



COMMISSION HEARING

TORONTO, ONTARIO – JUNE 28, 2010

**IN THE MATTER OF THE RACING COMMISSION ACT S.O. 2000, c.20;
AND IN THE MATTER OF THE APPEAL AND REQUEST FOR HEARING BY
SUDBURY DOWNS**

On April 23, 2010, the Director issued a Notice of Decision wherein he declined to approve a request from Sudbury Downs to use funds from the Sudbury Downs purse account to pay for stall expense credits to trainers who stable and race their horses at Sudbury Downs further to an agreement between Sudbury Downs and the Northern Horsemen's Association (NHA).

On April 23, 2010, Sudbury Downs filed a Notice of Appeal and on April 25, 2010, the Northern Horsemen's Association requested an opportunity to make submissions should a hearing be scheduled.

On June 29, 2010, a Panel of the ORC, comprised of Chair Rod Seiling, Vice-Chair James Donnelly and Commissioner Brenda Walker was convened to hear the appeal.

Maureen Harquail appeared as Counsel for the Administration. Catherine Beagan-Flood and Iris Antonios appeared as Counsel for Sudbury Downs. Bob Bodkin appeared on behalf of the Northern Horsemen's Association.

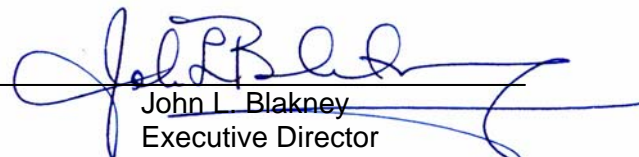
Upon considering the evidence of Steven Lehman, Wendy Hoogeveen, Patrick MacIsaac, Andrew MacIsaac and Bob Bodkin, and upon reviewing the exhibits filed and upon hearing the closing submissions, the Panel ruled as follows:

- i. The Director's decision that the proposed use of purse funds for stall expense credits would have been an improper use of purse funds is confirmed;
- ii. The Director's decision is, however, varied and the stall expense credit is allowed for the 2010 racing season.

The Panel's Transcript and Reasons for Decision are attached to this Ruling.

DATED at Toronto, this 13th day of July 2010.

BY ORDER OF THE COMMISSION


John L. Blakney
Executive Director



REASONS FOR DECISION

Overview

1. Sudbury Downs appealed a decision of the Director of the Ontario Racing Commission (ORC) wherein he declined to approve a request from the track to use funds from the Sudbury Downs purse account to pay for stall expense credits (SEC) to trainers who stable and race their horses at Sudbury Downs as per an agreement negotiated between the track and its horse people as represented by the Northern Horsemen Association (NHA). Furthermore the track appealed the Director's order to keep the stalls open for rent by horse people and capping the rent. A de novo hearing was held on June 29, 2010. The appeal was dismissed with written reasons to follow.

2. The SEC payments withdrawn from the Sudbury Downs purse account are substantial. \$200,305.75 in 2009 and \$166,400.00 in 2008.

3. The SEC is a mechanism whereby trainers who rent stalls (\$200 or \$225 per month) from the track can earn those funds back. For each start the trainer makes in a race from that stall, he/she is paid \$50 from the purse account. The payments are capped at \$200 per month. Three results flow. They are as follows:

- The track benefits by avoiding any contribution to the “rebate” all the while receiving full stall rent;
- Trainers' costs for stabling are reduced; and
- The purse account is depleted to the prejudice of those persons having a contingent interest in purse funds.

The \$50 payment or credits are referred to as “rebates”. This is a misnomer. The track rebates none of the stall rent paid to it.

Background

4. Maureen Harquail, legal counsel for the ORC along with the appellant's counsel, Catherine Beagan-Flood, assisted by Iris Antonios, provided the Panel with an Agreed Statement of Facts. It is contained in the Commission's Factum, Exhibit #2, numbers one through eight.

5. Ms. Harquail submitted that the Director, in making his decision, relied upon four reasons. They are as follows:

- it failed to meet the test as per SB Rule No. 7.16.05 (d)
- it was in conflict with existing board policy as per ORC Directive 5/07
- it was outside the parameters of the Georgian Downs decision
- its impact on the industry as a whole

6. Ms. Beagan-Flood submitted that the Director had not respected the rules of procedural fairness in making his ruling. She contended that there was an onus on him to provide an even higher level as he failed to allow the track access to the Georgian Downs procedures and the



race dates process. It was her position that he did not have the legal authority to order the track to keep its stalls open and to cap the rent payments.

