

COURT FILE NO.: 298/08

DATE: 20081003

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CARNWATH, SWINTON & RAY, JJ.

BETWEEN:

GERALD STERNBERG

Applicant

- and -

ONTARIO RACING COMMISSION

Respondent

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)
) *J. Thomas Curry & Emily McKernan, for*
) *the Applicant*
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) *Brendan Van Niejenhuis & Luisa J.*
) *Ritacca, for the Respondent*
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) **HEARD AT TORONTO: Sept. 29, 2008**

CARNWATH J.:

[1] Gerald Sternberg applies for judicial review of a decision of the Ontario Racing Commission ("the Commission") in which it ordered that he be prohibited from appearing as counsel before the Commission, pending receipt from him of an unqualified apology to the Commission. The apology was demanded as a result of Mr. Sternberg's attack on Rod Seiling, Chair of a Commission hearing before which Mr. Sternberg appeared on behalf of two clients.

[2] The issues put before us were:

- (a) Was the hearing before the Commission conducted in such a way as to raise a reasonable apprehension of bias towards Mr. Sternberg?

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- (b) Did the Commission exceed its jurisdiction by conducting a form of contempt hearing?
- (c) Was the sanction imposed inappropriate?
- (d) In the event the Panel's decision is quashed, should the matter be sent back to the Commission for a new hearing?

[3] Our answer to question (a) is "YES". Our answer to question (b) is "YES". Question (c) requires no answer. Our answer to question (d) is "NO".

BACKGROUND

[4] On March 6, 2008, a Panel of the Commission was convened to hear the appeal of licensees, Robert Zubkoff and Kelly Lester ("the hearing"). The licensees were represented by Mr. Sternberg. During the course of the hearing, the Administration called five witnesses. Mr. Sternberg called no evidence on behalf of his clients.

[5] During the course of the cross-examination of Paul Harrison, a judge of the Commission, Mr. Sternberg attacked the Chair of the Commission in response to a direction given by the Chair during his examination:

THE CHAIRMAN: Mr. Sternberg, I'm being very lenient. This is the second time you've gone over the same thing.

MR. STERNBERG: Sir, do you know what cross-examination is? Do you have any legal training? I would like to know whether or not you have any legal training.

THE CHAIRMAN: Don't lecture me.

MR. STERNBERG: Because there is no one here beside you to tell you what the rules are.

THE CHAIRMAN: Sir –

MR. STERNBERG: All I know is you were a hockey player in your day. Have you had legal training to say what cross-examination is? I am tired of listening to you when you don't even know the rules! You've had no legal training!

THE CHAIRMAN: Sir, I'm trying to be as lenient as possible –

MR. STERNBERG: Well, cross-examination is very lenient. You can ask a number of times.

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THE CHAIRMAN: Yes, you can, and he's answered you twice the same way, that's all I said. I said –

MR. STERNBERG: He has not answered the same way.

THE CHAIRMAN: Well, my notes say he did, but continue on.

[6] Following his exchange, Mr. Sternberg continued his cross-examination and the hearing was completed without further incident. At no time during the hearing did Mr. Sternberg apologize to the Chair for his outburst. At the conclusion of the hearing, the Panel reserved its decision. In reasons released March 13, 2008, the Panel concluded that Mr. Sternberg's clients had breached the Rules of Standardbred Racing. The decision is currently the subject of an application for judicial review.

[7] On March 27, 2008, Mr. Sternberg was provided with Notice that his conduct during the hearing would be reviewed by the Commission during its monthly meeting on April 24, 2008. In particular, Mr. Sternberg was notified that the Commission would consider whether a response to his conduct was appropriate and, if so, what form the response should take. In the Notice, the Commission outlined the three potential responses it would consider:

1. Referral to the Divisional Court for consideration or contempt and penalty;
2. Referral to the Law Society of Upper Canada for Disciplinary Action; or
3. Disposition by the Ontario Racing Commission under its jurisdiction to control its own process.

[8] On April 9, 2008, Mr. Sternberg requested that the matter be put over to another date, as he was scheduled to be outside of the jurisdiction on April 24, 2008. Mr. Sternberg's request that the matter be re-scheduled was denied without reasons. The meeting proceeded on April 24, 2008 with Mr. Sternberg in attendance.

[9] A Panel of six Commissioners, chaired by the Honourable James Donnelly, presided over the meeting. While Mr. Seiling did not form a part of the Panel, the two other Panel members from the hearing (Brenda Walker and Bernard Brennan) were part of the Panel.

[10] The applicant and counsel for the Ontario Racing Commission Administration were invited to make submissions. During his submissions, Mr. Sternberg apologized three times for his statements at the hearing:

It is unfortunate that I spoke that way. I apologize to and would like to apologize to the Chairperson for the way I spoke and I would suggest that I would hope that we could move on from there
[.]

