs and Horticulture" under Agri-Food Sector including Business Risk Management (Vote/Item 105-1).

ii. Approved the following program details:

a. *Producers who participated in the Cost Recognition Top-up Program and have more than 50% of their total sales from their combined sales of hogs, cattle and horticulture are eligible*.

b. *Payments are based on a percentage of a producers total uncapped allowable net sales as calculated for the Ontario Cost Recognition Top-Up Program*.

c. Payments are capped at a maximum of $3 million per producer.

d. Outstanding monies owing to the government of Ontario due to past overpayments in other programs would not be recovered against payments for the Ontario Cattle, Hogs and Horticulture program.

e. *The payments will be administered by AgriCorp*.

f. *Noted that all funding must be distributed by March 31, 2008* following appropriate accountability and accounting practices or returned to the Treasury Board Contingency Fund. [Emphasis added.]

[73] While I note that the OCHHP program, as recommended by the Minister and approved by Treasury Board, did not adopt either of the two options that had been proposed by Ontario Pork in October 2007, the requirement of the OCHHP program that all funds must be distributed by March 31, 2008, was consistent with the rationale for the second, "more preferable" option proposed by Ontario Pork "to advance the funds to producers as soon as possible to deal quickly and decisively with the liquidity crisis."

[74] In all of the circumstances, I agree with the position of the Crown that while the implementation or application of the funding formula under the OCHHP program to any particular farmer is arguably operational, the decision to design the OCHHP program using the 2000-2004 ANS data as the basis for the funding formula was itself an integral part of the Crown's decision to subsidize farmers. In my view, it is not the case, as the plaintiffs argue, that the policy decisions here include only the decision to establish the OCHHP program and the decision to allocate $139M to the OCHHP program. The decision to use the 2000-2004 ANS date as the basis for the funding formula was also a policy decision.

[75] Considering the level and responsibilities of the decision-maker, the decision to use the 2000-2004 ANS date as the basis for the funding formula for the OCHHP program was recommended by the Minister and made by Cabinet, consistent with the powers and duties of the Minister and the Lieutenant Governor in Counsel as set out in ss. 4 and 7 of the *Ministry of Agriculture, Food and Rural Affairs Act*.[27] To be sure, this was not some funding decision made by a junior ministry official or some administrative staffer. This was a decision made by the highest echelons of government – by the Cabinet itself, acting on the recommendation of a Minister of the Crown.

[76] Moreover, as expressly reflected in the Treasury Board Minute of the decision of Cabinet, the decision to use the 2000-2004 ANS date as the basis for the funding formula for the OCHHP program was explicitly set out in the Treasury Board Minute. That is, in the same breath that Cabinet decided to establish the OCHHP program, in the same breath that Cabinet decided (at least initially) to allocate $130M to the OCHHP program, in the same breath that Cabinet decided that the moneys must be distributed to the farmers by March 31, 2008, Cabinet also decided that "payments are based on a percentage of a producers

[27] *Ministry of Agriculture, Food and Rural Affairs Act*, R.S.O. 1990, c. M.16, ss. 4(1

total uncapped allowable net sales as calculated for the Ontario Cost Recognition Top-Up Program" – that is, Cabinet decided to use the 2000-2004 ANS date as the basis for the funding formula for the OCHHP program.

[77] Second, in considering the process by which the impugned decision was made, on the evidence before this court (including the reasonable inferences that may be drawn from that evidence), it is clear that the decision-making process that led up to the recommendation by the Minister and decision by Cabinet to use the 2000-2004 ANS date as the basis for the funding formula for the OCHHP program involved input from stakeholders (Ontario Pork represented 3,600 hog producers), contemplated the advantages and disadvantages of competing policy options, considered the far-ranging implications of international trade risks, and, in keeping with the recommendation of Ontario Pork "to advance the funds to producers as soon as possible to deal quickly and decisively with the liquidity crisis," included a requirement that all funds under the OCHHP program must be distributed by March 31, 2008. Clearly, this was not a decision that can be characterized as a reaction of a Ministry employee or groups of Ministry officials to a particular event, reflecting their discretion and with no sustained period of deliberation.[28]