7. On site stabling in its early years, Sudbury submitted, was related to the sustainability of the track. Due to its northern location, it helped ensure a reliable number of horses were available. The 2003 horse people agreement was the first with the track post introduction of the Slots at Racetrack Program. The track had been prepared to close its stabling. On that basis, the NHA had agreed with the track for an SEC. That two-year contract, on expiry, was replaced with a similar contract in 2005 that expired in 2009. Every year through both contracts, the ORC Board had approved the SEC disbursement until this year.

8. Ms. Beagan-Flood submitted that Rule 7.16.05 has not changed except that the approval is now by the Director. According to her, the SEC process had been open and transparent. The NHA membership vote on the 2010 contract (90% pro) was an indication of the level of support by the membership.

9. She submitted firstly that the Directive #5/07 was not applicable as this matter did not relate to a non betting race and secondly that benefit threshold has always applied but that the Georgian Downs case was different and as a result had no bearing. She added that the race date project may impact purse funds but there had been no such prior communication with Sudbury.

10. The track received two separate communications from the Commission related to a review of the SEC. The first letter (Ex. 3, tab 20) dated May 29, 2008, wherein the track was advised the Board would be reviewing the SEC for 2009 and if the track was contemplating continuing the practice for 2009, it should include the application for approval in its 2009 racetrack licence application which is normally filed in late August that same year. No evidence was led that the track complied. The second notice was communicated to the track in a letter (Ex. 3, tab 23) dated January 15, 2009. The letter advised that the "Board has instructed that the concept of stall rent credit be reviewed. As a result it would be recommended that this review take place prior to any inclusion of stall rent credit in any future agreement." The track was asked to contact Wendy Hoogeveen, Director Industry Development and Support. No evidence was led that the track complied. The track did not share this information with the NHA.

11. The NHA received a letter from Steve Lehman, CAO for the ORC (Ex. 1, tab 12) dated February 11, 2010. This letter was in response to a letter from the NHA (Ex. 1, tab 11) enquiring about the possible use of purse funds. That letter included information that the current SEC benefits were no longer equitable or fair. Mr. Lehman wrote, "to earn the Director's approval, one would have to demonstrate that the use of purse account monies would generate benefit to the horse people and that benefit is shared by all or a sizeable proportion of the horse people racing at Sudbury Downs." This information was not shared with the track.

12. Mr Lehman's evidence was that the Director was not satisfied the request to use purse monies to fund the SEC in the new contract satisfied the requirements of 7.16.05 (d). Meeting a certain benefit threshold does not translate into an automatic approval. Regarding the Georgian Downs matter, the track and horse people presented a formal agreement requesting purse funds for maintenance of the track. The Director rejected that request on the same basis. The race date process had grown over the eight months to include economic issues such as purses.



The practice of allowing the purse fund to pay for stall rent had been allowed so as not to interfere in a multi year agreement. With the new agreement concluded between the track and NHA, this was the first time for the Director to review.

13. Ms. Harquail introduced Exhibit 6, a letter from one Edward Bassis, dated March 22, 2010, wherein he objected to the approval of purse funds from the Sudbury Downs purse account to pay for stall rent. His reasons were that purse funds should be used for purses only, that those funds are for everyone who races at the track not just for a limited number, and that it creates a possible scenario that every track in Ontario could use purse funds for other purposes than purses.

14. It was unclear from Mr. Lehman's attempts to provide estimates as to how many individuals benefited from stall credits as his numbers were disputed by the appellant. Mr. Bodkin's testimony in this area was not disputed. His evidence was that about fifty per cent of the horses that race at the track stable there. Of the 145 stalls rented from the track, about 80 horses are stabled in them. The benefit of the SEC back in 2003 is no longer present.

15. Sixty-nine of the one hundred and ten eligible voters in the NHA, voted on the SEC matter with 90% voting in favour. According to Mr. Bodkin, the NHA acquiesced in rather than agreed to the SEC in any form other than universal. Mr. Bodkin went on to explain that the NHA negotiating team was instructed at the 2009 general membership meeting that the SEC provision should be changed to include "all horsemen racing at Sudbury Downs or none". The NHA was unable to negotiate that universal payment (hitching fee) as it received feedback from Mr. Lehman (Ex. 1, tab 12) that such a request would be best considered in a "breed-wide context – not for a single agreement at one track."

16. Ms. Hoogeveen confirmed the notice aspect of the SEC not being automatically approved as per her testimony in the Georgian Downs hearing. She did so on the basis that she was aware of the letters related to Mr. Bodkin (Ex.1, tab 11 & 12) as she provided some assistance in the response but she was not aware of who all actually received the letter.