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Notwithstanding those comments and indicating that what I felt was unfair it was still inappropriate for me to react in that way. ... I am sorry for that exchange taking place but as I say, this is the first time in all my career that this has happened and I certainly, as I said before, I wanted to apologize to the Chair for that exchange but it was something that was brief and we were able to continue on and finish the matter... . I'm not asking or suggesting that my actions were appropriate. They are not and I've indicated that [.]

I took it [that my comments were only reflected on the Chair] but if it was reflective on other members of the panel, which I hope it wasn't, I would apologize to them as well.

[11] Following submissions from the applicant and counsel for the Administration, the Chair indicated that the Panel would "rise for ten minutes". The video recording of the proceeding reveals that the Panel rose for eight minutes, reconvened and rendered its decision. The decision was read partially by the Chair of the Panel and partially by Jane Garthson, one of the Commissioners. The reading of the decision took approximately twenty-five minutes. For reasons discussed later, we find the decision of the Panel was pre-prepared and had been typewritten in advance. The decision was identical to the fifteen-page Reasons for Decision released in writing by the Commission the following day.

[12] The Commission, citing the ability provided to it by s. 23(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 ("SPPA") to control its own processes, ordered:

THAT Gerald Sternberg be prohibited from appearing as Counsel before the Ontario Racing Commission, including Judges and Stewards, pending receipt by the Ontario Racing Commission of an unqualified apology by Gerald Sternberg.

(a) **Was the hearing before the Commission conducted in such a way as to raise a reasonable apprehension of bias towards Mr. Sternberg?**

[13] As noted earlier, we find the reasons for the Commission's decision to have been prepared in advance of the hearing. They consist of fifteen pages of typewritten material. To suggest that the reasons could have been prepared in the eight-minute adjournment defies logic. Moreover, the internal construction of the reasons totally ignores what took place during the hearing itself. At page fourteen of the reasons, line 9, we read: "There was neither admission of wrongdoing nor expression of remorse". There were, of course, three occasions on which Mr. Sternberg expressed an apology evidently unacceptable to the Commission. By hewing to the original pre-prepared reasons, the Panel failed to consider these apologies.

[14] The reasons reveal careful preparation. One finds a learned review on the law of cross-examination, a review of the legitimate expectations of the conduct of counsel as provided by the

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Law Society of Upper Canada, Rules of Professional Conduct, combined with references to the *SPPA* and the *Racing Commission Act*, S.O. 2000, c.20.

[15] Further evidence of the care with which the reasons were prepared lies in certain rhetorical flourishes not normally found in a decision drafted in eight minutes. The decision includes phrases such as:

First offender status is a bountiful benefit enjoyed but once...

A cross-examination mired in repetition and degenerating into argument could precipitate inadequacy and frustration culminating in a certain petulance...

The declaration must not be a pragmatic incantation of words carrying no persuasive force. No expression of apology made this day would serve to atone. The taint of expediency would be ingrained – a facile response to circumstances of the moment...

[16] Procedural fairness requires impartial and unbiased decision-makers. Once a hearing is tainted by the appearance of bias, the integrity of the process requires that the decision of the hearing panel be quashed (see: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utility)*, [1992] 1 S.C.R. 623, at para. 40).

[17] In assessing whether this aspect of procedural fairness has been met in any individual case, the courts will analyze the particular circumstances of that case to determine the extent to which impartiality of the decision-maker is necessary. Whether any particular set of circumstances will disqualify a decision-maker on the ground of reasonable apprehension of bias depends on the following general test:

What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude?

(*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 31)

[18] We find the Panel pre-judged the issues arising from the hearing. A member of the public would consider the following circumstances to be persuasive in concluding there was a reasonable apprehension of bias:

- (a) The Panel took only eight minutes to consider a matter of considerable importance, particularly to Mr. Sternberg;
- (b) The Panel's reasons were written and the matter resolved against Mr. Sternberg before the hearing began. The reasons were pre-typed, fifteen pages in length, and identical to those written reasons issued on the following day. We agree with counsel for the applicant that it would have

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been impossible for the Panel to have deliberated and drafted the reasons in the eight-minute adjournment following the hearing;

- (c) The presence of Ms. Walker and Dr. Brennan on the Panel also gives rise to a reasonable apprehension of bias. Both these members also sat on the Zubkoff hearing;
- (d) No opportunity was given to Mr. Sternberg to make submissions on penalty.

[19] We reject the submission that Mr. Sternberg waived his rights to raise these allegations by taking no action at the meeting. Mr. Sternberg could not have known the extent to which the Panel had pre-judged his matter until the reasons were delivered. We find the actions of the Panel to constitute a reasonable apprehension of bias towards Mr. Sternberg. The decision must be quashed on this ground.

