



COMMISSION HEARING

TORONTO, ONTARIO – MAY 2, 2013

NOTICE OF DECISION

IN THE MATTER OF THE RACING COMMISSION ACT, S.O. 2000, c.20;

AND IN THE MATTER OF THE NORTHERN HORSEMEN'S ASSOCIATION (NHA) APPEAL

The Northern Horsemen's Association appealed against the Decision by Director Steve Lehman issued on April 12, 2013 - "ORC approves race dates for May through December 2013", as it applies to Sudbury Downs.

Date of Hearing: May 2, 2013

ORC Panel Members: Chair Rod Seiling
Vice-Chair Anthony Williams
Commissioner John Macdonald

Representative for Appellant: Dr. Karen Pappin, as a friend

Counsel for the Administration: Jennifer Friedman

The Panel denied the appeal.

The Panel's Reasons for Decision is attached to this Notice.

DATED at Toronto this 16th day of May 2013.

Steven Lehman
Executive Director

REASONS FOR DECISION

Overview

1. The Northern Horsemen's Association (NHA) appealed on April 19, 2013, the Ontario Racing Commission (ORC) April 12, 2013 Notice to the Industry wherein Sudbury Downs was allocated 20 live race dates for 2013, a variance from 60 days in 2012.
2. The Panel denied the appeal without prejudice to further application for future variation upon notice. The NHA was directed that such an application should be made to the Director along with a business case and should, hopefully, come forward with the support of both partners, Sudbury Downs and the NHA.
3. The Panel went on to state that it understands the challenging times for the NHA and its members. The same scenario is playing out all across the province. These unfortunate and uncertain times are taxing to horse people and their families.
4. Written reasons were to follow. These are those reasons.

Background

5. On May 2, 2013, a de novo hearing was held to hear the matter. Jennifer Friedman acted on behalf of the ORC as legal counsel. Dr. Karen Pappin, acting as a friend, represented the NHA. Andrew MacIsaac asked for and was given standing representing Sudbury Downs.
6. The ORC approved 20 live race dates for Sudbury Downs (Ex. 1, tab 2). The 2012 live racing schedule for the track was 60 days.
7. The ORC promulgated the Ontario Racing Program (ORP) in 2010. The genesis for the ORP was the industry, itself, which had direct input through an ongoing and thorough consultation process.
8. The ORP is a framework. This framework is based on 6 principles (Ex. 5, p 4). They are as follows:
 - a. Enhance live racing and provide benefits to the agricultural sector in Ontario;
 - b. Allow a fair return on investment over the short term while protecting value for owners and communities over the long term;
 - c. Provide customer-focused, competitive racing by recognizing both supply and demand;
 - d. Leverage and support the horse racing's partnership with the public sector by using government's investment to enhance the economic sustainability of Ontario horse racing;
 - e. Encourage and provide incentives for live racing;
 - f. Be simple and objective.
9. The Government of Ontario canceled the Slots at Racetrack Program (SARP) on March 31, 2013. This policy decision was an earth shattering change to the economics of horse racing in Ontario, creating a great deal of uncertainty and angst as to the future of the industry in the province.
10. The Government, in response, created a transitional Panel. That Panel, following numerous consultations with representatives of the industry, issued a report recommending transitional funding for racetrack operations, 100% of pari mutuel revenues to fund purses and live race days to decrease to about 800 per year.
11. Upon acceptance of the Panel's report by the government, that same group was given the responsibility by it to negotiate with tracks regarding operating funds for each track for a specific number of identified live race dates.

12. Under the ORP, Sudbury Downs is classified as a “Grass Roots” track. According to David Stewart, a Commission Judge and a member of the ORC's IM Group, the Panel had been providing funding to other Grass Roots tracks for 20 live race dates (Clinton, Hanover).