[78] Third, considering the nature and extent of budgetary considerations, the decision to use the 2000-2004 ANS date as the basis for the OCHHP program was the means to allocate $139M in funds. It was far from a day-to-day budgetary decision of an individual Ministry employee.[29] Rather, the decision to use the 2000-2004 ANS data was central to the allocation of significant government resources to 13,000 plus cattle, hog, and horticulture producers. The decision to use the readily-available 2000-2004 ANS data as the basis for the OCHHP program facilitated the payment of the program funds as quickly as possible to meet a liquidity crisis in the industry. It avoided using an application process to obtain more current data, which would have proved time-consuming and administratively more complicated (and in this regard, it is noteworthy that 2007 raw tax data would not have been available until the fall of 2008, and, even then, it would have needed to be further inputted and calculated for use in a program). It permitted most of the funds to be distributed by March 31, 2008. In my view, determining the basis for the allocation of government funds does raise separation of powers concerns and is more within the core competency of the executive, as opposed to the courts. Determining the basis for the allocation of limited public monetary resources is core government policy.

[79] Fourth, in considering the extent to which the decision was based on objective criteria, I find that the decision to use the 2000-2004 ANS data as the basis for the OCHHP program was a decision that involved the weighing of competing interests and the making of value judgments. The confidential advice to the Minister included the presentation of the respective advantages and disadvantages of competing options, including how the different options might impact the interests of different stakeholders. It is plain that the Minister's decision to recommend the use of the 2000-2004 ANS data was, in part, motivated by the

---

[28] See *Nelson*, at para. 63.
[29] *Ibid.*, at para. 64.

value judgment that some priority should be given to the interest to dispersing the moneys as quickly as possible to farmers to assist them in weathering the liquidity crisis that they were facing within the industry. The disbursement of (ultimately) $139M in public resources involved some 13,000 producers. In my view, it is a fair inference to conclude that while some producers, like the plaintiffs here, would have preferred that the program use some different basis for allocation other than the use of the 2000-2004 ANS data, perhaps even if it took longer to provide the subsidy, no doubt other producers benefitted from the speed with which the moneys were distributed, which, in part, was facilitated by the use of the 2000-2004 ANS data. At the end of the day, the Crown decided to expedite subsidy payments, which involved using past program data. In my view, this was a value judgment involving competing producer interests. This was a policy decision.

[80] In sum, I find that the Crown's decision to use the readily-available 2000-2004 ANS data as the basis for the OCHHP program was a policy decision, in respect of which the plaintiffs' claim in negligence is prohibited at common law and under s. 11(4) of the *CLPA*.

[81] The Crown has satisfied its burden to show, and I find, that there is no genuine issue requiring a trial on whether the Crown's decision to design the OCHHP program so as to base the amount of payments using 2000-2004 ANS data was a policy decision or an operational decision. I have found that it was a policy decision. The action must be dismissed.

In the alternative, whether the Crown owed the plaintiffs a private law duty of care and, if so, whether there was a breach of the standard of care?

[82] Given my decision that the Crown's decision to design the OCHHP program based on the 2000-2004 ANS data was a policy decision, it is not necessary to address the Crown's alternative argument that the Crown did not owe the plaintiffs a private duty of care and, further, that the Crown did not breach any consequent standard of care.

Whether the plaintiffs' claim is barred by the two-year limitation period?

[83] While all counsel are agreed that a decision by the court that the plaintiffs in this case are seeking to challenge a policy decision – as I have found here – puts an end to the action on that basis alone, I would also consider the Crown's argument that the plaintiffs' claim is statute-barred by the two-year limitation period under the *Limitations Act, 2002*.

[84] In my view, there is merit in the Crown's position.

[85] There is no real dispute between the parties as to the applicable legal principles.