17. In regards to the order to keep the stalls open, she referenced precedent orders from the Commission related to events at Windsor Raceway and Flamboro Downs. She had personal knowledge relative to the Flamboro matter, and stated the action was taken to ensure there was adequate time for horse people to find alternative stabling.

18. Pat MacIsaac, President of MacRanald Enterprises, the track operator, testified that there was no value in contacting the ORC ahead of any contract with the NHA. His reasoning was that until a contract was finalized one would not know its contents notwithstanding the previous communications from the Commission. His evidence included that a backstretch community was seen as a means to help develop a fan base for horse racing.

19. With regard to the impacts on the industry, he claimed he only was aware of any purse discussions via his participation in industry meetings that occurred over the past month. He admitted that Sudbury has been represented over the past eight months in the race date process by another privately owned track.



20. Andrew MacIsaac, Director of Operations for the track, confirmed his involvement in the negotiations with the NHA. He unsuccessfully tried to reach the Director on March 23, 2010, in order to seek guidelines related to procedures and process for the SEC. He contacted the ORC a number of times and finally received a response to get an agreement and submit it. The Commission, he testified, never called the track to seek information. It was his position that other than Directive 5/07 Sudbury Downs had not received any communication about the SEC from the ORC notwithstanding the two letters referenced earlier (Ex. 3, tabs 20 & 23). Regarding the Board policy (Ex. 1, tab 8) that purses are for only pari-mutuel related matters, his answer was that the directive only referenced non betting events.

Issue

21. Was the request from Sudbury Downs to use its purse account to fund the proposed SEC within the terms of the trust impressed upon purse funds? Does the SEC approval since 2003 preclude or restrict ORC intervention? Did the Director breach “legitimate expectation” and “procedural fairness” considerations? Did the Director exceed his authority in ordering the track to keep open its stalls and capping the amount of rent the track could charge?

Decision

22. After carefully listening to the testimony, reviewing the evidence and submissions made, the Panel confirms the Director’s decision that the proposed use of purse funds for stall credits would be improper.

23. However, the Panel varies the Director’s decision and will allow the stall expense credit as outlined in the proposed 2010 contract between Sudbury Downs and the NHA to exist for the 2010 racing season at the track. This time period is in recognition of the unique circumstances at Sudbury Downs and the contractual provision, “As a condition precedent to the validity of this agreement it is required that the ORC accept and approve the payment of stabling expense credits.” That time-limited approval will ensure opportunity for racing to continue at Sudbury Downs for the 2010 racing season to the benefit of the track, horse people and the public. It will allow Sudbury Downs and the NHA ample time to negotiate contractual remedies to cover costs associated with the operations of the track’s backstretch beginning in 2011. The approval for SEC payments during the 2010 racing season impacts on the “legitimate expectation” submission.

24. Given this decision, the Director’s order related to the continued operation of the track’s backstretch and stall rents costs no longer applies.

Reasons for Decision

25. Purse monies are the lifeblood for horse people. The Georgian Downs decision (SB Ruling No. 001/2010) identified the purse fund trust, the terms of the trust under Rule 7.16.05 (d), the importance of a secure purse structure, and the two stage test under subsection (d).



26. The rationale underlying the two-stage test is that a course of action may provide a “benefit” under subsection (d). Whereas another course of action may provide a far greater “benefit” and thereby would be in the best interest of racing. That secondary consideration is for the Director.

27. Purse account funds are impressed with a trust in favour of persons beneficially entitled. The essential characteristic of those funds is equality of opportunity to compete for entitlement. All licensed owners have a contingent interest in the funds. That contingent right vests in specific owners who by meeting the qualifying standards and conditions for a particular event, race and finish “in the money”.

28. The essence of Sudbury’s proposal is to award purse account funds to a limited class of starters, whether or not they place in the first five. Through the SEC mechanism, owners who race successfully are conscripted to divert a portion of their prospective purse earnings as a subsidy to a narrow and pre-determined segment of the racing community, that being stall-renting trainers who have raced sufficiently to have full or partial entitlement to the “rebate”.

29. No universal starting (hitching) fee has been adopted by Standardbred racing in Ontario. Such a radical revision would require input by the entire industry as Mr. Lehman correctly communicated to the NHA. The selective starting fee suggested is unequal and thereby unfair. Being unfair, it cannot pass the threshold test under SB Rule No. 7.16.05 (d): “For the benefit of racing or will provide benefits to all or a sizeable proportion of horse people who participate at meetings of the Association”.