13. The IM Group, on the understanding that the Panel was in the process of providing Sudbury Downs operating funds for 20 live race dates, recommended that the track race 20 days in 2013. It was understood that no confirmed deal was in place at the time. In fact, Andrew MacIsaac confirmed the track did not have a deal in place as of the hearing but given that he did not object to the number of days being proposed, it is reasonable to conclude that the track was willing to race the scheduled 20 dates

14. Dr. Pappin, on behalf of the NHA, submitted that it would be unreasonable to expect the track to race more days than it had funding to operate. On the other hand, from the horse people's perspective, from a viability/sustainability stance, the minimum number of days had to be 30.

15. Sudbury Downs, due to its geographic location, had been considered unique within the ORP. This uniqueness was the basis for the track racing more days than other Grass Roots tracks and having purse levels above the allowable ranges for tracks within that class.

16. On April 23, 2013, the ORC issued revised criteria (Ex. 8) for Grass Roots tracks. Changes included new purse levels (\$25,000 to \$35,000) and limitations on the number of races per day of racing (8 to 10).

17. On April 29, 2013 the ORC issued its Reasons for Decision – Ontario Racing Program for May to December, 2013 (Ex. 9). Page 2 of the Reasons reads as follows: “Considerations relating to the new economics of the Ontario horse racing – The race date calendars are the result of the application of the Ontario Racing Program principles and implementation criteria to the new economics of the industry. The new economics have been defined through government negotiation with industry, rental agreements between track operators and the OLG as well as the transfer payment agreements between tracks and Government have defined the financial circumstances for both tracks and the purses.”

18. On page 15, the rationale for the variance for Sudbury Downs was outlined. These reasons included:

- a. lack of customer demand – in 2012 track wagering was under \$7,000 per race day
- b. purse level of \$47,603 per day in 2012 not sustainable – wagering not sufficient;
- c. horse supply finite;
- d. financial condition only support 20 days as per Government payments;
- e. Sudbury's motivation to race limited to amount of funding available from Government.

19. The NHA submitted a business plan (Ex. 3) that purported to support 30 days of live racing. Dr. Pappin was unable to confirm to the Panel that some of the revenue projection was realistic. An \$80,000 grant from Government, accessing 50% of the 2.5 million in the purse account to fund track operations, increasing the Northern Teletheatre Network from 6 to 20 sites and access to revenues from potential new gaming sites and kinds of gaming were admittedly more in the hopeful wish list. Furthermore, no consultation had occurred with the track on an expanded network nor had there been any consideration regarding associated costs.

20. Paul MacLean, a driver, trainer, owner and a member of the NHA was of the opinion that if the ORC deviated from its policy and allowed the NHA access to the purse account, the precedent would be such that the same requests would come from all across the province.

21. Mr. MacLean has sold all but two of his fifteen horses that he raced at Sudbury last year. Conversely, Philippe Belanger kept all ten of his horses that he trains for his owners. Bob Bodkin, another NHA member, referenced a document that he assembled (Ex. 3) and submitted, demonstrated that there would be an adequate supply of horses for 30 days of live racing.

22. What were not in dispute are the financial and social impacts the new economics of horse racing were causing for NHA members. For starters, costs are 30% higher in the north. Compounding the problems for NHA members was the new schedule at Georgian Downs. At one time, that track was an option to race their horses. With the new abbreviated schedule for Georgian, that option was no longer available. Other Ontario tracks were just too far to truck.

23. The 70% date reduction for 2013 is career changing for many NHA members. It was submitted that full time horse people could not earn a living. Only part time horse people would be able to race at Sudbury the Panel was told.

24. Dr. Pappin, while agreeing to the new economic reality for horse racing in Ontario, submitted that because of its uniqueness, Sudbury horse people deserved continued consideration as the ORC has provided in the past. In this regard she asked that the Commission show some leniency.

25. She referenced that variances had been granted for more race dates at both Western Fair and Grand River tracks. Both tracks conduct Signature, not Grass Roots racing. Those decisions to add dates were made within the framework (customer demand) of the ORP to fill in regional gaps. Mr. Stewart confirmed that wagering trumps all the other principles of the ORP. There is also an expectation that the Government will provide the additional funding for operations. The aforementioned situation does not exist as it relates to Sudbury.