[86] The basis two-year limitation period is set out in s. 4 of the *Limitations Act, 2002*, which provides:

> Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

[87] Subsection 5(1) of the *Limitations Act, 2002* provides that:

> A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

[88] In short, s. 5(1) provides that a claim is discovered when the claimant first knew, or reasonably ought to have known, that "having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it."

[89] A claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts on which a plausible inference of liability on the defendant's part can be drawn. In its recent decision in *Levac v. James,*[30] our Court of Appeal explained when a claim is discovered, relying on the Supreme Court of Canada's decision in *Grant Thornton LLP v. New Brunswick,*[31] as follows:

> Under s. 5 of the *Limitations Act, 2002*, a claim is discovered on the earlier of the date when the plaintiff knew or ought to have known that an incident occurred that resulted in a loss (s. 5(1)(a)(i)), that the defendant did or failed to do something to cause that loss (s. 5(1)(a)(ii) and (iii)), and that, having regard to the nature of the injury, loss, or damage, a court proceeding is an appropriate means to seek a remedy (s. 5(1)(a)(iv)): *Gordon Dunk Farms Limited v. HFH Inc.*, 2021 ONCA 681, 16 C.C.L.I. (6th) 289, at para. 34. A plaintiff need not know the exact act or omission by the defendant that caused the loss, but rather must have knowledge of the material facts upon which a "plausible inference of liability" can be drawn: *Gordon Dunk Farms*, at paras. 30-36, citing *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, 461 D.L.R. (4th) 613, at para. 42.[32]

---

[30] *Levac v. James*, 2023 ONCA 73.

[31] *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, [2021] S.C.J. No. 31, 461 D.L.R. (4th) 613, 68 C.P.C. (8th) 219 [*Grant Thornton*].

[32] *Levac v. James*, at para. 105.

[90] In *Grant Thornton*, the Supreme Court held that knowledge may be actual or constructive, and that "a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence."[33] Further, the court clarified that: "a plaintiff does not need knowledge of all the constituent elements of a claim to discover that claim."[34]

[91] Subsection 5(2) of the *Limitations Act, 2002* creates a presumption that a person with a claim knows the matters referred to in s. 5(1)(a) on the day the act or omission on which the claim is based occurred, unless the contrary is proven.

[92] Paragraph 72 of the Plaintiffs' Factum concedes that: "[t]he Plaintiffs do not dispute that they were aware in 2008 of the harm they suffered as a result of the decision to use the 2000-2004 ANS data."

[93] Indeed, the plaintiffs acknowledge that the Crown points to correspondence sent and received by the plaintiffs in 2008 (as part of their complaints to the Ministry and their political action seeking an expanded OCHHP program or the creation of a new program for young farmers); the plaintiffs acknowledge that the Crown claims that the correspondence of the plaintiffs "demonstrates that [they] were aware that they were harmed by the use of the 2000-2004 ANS data as the basis for calculating OCHHP program payments."[35]

[94] Again, the statements of claim here were not commenced until September 2016.

[95] However, the argument of the plaintiffs is that they did not actually discover their claim until after Ms. O'Neil obtained the Guidelines under the OCHHP program through a freedom of information request in July 2014.[36]

[96] The plaintiffs argue that the evidence of Ms. O'Neil is that she had been told that the OCHHP program was designed to address "long-standing hurt" to farmers in the hog industry,[37] and that it was not until she obtained the Guidelines on July 7, 2014, that she realized that the purpose of the OCHHP was not to address long-standing hurt but, rather, it was designed to help farmers that were experiencing harms in 2007. "That is when I realized that the OCHHP really was for us beginning farmers."[38]

[97] Respectfully, I do not accept the plaintiffs' argument.

[98] In my view, as reflected in the plaintiffs' statement of claim and in the Plaintiffs' Factum, the claim of the plaintiffs focuses on the alleged negligent design of the OCHHP program

---

[33] *Grant Thornton*, at para. 44.
[34] *Ibid.*, at para. 3.
[35] Plaintiffs' Factum, at para. 71.
[36] *Ibid.*, at para. 69.
[37] *Ibid.*, at para. 65.
[38] *Ibid.*, at para. 66 and evidentiary references cited therein.

by reason of the Crown's decision to design the OCHHP program using the 2000-2004 ANS data as the basis for the funding formula.