30. The submission, premised on past ORC approval, that on the grounds of legitimate expectations and procedural fairness ORC approval must issue, fails. The original ORC approval in 2003 was granted in these circumstances:

- Sudbury Downs and some of its horse people had a turbulent relationship at times as evidenced by the Sudbury Downs case; (OHHA v ORC) (2002) 62 O.R. (3d) 44.
- Sudbury Downs through isolation and in its early stages of development required this SEC support to stabilize its horse supply;
- The 2003 contract was the first since the slots program became operational in November of 1999;
- Sudbury Downs was seeking to increase its horse racing fan base and the backstretch community was seen to be of assistance; and
- A change in the backstretch operation was contemplated (closing) and the SEC was devised by the track and the NHA.

31. Nowhere else in Ontario racing (then or since) has there been an approval for such use of purse funds. No precedent elsewhere in standardbred racing is known. In light of Sudbury’s isolation and developing status, approval was granted. That approval was not permanent as was self evident from the requirement for review and approval in any subsequent year. Furthermore, the Commission communicated with Sudbury on two prior occasions related to those approvals on a go forward basis.



32. The following circumstances led to the refusal by the Director for 2010:

- Timing: the 2005 contract expired 12/31/09. A review at expiration would not interfere with a multi-year contract;
- The responsibility for granting or refusing approval shifted by rule change in 2007 from the ORC Board to the Director (SB Rule No. 7.16.05);
- The parties to the contract were well aware of the necessity of obtaining approval because it was sought annually and further the 2010 contract was to be null and void if ORC approval was not forthcoming;
- By ORC letter dated 1/15/09 Andrew MacIsaac was advised, upon instructions from the Commission, the concept of an SEC payment from the purse funds was to be reviewed. This was in contradistinction to a review of the negotiated terms of the SEC in a proposed contract;
- The method of calculation of the SEC was being changed from a percentage of the stall rent to a flat amount - a change that would require consideration;
- On 2/11/10 the ORC responded to Robert Bodkin of the NHA in regard to an inquiry about funding from the purse funds, firstly the cost of the track simulcast signal and secondly a starting (hitching) fee for all starters in a race;
- The Sudbury track has evolved beyond the experimental stage;
- The NHA expressed dissatisfaction with the unfair element of the SEC through a letter from Mr. Bodkin to the ORC dated 9/7/09; and
- This was the first review of the concept by the Director pursuant to the amended rule, presenting an opportunity for a fresh perspective.

33. Regarding the ORC advice to Andrew MacIsaac to promptly submit the application for approval, this advice was well founded as a pathway to a prompt decision. The Panel notes that the decision by the Director was rendered within a week.

34. Directive 5-2007 has application only to non pari-mutuel events. It is irrelevant to the SEC other than as further evidence of the trust terms for purse funds.

35. Para 35 of the applicant's factum states. "The Director erred in failing to approve a purse account disbursement that the NHA and its members had determined to be of benefit to them and to racing." This is error of significant proportion. A similar claim was the subject of comment in the Georgian Downs reasons. What right do "A" and "B" have to contract for payment of funds held in trust for "C"? The comment in para 37 of the Georgian Downs decision applies.

36. The Commission, per se, takes no position as it relates to tracks charging for stall rents. Backstretch operations are an operating cost to tracks. How they account for those costs is a business matter each must address. If a track concludes it wants horse people to bear some of those costs there are contractual remedies available that do not involve purse funds. The Commission rightly has no fiduciary role in this area, and the parties can easily address matters such as stall rent.



37. The SEC as proposed by Sudbury Downs meets neither the test of SB Rule No. 7.16.05 (d) nor the Board's policy on the use of purse funds. The Director correctly concluded both and ruled accordingly.

38. In terms of benefit, it is clear from the NHA evidence that the SEC only benefited some horse people. Even if that number were much higher than the approximate 50% beneficiaries, the Panel agrees with Mr. Lehman's testimony that simply passing a benefit threshold does not equate to the Director automatically giving approval. The 90% vote in favour by the NHA voters is allotted its appropriate weight given that the NHA has traditionally had very little leverage negotiating contracts with the track and the alternative was no stalls at the track or no contract which meant no racing. The Director has the responsibility when considering such requests to also consider what other factors are at play, be they local, regional or provincial. Continuing to allow the SEC to be funded by the Sudbury Downs purse account would put the Commission's policy of only allowing pari-mutuel related disbursements in jeopardy. The Panel notes this is the third request this year for purse disbursements that do not meet the threshold of SB Rule No. 7.16.05 (d). (Mr. Bodkin's enquiry about the simulcast signal, Sudbury's SEC program and Georgian's winter track maintenance)

39. Comment was made by the appellant that the Commission never called to seek more information. The onus is on the licensee to provide the Commission with all the information he/she believes it will need to make an informed decision on the requested approval.

