SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

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Re:	**Divisional Court File No.: 381/08**	Pages	9

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COURT FILE NO.: 381/08
DATE: 20090114

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

A.C.J.S.C. CUNNINGHAM, JENNINGS AND JANET WILSON JJ.

B E T W E E N:	)	
	)	
WOODBINE ENTERTAINMENT GROUP	)	*P. David McCutcheon* and
	)	*Angela Casey*
Applicant	)	for the Applicant
- and -	)	
	)	
ROBERT HAMATHER, LLOYD NICHOLSON, GARY SMITH, GEOFFREY MOUND and ONTARIO RACING COMMISSION	)	*Ross R. Nicholson*
	)	for the Respondents, Robert Hamather,
	)	Lloyd Nicholson, Gary Smith and
	)	Geoffrey Mound
	)	
Respondents	)	*Luisa Ritacca*
	)	for the Respondent Ontario Racing
	)	Commission
	)	
	)	**HEARD at Toronto:** January 14, 2009

THE COURT:

[1] This application for judicial review brought by Woodbine Entertainment Group (WEG) seeks to quash the decision of the Ontario Racing Commission (ORC) dated June 18, 2008. The ORC ordered WEG to allow certain of the respondent owners' horses to enter races at the WEG race track.

Jurisdiction and standard of review

[2] There is no issue with respect to the jurisdiction of the ORC to hear this matter, or the appropriate standard of review.

[3] The ORC has jurisdiction pursuant to s. 7 of the *Racing Commission Act*, S.O. 2000, c. 20 to review the private actions of a race track in accordance with the principles enunciated by the Ontario Court of Appeal in *Ontario Harness Horse Association v. Ontario Racing Commission* (2002), 62 O.R. (3d) 44 at para. 48 (C.A.) (*Sudbury Downs*). The ORC, in making any decision, must recognize the interests of the public, including all participants in the industry, and the good of horse racing generally.

[4] It is not disputed applying the principles outlined in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9 that the standard of review applicable to the ORC's decision is that of reasonableness.

The facts and issues

[5] On April 14, 2008, a horse known as "Michelle's Power" trained by William Elliott tested positive for a banned performance enhancing drug known as Erythropoetin (EPO).

[6] Michelle's Power was not owned by any of the personally named respondents in this proceeding (the Owners). The Owners' horses were trained by Elliott and housed in his barn. None of the Owners' horses tested positive on the date of the test performed on Michelle's Power or in three other random tests conducted on other dates.

[7] WEG refused to accept racing entries for any of the Owners' horses trained by Elliott as at April 2008 on an indefinite basis. WEG relied upon its contract with the Owners, and asserted that by the terms of that contract, it had the absolute discretion to refuse the Owners' horses entry to their facility.

[8] EPO is a drug that is difficult to detect, as its effects can last up to six months after it is administered. There is no question that use of EPO brings the horse race industry into disrepute. Both the ORC and WEG share this view. WEG asserts that their denial of entry to the Owners' horses is necessary, given the public's concerns about the potential doping of these horses, to ensure that public perception as to the integrity of horse racing is maintained.

[9] The Owners sought an emergency hearing before the ORC on May 15, 2008 contesting WEG's denial of entry to their horses. *Viva voce* evidence was called. The principal of WEG testified, as did the Owners who are resident in Canada (one Owner is resident in England and did not testify).

[10] The ORC ruled in favour of the Owners and granted an interim order requiring WEG to allow the Owners' horses entry into WEG races pending receipt of written submissions about jurisdiction, and the release of the written reasons. The interim order was made final when written reasons were released on June 18, 2008. We interpret the phrase "permanent order" in the formal order to mean a final order. Obviously, the ORC decision does not grant immunity to the Owners' horses in the future.

The issues

[11] WEG raised the following issues:

(i) The ORC failed to consider relevant evidence with respect to the track history of the Owners and the Owners' knowledge of Elliott's prior suspension;

(ii) The ORC misapplied the test as to the onus of proof upon the Owners;

(iii) The ORC misinterpreted the terms of the contract between the Owners and WEG; and,

(iv) The reasons of the ORC considered as a whole are not reasonable and are not supported by the evidence.

Issue 1- Failure to consider relevant evidence

[12] The applicants make two arguments with respect to the evidence. First, WEG argues that the racing history and knowledge of two of the Owners should have been relevant to whether the Owners met the burden of proof incumbent on them in the inquiry before the ORC. Second, because of the knowledge of these two Owners, the ORC erred in finding in paragraph 54 of their reasons that the Owners were "blind-sided" by WEG's response to the positive drug test at Elliott's stables.