[99] In the Plaintiffs' Factum, the plaintiffs argue that the Crown's decision to use the 2000-2004 ANS data as the basis for the funding formula "was negligent because this decision did not align with the program's objectives set by the Ontario government."[39]

[100] However, in my respectful view, that is not the basis for the negligence claim as actually pleaded in the plaintiffs' statement of claim.

[101] Rather, in the plaintiffs' 33-paragraph consolidated statement of claim, they plead that:

a. "OMAFRA [the Ministry] made a policy decision to assist pork producers. It developed the Ontario Cattle, Hog and Horticulture … program in late 2007." (Para. 11).

b. "Eligibility and payment amounts to each producer was based on average 'allowable net sales' from out-of-date data from 2000-2004. Allowable net sales is a term used in other programs in the industry." (Para. 13).

c. "Because of the changes in their business structures, the Operating Entities [i.e., the plaintiffs] suffered very large losses as market hogs declined in value while feed costs increased. However, the Operating Entities were only eligible for small OCHHP payments because their allowable net sales of market weight hogs had been very small prior to their changes in business structure, and therefore in the period used for averaging [i.e., 2000-2004]." (Para. 23).

d. "All of the Beneficial Owners suffered great personal hardship." (Para. 26.)

e. "*The Defendants knew, or ought to have known, that the OCHHP producer database for eligibility and payment* [i.e., the 2000-2004 ANS data] *was out-of-date* and many producers, who were in a state of flux, were changing their businesses in an effort to survive. *The Defendants were obligated to take such changes into account and into their risk considerations*." (Para. 31.) [Emphasis added.]

f. "Despite requests and demands, the Defendants have refused or neglected to deal with this issue." (Para. 32.)

[102] Clearly, to the extent that the plaintiffs' statement of claim pleads negligent design of the OCHHP program, as the Plaintiffs' Factum says it does, the alleged negligent design is the Crown's decision to use the "out-of-date" 2000-2004 ANS data as the basis for the OCHHP program.

---

[39] Plaintiffs' Factum, at para. 4.

[103] That said, I do acknowledge that in para. 30 of their consolidated statement of claim, the plaintiffs do state that they "learned in July of 2014 that OMAFRA directives were not followed by AgriCorp and that OMAFRA chose not to pursue the subject."

[104] However, even assuming for the moment that the language of para. 30 of the statement of claim is meant to refer to the alleged revelation of Ms. O'Neil that the realized in July 2014 that the purpose of the OCHHP was not to address long-standing hurt but, rather, was designed to help farmers that were experiencing harms in 2007, as it stands now, I regard para. 30 of the statement of claim to be a pleading of fact. There is no plea in para. 30 that this alleged negligence constituted negligence. There is no plea that any such alleged negligence caused the plaintiffs to suffer damage.

[105] In sum, while the plaintiffs submit in their Plaintiffs' Factum that they did not discover until July 2014 that "the use of the 2000-2004 ANS data did not align with the OCHHP's objective,"[40] that assertion is not found in the statement of claim as an allegation of negligence. What the plaintiffs' statement of claim alleges is that the Crown's decision to use the "out-of-date" 2000-2004 ANS data as the basis for the OCHHP program was negligent. And, on their own admission, the plaintiffs well knew that OCHHP program was based on the 2000-2004 ANS data back in 2008. They did not commence their actions until 2016. Their claims are statute-barred.