Issue

26. Are there cogent, compelling reasons to breach the principles of the ORP and grant the NHA's request for 30 days of live racing at Sudbury Downs for 2013? Should the ORC deviate from its policy and allow purse funds to be used for track operations?

Reasons for Decision

27. The onus was on the applicant to provide cogent and compelling evidence that the principles of the ORP should not be applied as per the Director's Notice of Decision. The Panel empathizes with the members of the NHA, but it cannot in good conscience ignore the ORP. In actual fact, it does not have that authority as per the Ontario Harness Horse Association hearing Ruling Number COM GEN 001/2011. It reads at para 13, "Implicit in that Framework is the right of the Director to assign race dates and undoubtedly to revise as inequities within the Framework may be perceived. The Panel having a statutory right of review must have that same jurisdiction. At para 14, "Accordingly, the Panel rules: There is no jurisdiction either in totality or substantial result to reverse the Framework as an ORC policy." This Panel agrees and unequivocally supports the Framework and its accompanying principles.

28. The ORC is charged with a responsibility to act in the best interests of racing under the Racing Commission Act of 2000. This is a responsibility that the ORC takes very seriously and must continually take into account the interests of the majority versus those of the individual. The majority's interests must prevail in situations like this.

29. In support of this decision, the Panel is drawn to the Windsor Raceway decision, Ruling Number COM GEN 003/2010. At para 27 it reads, "The Framework for race dates is an industry wide strategy. Its implementation will require participants to think beyond today and seek a glimpse of tomorrow. The individual vision should not be restricted to "what's it in for me" but should include "what's in it for the industry." This fact, in and of itself is sufficient reason to dismiss the appeal just as it was in the NHA appeal, Ruling Number COM GEN 002/2012. Under the new economics for racing, the uniqueness fact for Sudbury is irrelevant.

30. Issues such as those brought forward by the NHA where careers and the livelihood of families are at stake, one naturally has empathy for the individual. Notwithstanding, the ORP principles remain a touchstone and are the foundation for racing's future in Ontario. For the good of racing, the ORC must continue to be guided by the framework and the principles of the ORP.

31. As Dr. Pappin stated, it would be unreasonable to expect Sudbury Downs to fund the extra 10 days. Sudbury is a Grass Roots track. Undisputed testimony was led that the Government is funding 20 days of live racing at those classified tracks. There has been no consideration from the Government for any "leniency". The ORC has no authority in this area.

32. The business plan submitted by the NHA to support the extra 10 days has no reasonable basis to generate the extra revenues required. Therefore there is no financial basis to operate 30 days.

33. It is apparent that Sudbury Downs, from a motivational perspective, is willing to operate 20 days of live racing. Their rationale is obvious. The Government is funding the operations for those days.

34. From a customer demand, the most important factor, with wagering at less than \$7,000 in 2012, it is reasonable to conclude that supply has exceeded demand. In the new economics for racing, funding for purses comes exclusively from wagering. A \$7,000 daily bet even supplemented via simulcasting does not generate sufficient monies to incite owners to race.

35. Horse supply, notwithstanding Mr. Bodkin's projections, is uncertain at best. The Panel is aware there has been a cull of racing stock in Ontario since the ending of SARP. Mr. MacLean is living proof. On the other hand, the experts are not sure how large the cull is. What is for certain, a horse shortage in southern Ontario will exacerbate the horse supply in the north as owners will not have to ship north to race.

36. Purse money is the life blood of horse people. The ORC has a policy that ensures purse money can only be utilized for purses unless it can be demonstrated via cogent and compelling evidence that it is in the best interests of racing. Local interests do not equate into the best interests of racing. Mr. MacLean admitted that the precedent in allowing purse underpayment funds to go towards track operations would create similar "attacks on purses" all across the province. It is in racing's best interests that the ORC protect purse funds for purses. The industry's future sustainability will be greatly enhanced by maintaining this stance.

DATED this 16th day of May 2013.

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

Rod Seiling
Chair