CITATION: Whelan v. Ontario Racing Commission, 2011 ONCA 299
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COURT OF APPEAL FOR ONTARIO

Goudge, Juriansz and MacFarland JJ.A.

BETWEEN

James Whelan

Applicant (Respondent)

and

Ontario Racing Commission and Woodbine Entertainment Group

Respondents (Appellant)

P. David McCutcheon and Reena Goyal, for the appellant

Arlen Sternberg, for the respondent

Brendan Van Niejenhuis, for the Ontario Racing Commission

Heard: February 16, 2011

On appeal from the judgment of the Divisional Court (Molloy, Swinton and Cullity JJ.) dated June 30, 2010, with reasons by Molloy J. and reported at (2010) 265 O.A.C. 85.

Goudge J.A.:

[1] The appellant Woodbine Entertainment Group (WEG) is the owner and operator of the Woodbine and Mohawk racetracks. In April 2009, WEG refused to permit the respondent, Mr. Whelan, to race his horses at its tracks unless he signed its Access Agreement, which provided the terms of entry onto its premises. He refused to do so and sought a declaration from the Ontario Racing Commission (ORC) that he could not be required to sign WEG's Access Agreement in order to be allowed to enter his horses to race on its tracks.

[2] The ORC dismissed his application in September 2009. Mr. Whelan then sought judicial review of the ORC decision. The majority of the Divisional Court found the decision to be unreasonable and ordered that WEG be prohibited from excluding Mr. Whelan's horses solely on the basis that he had not signed the Access Agreement.

[3] WEG appeals the Divisional Court's decision. For the reasons that follow, I conclude that the majority of the Divisional Court erred in finding that the ORC decision was unreasonable. I would therefore allow the appeal.

THE BACKGROUND

[4] WEG is a private property owner running a business on its two racetracks. As a property owner, it has considerable authority to act autonomously, for example, to exclude individuals from its premises. However, in two respects it is a highly regulated business.

[5] First, horse racing at WEG's racetracks is regulated by the ORC, as it is in all racetracks in Ontario. The *Racing Commission Act 2000*, S.O. 2000, c. 20 gives the ORC a broad mandate to regulate horse racing in Ontario. This mandate gives the ORC the power, in the public interest, to take action which may incidentally affect the property rights of racetrack owners such as WEG: see *Ontario Harness Horse Association v. Ontario Racing Commission* (2002), 62 O.R. (3d) 44 (C.A.), known as the *Sudbury Downs* case. For example, when a racetrack owner excludes a licensed horse owner from its premises and therefore from racing there, this action comes within the regulatory jurisdiction of the ORC, even though it affects the owner's property rights. As this court said in *Sudbury Downs* at para. 47, "It is much more a horse racing issue than a property issue."

[6] A second area in which WEG is subject to regulation is wagering. The viability of its business depends upon revenue from wagering. This requires that its racetracks be licensed by a federal agency, the Canadian Pari-Mutuel Agency (CPMA). To obtain a license, WEG is required by the CPMA to have an "agreement with horsemen" setting out how wagering revenues are shared.

[7] Until December 2008, WEG had a contract with the Ontario Harness Horse Association about how wagering revenues were to be shared. This contract satisfied the CPMA requirement, but it expired at the end of 2008. Starting in January 2009, to satisfy the CPMA, WEG entered into individual Access Agreements with each horseperson using its racetracks. In addition to setting out the terms for the right to enter WEG's

premises, the Access Agreements provided a formula for sharing wagering revenue. Based on that aspect of the Access Agreements, the CPMA issued WEG a wagering license for 2009.

[8] Mr. Whelan took issue with a number of aspects of the Access Agreement. He objected to the provision that required him to abide by WEG's rules particularly the provision that reserved to WEG the right to revoke access to its premises "at any time in its sole and absolute discretion and without notice, reason or compensation." He therefore refused to sign the Access Agreement. As a consequence, WEG refused him entry, which meant that his horses were not eligible to race at WEG racetracks. The sole basis for this refusal was that Mr. Whelan had not signed an Access Agreement.

[9] Ultimately, after being told by the onsite ORC judge that he had to sign to be allowed to race, Mr. Whelan appealed to a three-person panel of the ORC. He sought a declaration that he is not required to execute WEG's Access Agreement in order to enter his horses to race on its racetracks.