[106] However, beyond the fact that I do not accept the plaintiffs' claim or characterization that their action for negligence is based on their alleged "discovery" in 2014 that "the use of the 2000-2004 ANS data did not align with the OCHHP's objective"[41] – I think the language of their statement of claim speaks for itself – I also do not accept the plaintiffs' claim that it was not until July 7, 2014, that the plaintiffs learned for the first time that the purpose of the OCHHP program was to "help farmers that were experiencing harms in 2007." [42]

[107] Respectfully, I think the plaintiffs well knew in or about 2008 that one of the purposes of the OCHHP program was to "help farmers that were experiencing harms in 2007." In my view, that purpose could not have been lost on them. Respectfully, I view any claim to the contrary – that is, any claim that they did not know until July 2014 that the purposes of the OCHHP program included the objective to "help farmers that were experiencing harms in 2007" – to be strategic and specious.

[108] In particular, I find that the plaintiffs knew or ought to have known in or about 2008 that one of the purposes of the OCHHP program was to "help farmers that were experiencing harms in 2007" given the following evidence:

---

[40] *Ibid.*, at para. 72.

[41] *Ibid.*

[42] See Plaintiffs' Factum, at para. 66, citing *Responding Motion Record*, dated May 15, 2023, Tab 1, Affidavit of Ursula van den Heuvel O'Neil sworn May 15, 2023, at para. 31 [CaseLines Master Page B-1-137].

a. In para. 31 of her affidavit sworn May 15, 2023, Ms. O'Neil states that:

> I very clearly remember reading the purpose of the OCHHP as written in the Guidelines.
>
> > **Purpose**
> >
> > The Ontario Cattle, Hogs and Horticulture Payment (OCHHP) is a one time program designed to assist cattle, hog and horticultural producers who have experienced stee[losses as a result of a number of economic pressures that have led to higher input costs and lower market prices.
>
> This is when I realized that the purpose of the OCHHP was not to address longstanding hurt; *it was to help farmers that were experiencing harms in 2007*. This is when I realized that the OCHHP really was for us beginning farmers. [Emphasis added.]

b. However, the actual Treasury Board Minute of December 13, 2007, evidencing the decision of Cabinet to establish the OCHHP program stated that it approved $130M for the OCHHP program "to support … producers to manage low commodity prices and escalating input costs". The purpose of the OCHHP program was thus expressly set out in the Treasury Board Minute of December 2007, and the reference to low commodity prices and escalating input costs was a reference to the difficulties that hog producers and others were facing in 2007. I note there was no reference in the Treasury Board Minute to "long-standing hurt."

c. The October 2007 submission of Ontario Pork stated that "Ontario's pork producers are experiencing a severe and damaging liquidity crisis owning to low market prices, high and rising corn prices, and an appreciating dollar." Again, there was no reference to "long-standing hurt."

d. It could not have been lost on the plaintiffs that the Crown announced the establishment of the OCHHP program in December 2007, with the directive that all payments were to be made by end of March 2008. Surely that fact alone would have registered with the plaintiffs – or certainly with the reasonable person in the hog industry – that the objective of the OCHHP program was "to help farmers that were experiencing harms in 2007." Otherwise, if the purpose was just to address, as the plaintiffs say they understood "long-standing hurt," why was it that the establishment of the OCHHP program was announced in December 2007 with all funds to be distributed by end of March 2008? I do not accept that the plaintiffs believed that the timing of such a program to address, as they would have the court believe, only "long-standing hurt" was so coincidental with the liquidity crisis facing Ontario hog farmers in 2007. Surely the timing of the announcement of the OCHHP program was not lost on the plaintiffs.

e. I agree with Crown counsel's contention that the plaintiffs are engaging in a "cherry-picking" exercise here. They emphasize, for example, statements in the House where the Minister expressed the sentiment that the government program (also) intended to

address long-standing hurt, while ignoring clear statements – that were known to the plaintiffs – that the purpose of the OCHHP program certainly also included attempting to address the desire "to help farmers that were experiencing harms in 2007." Hence the statement in the Estimates Committee of the Legislative Assembly by M.P. Ernie Hardeman to the Minister that:

> What they explained to me was that because of a number of consecutive years of losses in their sectors, exacerbated by the high Canadian dollar and higher input costs, there was a very serious, significant and immediate need.