40. The appellant submitted incorrectly that this case was different from Georgian Downs. Sudbury Downs negotiated a contract with the NHA that included the disbursement of purse funds just as Georgian Downs and OHHA did. Both contracts were then submitted post facto to the ORC for approval. The only difference was that Sudbury Down recognized the need for ORC approval. As per the Georgian Downs decision, "the expenditure of horse people's trust funds is wrong in both form and substance." The form is wrong in that prior to concluding the contract no opportunity was given to the guardian of the trust fund, the Commission, to examine the reasonableness despite two separate communications to the track. The substance is wrong as neither party has any legal right to direct the use of the funds. Therefore, no deference is owed to either party. It is reasonable to conclude despite suggestion to the contrary, that the Commission would not rubber stamp the request.

41. The appellant argued that it had not had the opportunity to comment on Georgian Downs. It is reasonable to conclude that Sudbury Downs was well aware of the Georgian Downs hearing and the issues at stake. It was well within the abilities of Sudbury Downs, given both Pat and Andrew MacIsaac are lawyers, to seek standing and or intervener status at that hearing. The claim that Sudbury Downs was denied procedural fairness must fail.

42. The appellant claimed to be unaware that the race date moratorium process has grown to include purse funds. In as much as Sudbury Downs had a representative attend the meetings over the past eight months, it is reasonable to conclude that the track would have been updated on such an important turn. It is important to the overall success of this process that the Commission not take any action that could impact on the work in process.



43. The ORC has a policy of not becoming involved in contractual matters between track and horse people. Having stated this, it can and will become involved if any of the following is at risk.

- health and welfare of the horse
- safety of participants
- public interest

Based on the authority vested in the Commission under the Racing Commission Act, under any of these aforementioned circumstances the ORC should act to intervene.

44. For greater certainty for the future, it is reasonable to conclude that the Director issued his order related to the stalls remaining open at the track to ensure there was safe and secure stabling available for trainers to house their horses in the interim. This practice has precedent at both Flamboro and Windsor.

45. In the course of discussion about purse funds, it may be appropriate to comment on ORC funding. As was abundantly conveyed to the industry, for five years ORC costs have flat lined. Revenues declined. By statute, the industry is self funding and so bears the cost of its governance and regulation. By nature, the industry requires governance to survive. The choice is governance or chaos. An equitable division of the funding shortfall amongst stakeholders including horse people required contributions from purse funds. This contribution, although subject to predictable objection from special interest industry groups (objections having been received from WEG, COSA, OHHA, NHA, NCRHHA, HPBA) was clearly within SB Rule No. 7.16.05.

DATED this 13th day July 2010.

A handwritten signature in cursive script that reads "Rod Seiling".

Rod Seiling
Chair

ONTARIO RACING COMMISSION

STANDARD BRED HEARING

IN THE MATTER OF THE APPEAL AND REQUEST FOR HEARING OF

SUDBURY DOWNS,

Held Before:

Rod Seiling, Chairman

James Donnelly, Vice Chairman

Brenda Walker, Commissioner

These are an excerpt of the proceedings in the above mentioned matter held before The Ontario Racing Commission, Re: **SUDBURY DOWNS**, taken before Toronto Court Reporters, Suite 1410, 65 Queen Street West, Toronto, Ontario, at 10 Carlson Court, Suite 400, Toronto, Ontario, on the 28th day of June, 2010.

Appearances:

Maureen Harquail, for the Ontario Racing
Commission Administration

Catherine Beagan Flood &
Iris Antonios, for Sudbury Downs

1 Hearing continued ...

2 MR. CHAIRMAN: All rise please. Please be seated. After
3 carefully listening to the testimony, reviewing the evidence and submissions
4 made the panel confirms the Director's decision that the proposed use of
5 purse funds for stall expense credits would have been an improper use of
6 purse funds. However, the panel varies the Director's decision and will allow
7 the stall expense credit as outlined in the proposed 2010 contract between
8 Sudbury Downs and NHA that exists for the 2010 racing season at the track.
9 This time period is in recognition of the unique circumstances at Sudbury
10 Downs and will ensure racing continues at Sudbury Downs for the 2010
11 racing season for the benefit of the track, horse people and the public and
12 will allow Sudbury Downs and the NHA ample time to negotiate contractual
13 remedies to cover costs associated with the operations of the track's back
14 stretch beginning in 2011.

15 Given this decision the Director's orders as related to operations
16 of the track's back stretch and stall rental cost no longer apply. Written
17 reasons are to follow. Questions? I think it is pretty clear. Thank you.

CERTIFIED CORRECT: _____
RAYMOND P. MACDONALD, B.A., CVR
Commissioner of Oaths