[10] The ORC dismissed Mr. Whelan's request for a declaration. It held that nothing in WEG's rules or its Access Agreement usurped the ORC's statutory function as regulator, including giving Mr. Whelan the right to be heard on his appeal from the WEG decision. It repeated a number of times that nothing in WEG's rules or the Access Agreement diminished Mr. Whelan's access to due process before the ORC. In the circumstances, the ORC concluded that the public interest overwhelmingly supported the requirement

that Mr. Whelan sign the Access Agreement to be allowed to race his horses at WEG's racetracks.

[11] Mr. Whelan sought judicial review of this decision. The Divisional Court unanimously rejected his argument that only the ORC's rules – as distinct from WEG's rules – can regulate racing, and since the ORC's rules do not oblige him to sign the Access Agreement in order to race, WEG could not require him to do so. It also rejected his argument that the ORC exceeded its jurisdiction by requiring Mr. Whelan to agree to certain wagering revenue sharing as a condition of his eligibility to race, given that the CPMA has jurisdiction over issues of revenue sharing.

[12] However, Mr. Whelan succeeded in persuading the majority of the Divisional Court that the ORC decision was unreasonable and should be set aside. The majority held that the ORC decision permitted WEG to arbitrarily exclude Mr. Whelan from racing his horses at its tracks and to do so without giving him a hearing. They concluded that, in the circumstances, this decision fell outside the range of possible acceptable outcomes and was therefore unreasonable. At paras. 75-81 of their decision, the majority framed their conclusion as follows:

> WEG cannot set itself up as a second tier regulator entitled to arbitrarily exclude individuals from racing at its tracks, in its own discretion, without any fault and without an opportunity to be heard.
>
> ...
>
> I also cannot understand why the ORC would think it reasonable that Mr. Whelan be barred from racing at WEG

> for refusing to agree to provisions in an agreement that ORC itself says is contrary to the public interest and unenforceable....
>
> ...
>
> In my view, the ORC's conclusion that WEG is entitled to do so in the public interest cannot be said to be reasonable or to fall within that range of possible outcomes that can reasonably be justified.
>
> ...
>
> [T]he ORC acted unreasonably by permitting WEG to insist on a signed Access Agreement containing provisions that purport to give WEG absolute unfettered power to exclude licensed ORC horse racing participants who have committed no fault.

[13] In her dissent, Swinton J. underlined that the ORC recognized that the Access Agreement did not interfere with Mr. Whelan's right to procedural fairness. She noted that the ORC decision carefully reviewed the public interest considerations that favoured not interfering with WEG's requirement to sign the Access Agreement, and found that they outweighed the impact of that requirement on Mr. Whelan. She concluded that the ORC decision neither subjected Mr. Whelan to arbitrary exclusion from racing nor denied him due process, but was a reasonable decision deserving of deference. She would have dismissed the application for judicial review.

[14] In this court, WEG argued that the ORC decision is entirely reasonable and that the majority of the Divisional Court erred in finding otherwise. Mr. Whelan takes the contrary view, for the reasons of the majority, but also seeks to support the order

appealed from on the basis of the two arguments rejected by all three judges below. The ORC takes no position on the merits.

ANALYSIS

[15] All parties agree that the issue on which the Divisional Court divided is not a question of the ORC's jurisdiction. Rather, it requires a review of the ORC decision against the standard of reasonableness. It is also not contested that reasonableness is concerned with justification, transparency and intelligibility in the process of decision making, and with whether the result falls within a range of possible, acceptable and defensible outcomes: see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 47. I have concluded that the majority of the Divisional Court erred in this analysis and that the ORC decision satisfies the standard of reasonableness in both respects.

[16] In my view, the majority erred in two ways. First, the ORC decision did not require Mr. Whelan to sign an Access Agreement that denied him an opportunity to be heard. Nor does the Agreement give WEG absolute unfettered power to arbitrarily exclude him. The Access Agreement does neither, as the ORC correctly found. The majority of the Divisional Court erred in finding otherwise.

[17] Mr. Whelan does not claim a right to be heard by WEG before it makes a decision to exclude him. Nor does he have such a right. In excluding an individual, WEG is exercising its property rights, not performing a statutory duty that affords the individual the right to a hearing before it does so. Mr. Whelan and WEG both agree that his right to

be heard arises on an appeal to the ORC from a decision by WEG to exclude him. The ORC correctly found that nothing in the Access Agreement purports to take away the right to due process before the ORC.

[18] Nor does that Access Agreement give WEG absolute unfettered power to arbitrarily exclude Mr. Whelan. Any WEG decision to exclude him can be appealed to the ORC. If it finds the decision to be arbitrary, it can set the decision aside. The Access Agreement does not and cannot remove this right of appeal. Any attempt to do so can be overridden by the ORC.