f. In my view, a very complete rebuttal of the plaintiffs' claims that "we didn't know until July 2014" is set out in the comparison chart appearing at Tab 29 of the Oral Argument Compendium of the Crown dated August 15, 2023, and I accept and adopt for my own reasons that comparison chart as demonstrating that the plaintiffs well knew that one of the purposes of the OCHHP program was "to help farmers that were experiencing harms in 2007."

g. Consequently, on the evidence before me, I find that, contrary to the suggestion in para. 31 *et seq.* of Ms. O'Neil's affidavit sworn May 15, 2023, and paras. 20-21 and 72 of the Plaintiffs' Factum, the plaintiffs were well aware in or about 2008 that one of the purposes of the OCHHP program was "to help farmers that were experiencing harms in 2007."

[109] For all of these reasons, I find that the plaintiffs had sufficient knowledge in or about 2008 to draw a plausible inference of liability to support an allegation of negligence against the Crown. I find that the plaintiffs knew or reasonably ought to have known in 2008 that, having regard to the nature of their alleged injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it. Moreover, I also find that a reasonable person with the abilities and in the circumstances of the plaintiffs first ought to have known that they had a claim against the defendants in or about 2008.

[110] On the basis of all of the evidence before the court, I find that the plaintiffs have not displaced the presumption created by s. 5(2) of the *Limitations Act, 2002*.

[111] In sum, I find that the Crown has established that there is no genuine issue requiring a trial as to whether the plaintiffs' claim is statute-barred by the two-year limitation period under the *Limitations Act, 2002*. I find that the plaintiffs' claim is barred by the two-year limitation period.

Conclusion

[112] For all of these reasons, I allow the Crown's motion for summary dismissal. The Crown has satisfied me that there is no genuine issue requiring a trial.

[113] In para. 128 of the Crown's Factum, the Crown makes the following submission:

> If the action is dismissed on the basis of the *CLPA*, the Crown seeks no costs per s. 11(8) of the *CLPA*. If the action is not dismissed on the basis of the *CLPA*, but is dismissed on the basis of the common law or the *Limitations Act, 2002*, the Crown seeks its partial indemnity costs. [Underlined emphasis in original.]

[114] In the instant case, I have found that the plaintiffs' claim cannot be maintained against the Crown because it challenges a policy decision. In other words, to use the language of para. 128 of the Crown's factum, I have dismissed the plaintiffs' action on the basis of the *CLPA* (as well as it having been commenced after the limitation period). As such, in accordance with para. 128 of the Crown's factum and s. 11(8) of the *CLPA*, the action is dismissed without costs.

[115] In any event, even if I had not dismissed the plaintiffs' claim on the basis of the *CLPA* but had otherwise found that the Crown should succeed, I still would have made no order as to costs. Given the circumstances of the plaintiffs, and the frustrations and hardships caused to them by reason of the deficiencies in the Crown program, this is not an appropriate case to make an order of costs against the plaintiffs.

[116] The action of the plaintiffs is dismissed without costs.

Original signed by "Justice J. Paul R. Howard"
J. Paul R. Howard
Justice

Released: April 2, 2024

CITATION: Mila Hills Swine v. Ontario (Minister of Agriculture), 2024 ONSC 1914
CHATHAM COURT FILE NO.: CV-16-00006554-0000
DATE: 20240402

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MILA HILLS SWINE LTD., URSULA VAN DEN HEUVEL O'NEIL, VEHOF FARMS INC., JOHANNES VEHOF, TINA VEHOF, PALM CREEK FARMS INC., WARREN CAUGHILL, JOANNE CAUGHILL, TOM MURRAY and CHERYL MURRAY

Plaintiffs

– and –

HIS MAJESTY THE KING IN RIGHT OF ONTARIO, AS REPRESENTED BY THE MINISTER OF AGRICULTURE, FOOD AND RURAL AFFAIRS and AGRICORP

Defendants

RULING ON
SUMMARY JUDGMENT MOTION

Howard J.

Released: April 2, 2024