- (b) **Did the Commission exceed its jurisdiction by conducting a form of contempt hearing?**

[20] As the Commission's own reasons for decision acknowledge, the Commission does not have the jurisdiction to adjudicate on the issue of contempt. Rather, s. 13 of the *SPPA* expressly reserves that jurisdiction to the Divisional Court. Section 13(1)(c) provides:

Contempt proceedings

13.(1) Where any person without lawful excuse,

...

- (c) does any other thing that would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court,

the tribunal may, of its own motion or on the motion of a party to the proceeding, state a case to the Divisional Court setting out the facts and that court may inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the court.

[21] The Commission's jurisdiction to entertain contempt allegations is limited to deciding whether to state a case to the Divisional Court. The Commission's jurisdiction in that regard is restricted to determining whether a *prima facie* case has been made out for the conduct described

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in s. 13 of the *SPPA*. The jurisdiction to make findings of fact, to adjudicate findings of guilt, and to determine whether to punish a person in like manner as if the person had been guilty of contempt of court is reserved to the Divisional Court (see: *McNaught v. Toronto Transit Commission*, [2005] O.J. No. 224 (C.A.)).

[22] Section 23(1) of the *SPPA* provides a tribunal may "make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes". Counsel for the Commission submits this was what the Commission was doing in the meeting of April 24, 2008. We reject this submission.

[23] The following passages in the reasons of the Panel persuade us that the hearing was, in pith and substance, a contempt hearing:

- (a) At page 7 of the reasons, the Panel listed in bullet form the consequences of Mr. Sternberg's utterances, described as scandalous in presentation and content:
 - Demean the Office of Chair of the Ontario Racing Commission.
 - Ridicule and scorn the person serving in that position.
 - Vilify the adjudicative function of the Ontario Racing Commission.
 - Disparage the adjudicative qualification of the Racing Commissioners.
 - to bring disrepute to the institution of the Racing Commission.
- (b) At page 10 of the reasons, Mr. Sternberg's inexcusable attack on the Chair of the hearing constituted 'a profound injustice'.
- (c) At page 12 of the reasons, the Panel again, in bullet form, listed the aggravating factors of Mr. Sternberg's conduct:
 - There was no extenuation of culpability through provocation.
 - There was no reprieve through justification.
 - There was neither admission of wrongdoing nor expression of remorse.

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- (d) At page 13 of the reasons, the Commission found it inconceivable 'that Mr. Sternberg should appear before the Commission without first having **purged his misconduct** by unqualified apology to the institution of the Racing Commission'. [Emphasis added]
- (e) At page 14 of the reasons, the Panel concluded by setting the conditions for Mr. Sternberg to purge his misconduct. He was required to apply in writing for permission to appear before the Commission for the purpose of unqualified retraction and apology. Until that time, he was barred from appearing before the Commission.

[24] Despite the protestations to the contrary, we find the Commission did conduct a contempt hearing and exceeded its jurisdiction in doing so. For this reason alone, the decision must be quashed.

(c) **Was the sanction imposed inappropriate?**

[25] The sanction falls with the quashing of the decision.

(d) **In the event the Panel's decision is quashed, should the matter be sent back to the Commission for a new hearing?**

[26] During the course of submissions, we learned that counsel for the Administration of the Commission had referred Mr. Sternberg's remarks at the Zubkoff hearing to the Law Society of Upper Canada, by way of complaint. The complaint was made before Mr. Sternberg's appearance before the full Panel of the Commission. We find it inappropriate to return the matter to the Commission. Mr. Sternberg's counsel has acknowledged that his remarks were "inexcusable". The remarks clearly induced a sense of outrage in the Commission, perhaps understandably so. What is less understandable is why the Commission responded in the manner it did. We find it would serve no useful purpose for the matter to be re-visited by the Commission.

[27] The matter now remains to be dealt with by the Law Society of Upper Canada, the appropriate forum for consideration of Mr. Sternberg's conduct.

[28] The decision of the Panel of the Commission is quashed.

[29] If the parties are unable to agree upon costs, they may make short written submissions not exceeding three pages in length within twenty-one days of the issue of these reasons.

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CARNWATH J.



SWINTON J.



RAY J.

Released: 20081003

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JUDGMENT

CARNWATH J.

Released: 20081003

The Ontario Racing Commission
Respondent

DIVISIONAL COURT

BEFORE The Honourable Carmack, Swinton, Ray J. J.

DATE Sept. 29, 2008

DISPOSITION THIS APPEAL

APPLICATION IS *REMOVED.*

Ge. McC...

October 3, 2008.

Decision issued.

C. McC...

Court File No.

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

PROCEEDING COMMENCED AT
TORONTO

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