[13] With respect to the first argument, the evidence is clear that two of the four Owners knew that Elliott had been subject to prior suspensions. The detailed training history prepared by WEG with respect to each of the Owners suggests that in the past they may have had other horses in the care of trainers who had also been subject to suspension. WEG argues that the ORC erred in finding at paragraph 48 that "after the fact evidence with respect to the applicants' racing records" is irrelevant.

[14] We disagree.

[15] There is no allegation that any of the Owners ever had any horse trained by Elliott or any other trainer test positive for prohibited drugs in spite of, in the case of some of the Owners, an extensive history in horse racing. Although Elliott had been previously suspended, he had served his penalty, and was a licenced trainer in good standing when the positive drug test on Michelle's power emerged. We conclude that the Owners were entitled to train their horses with a trainer of their choice who is in good standing in accordance with the legislation.

[16] Second, the applicants take issue with the finding in paragraph 54 of the ORC's reasons that the Owners did not know of Elliott's prior suspension for use of prohibited drugs:

> "WEG's rejection of entries fails because the process is fundamentally flawed. Without prior notice or knowledge, the applicants were in sporting terms "blind-sided". On fairness and as a matter of principle, WEG's response cannot be allowed to stand."
>
> [emphasis added]

[17] Although it appears that two of the four Owners did have knowledge of Elliott's past history, in our view, this fact does not undermine the reasonableness of the ORC's conclusions. We also conclude, contrary to the submission of WEG, that it is not relevant or necessary in the facts of this case to go through the entire racing record of each of the Owners including all previous trainers in assessing whether the principles of *Sudbury Downs* have been met. Had it been one of the Owners' horses that tested positive, this evidence with respect to the training history and knowledge of the owner in question may well have been relevant.

[18] We conclude that the ORC reasonably considered the relevant evidence in reaching their decision.

Issue 2: Misapplication of the burden of proof

[19] The applicants argue that although the ORC enunciated the correct test with respect to the Owners' burden of proof before the ORC, it failed to properly apply that test.

[20] The Divisional Court in *Friedman v. Ontario Racing Commission*, [2008] O.J. No. 1706, cited with approval the test that had been enunciated by the ORC in its decision in *Lamoureux et al. v. Ontario Racing Commission*, November 8, 2002, Ruling #COM SB 22/2002:

> In sum we have concluded that the onus of proof in this case rests with the applicants and in order to upset the decision of the [race track], they must satisfy us on clear and convincing or cogent evidence that they should be permitted to return to race.
>
> [emphasis added]

[21] The applicants rely upon the principles enunciated in another ORC decision in *Antonio Chiaravalle*, Ruling Number Com SB 027/2008, page 9, para. 57. WEG asserts that there was a positive onus upon the Owners to make inquiry and take steps to avoid improper conduct by Elliott, and that this obligation was relevant to the ORC's analysis of whether the Owners' had met the applicable burden of proof. Paragraph 57 of *Chiaravalle* provides:

> The standard of care imposed by the rules of racing must vary with the existing circumstances. Perhaps with a first time owner and a reputable trainer the instruction "keep it clean" may suffice to discharge the owner's obligation relating illegal substances. However, as the circumstances change, the owner's burden may become more onerous. Those changing circumstances could include
>
> ...the trainer has a record for positive tests and suspensions.
>
> ...the owner has accumulated a record for positive tests notwithstanding his repeated instructions to "keep it clean"
>
> ...returning to trainer relationship with a trainer who has ignored instruction to "keep it clean".
>
> [emphasis added]

[22] The facts in *Chiaravalle* provide context for the guidelines provided in paragraph 57. Chiaravalle was the owner of the horse that tested positive for use of prohibited drugs. He had four prior violations with other horses. The other decision relied upon by the applicants, *Friedland, supra*, also involved an owner whose horse tested positive, and not for the first time. The burden of proof upon an owner seeking to set aside a racetrack decision denying his or her horse entry is obviously higher if that horse has tested positive for prohibited drugs, particularly if the owner has a problematic prior history.

[23] By way of sharp contrast, the Owners' records in this case are unblemished. There is no prior history of any positive test by any of their horses. They testified to this effect before the ORC.

[24] The findings of the ORC with respect to the integrity of the Owners are important and are worth repeating.