[19] The second way in which the majority erred is by focusing exclusively on the burden imposed on Mr. Whelan in having to sign the Access Agreement. Even if the majority was correct in describing this burden, they failed to consider that the ORC balanced it against the various public interest considerations supporting WEG's requirement that Mr. Whelan sign the Agreement. The reasonableness of the ORC's balancing is the true measure of whether its decision falls within a range of possible acceptable outcomes. The majority did not make this assessment.

[20] I agree with Swinton J. that the ORC's decision satisfies both aspects of the concept of reasonableness described in *Dunsmuir*. The first aspect, the process by which the ORC reached its decision, is not put forward by Mr. Whelan as deficient. Nor could it be. The reasons of the ORC clearly show the path of reasoning it followed to reach its

decision and this path has a defensible logic sufficient to satisfy the first aspect of the reasonableness requirement. As Swinton J. put it:

> The reasons of the ORC show a careful consideration of the competing interests at play in this case and explain why the ORC chose not to intervene to prevent WEG from requiring individuals such as the applicant to sign the Access Agreement in order to race their horses at its facilities.

[21] The decision held that the Access Agreement did not bar access to a hearing before the ORC and that it therefore did not impair Mr. Whelan's due process rights. In the same way, the Access Agreement did not expose Mr. Whelan to arbitrary exclusion by WEG from its racetracks because any such exclusion could be set aside on appeal to the ORC. The ORC then balanced any remaining burden on Mr. Whelan from being required to sign against the significant public interest considerations favouring the imposition of that requirement by WEG. The ORC listed them as follows:

- Changing widely accepted industry practice to accommodate one individual.
- To undermine the efficacy of a system adopted by horse people on a 2500 to 1 basis, a system with long-term high quality proven results.
- Promoting compliance with rules and procedures proven to be workable and to industry advantage.
- Temporarily avoiding imperilling WEG's wagering permits thereby promoting continuity of racing and the vast economy which it supports.
- Compliance with CPMA contract requirements.
- Compounding insurance litigation. The liability waiver affords protection against subrogated claims between

insurers. Avoiding multiple lawsuits is in the public interest.

- Continuing to provide racing entertainment for the segment of the public so inclined.
- Avoiding micro-management of business affairs by the industry Regulator.
- Avoiding a creeping and improper extension of the ORC mandate to regulate and govern.
- Avoiding an unauthorized duplicate due process structure.

[22] The ORC concluded that the public interest considerations significantly outweighed any burden on Mr. Whelan and that "the balance of probability scale clearly and abundantly favours WEG's position". I agree with Swinton J. that this conclusion is within the range of possible, acceptable and defensible outcomes in the circumstances of this case. It was reasonable to decide that any limited burden on Mr. Whelan was significantly outweighed by the public interest considerations favouring WEG's requirement. That decision reflects the ORC's statutory obligation to govern horse racing in the public interest.

[23] As he did before the Divisional Court, Mr. Whelan advances two additional reasons to reverse the ORC decision and conclude that WEG cannot impose a rule barring him from racing if he does not sign the Access Agreement. He argues that only the ORC can set rules that bar him from racing. The Divisional Court unanimously rejected this argument. It found that there is nothing in the existing ORC rules or the governing legislation preventing a racetrack owner like WEG from imposing rules, as it

did in this case, that regulate entry to its premises and yet relate to racing. Racing is not only affected by the ORC's rules. If there is a conflict with the ORC's rules, the latter prevail. I would come to the same conclusion for the same reasons and would reject this argument.

[24] Mr. Whelan's second argument is that by requiring him to sign the Access Agreement, the ORC is requiring him to agree to the particular wagering revenue sharing formula contained in it and that only the CPMA has the jurisdiction to do that. The Divisional Court unanimously rejected this argument as well, holding that the ORC decision did not require Mr. Whelan to accept WEG's revenue sharing formula. The ORC simply declined to intervene when WEG required him to accept it. The ORC did not impose the revenue sharing formula; rather WEG did, pursuant to the regulatory authority of the CPMA. Here too, I would reject Mr. Whelan's submissions for the same reasons as the Divisional Court.

[25] In the result, I would allow the appeal, restore the ORC's decision and dismiss Mr. Whelan's application for judicial review.

[26] WEG is entitled to its costs of the application and the appeal, including the leave motion, to be paid by Mr. Whelan on a partial indemnity basis. I would fix them at $10,000 and $20,000 respectively, inclusive of disbursements and applicable taxes.

RELEASED: APR 18 2011

I agree JA.

I agree JA