> Their commonality is the relevant feature:
>
> ...none has ever had a horse with a positive test;
>
> ...no one has been the subject of ORC suspension or discipline;
>
> ...there is no evidence of any of the applicants suggesting, requesting or directing that a trainer, including Mr. Elliott, use any improper drug, medication or substance on any of their horses or of the applicants conspiring, condoning or acquiescing in such conduct;
>
> ...there is no evidence of any of the applicants having knowledge or belief of such administration of a substance on their horse by Mr. Elliott or anyone else or of joining Mr. Elliott's stable for any improper purpose;
>
> ...there is no suggestion in evidence that the "investigative information" underlying the out of competition testing related to any of the applicants;
>
> ...all are men in their sixties at or near retirement following successful business careers;
>
> ...no allegation is made nor is there a scintilla of evidence suggesting bad character by any of them;
>
> ...they are capable of being seen as typical of the quality of person the industry so badly needs in order to survive – legitimate, interested and financially able to support that interest.
>
> Having not detailed the evidence as finder of fact, it is important to record impressions of the applicants and their evidence. Individually and as a group they presented as honest, truthful and reliable, if somewhat chagrinned upon finding themselves without notice or fault in this predicament.

[25] In our view, the ORC correctly applied the test and the burden of proof. The ORC findings of fact are "clear, convincing, cogent evidence" why WEG's decision should be overturned. The ORC specifically concludes at paragraph 65: "The applicants have discharged their burden of proof."

Issue 3: Misinterpretation of the contractual terms between the parties

[26] WEG relied upon the governing contract between the parties to deny entry to the Owners' horses trained by Elliott to the WEG facility. Clause 1.1(a) provides:

> "1.1(a) It is a privilege, not a right, to use the Premises and Race at the Racetracks. Any conduct determined by WEG, in its sole and absolute discretion, to be injurious to the sport of horse racing or not to be in the best interest of the sport of horse racing, may result in the imposition of a penalty in accordance with Section 7.1 of the Rules and Regulations. Section 7.1 allows for suspension of privileges or eviction from the premises."
>
> [emphasis added]

[27] Notwithstanding this contractual term, the ORC has jurisdiction pursuant to s. 7 of the *Racing Commission Act* to review a race track's private actions in accordance with the principles in *Sudbury Downs*. The ORC must recognize the public interest, including all participants in the industry, including owners and race tracks, and the good of horse racing generally. Section 19 of the *Racing Commission Act* imposes the duty on a licensee such as WEG to act in the public interest.

[28] The ORC concluded that the decision of WEG in the facts of this case was unfair, arbitrary and contrary to the public interest and the good of horse racing in general. The ORC reached the following conclusions:

> 30. There can be no public interest in permitting overzealous tactics in the war against illegal substances to die roughshod over the rights of licensees who have done nothing wrong.
>
> 31. The WEG commitment to protect integrity and possibly to purge the Robinson Connection cannot ratify punitive measures based on suspicion.
>
> 37. Owners are entitled to fair treatment.
>
> 38. The applicants met all announced standards set by the ORC and WEG. Absent notice and given the gravity of the consequences, the appearance or fact of the dominant player changing the rules in mid-game is to be avoided."

[29] In our view, the ORC properly applied the test in *Sudbury Downs* recognizing its obligations with respect to the public's interest in the fairness and integrity of horse racing, in particular as these obligations affect both horse owners and race tracks.

Issue 4: The ORC's reasons as a whole are unreasonable

[30] We disagree with the applicant's submission that the ORC's reasons considered as a whole are unreasonable. We are mindful of the test with respect to reasonableness enunciated at paragraph 47 of *Dunsmuir*, *supra*:

> Reasonableness is a differential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[31] We conclude without hesitation on the facts of this case that the conclusions reached by the ORC are reasonable, in accordance with the principles in *Sudbury Downs,* and are well within the range of acceptable outcomes and are defensible in fact and law.

[32] For these reasons, the application for judicial review is dismissed.

Costs

[33] At the conclusion of argument, we advised counsel of the outcome of this application prior to releasing these reasons. We therefore heard submissions with respect to costs. In our view, the reasonable partial indemnity costs in favour of the Owners should be fixed and payable in the amount of $12,000.00, inclusive of GST, payable by WEG forthwith. We conclude that the reasonable costs in favour of the ORC should be fixed in the amount of $10,000.00, inclusive of GST, payable by WEG forthwith.

[34] We thank counsel for their submissions.

ACJ

A.C.J.S.C. CUNNINGHAM

JENNINGS J.

JANET WILSON J.

Date of Reasons for Judgment: January 14, 2009
Date of Release:

JAN 27 2009

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A.C.J.S.C. CUNNINGHAM, JENNINGS AND JANET WILSON JJ.

B E T W E E N:

WOODBINE ENTERTAINMENT GROUP

Applicant

- and -

ROBERT HAMATHER, LLOYD NICHOLSON, GARY SMITH, GEOFFREY MOUND and ONTARIO RACING COMMISSION

Respondents

REASONS FOR JUDGMENT

Date of Reasons for Judgment: January 14, 2009

Date of Release: JAN 27 2009