Ontario Racing Commission
10 Carlson Court
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Toronto, ON M9W 6L2
Tel (416) 213-0520

Standardbred Official Ruling

Series No. SB 43226

Date of Birth | | | | | | | | Licence No. Z0161961
Month Day Year

Date: MARCH 31, 2011 | Track: KAWARTHA DOWNS

Name of Participant: ISAAC WAXMAN | Address of Participant: DUNDAS

The Penalty of PURSE MONIES HELD

is hereby ordered against the above named for the following reasons:
(Designate in full the rules violated and the race and/or place where the violation took place)

ORC RULES 5:11 AND 1:09
AS IT PERTAINS TO "SB43223" PURSE MONIES WHERE BEING HELD PENDING THE COMPLETE DISPOSITION OF THE ONTARIO SUPERIOR COURT INJUNCTION THAT WAS GRANTED TO ISAAC WAXMAN ON FEBRUARY 4th, 2011.

THE HEARING REGARDING THE INJUNCTION WAS HELD ON MARCH 23rd, 2011 ~~IN~~ AT THE ONTARIO SUPERIOR COURT OF JUSTICE, WHERE IT WAS RULED THAT THE INJUNCTION OUGHT NOT TO HAVE BEEN GRANTED.

ATTACHED IS A COPY OF THE COURT DECISION.

PURSE MONIES CURRENTLY BEING HELD WILL CONTINUE TO BE HELD PENDING MR WAXMANS APPEAL HEARING BEFORE THE O.R.C. ON APRIL 15th, 2011.

RULE 6.15 Fines imposed in accordance with the rules are payable forthwith upon their imposition and before the participant races again, unless there has been an appeal filed. A licensee who fails to pay such fine may be suspended until the fine is paid, and such suspension will result in a penalty of not less than $25.00.

By Order of the Judges

Rick Lees | per Lee Collies | per. John Murray

04131 (12/2006)

Copy 1 of 5 - Ontario Racing Commission

CITATION: Waxman v. Ontario Racing Commission, 2011 ONSC 1908
COURT FILE NO.: 11-25384
DATE: 2011-03-28

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Isaac Waxman v. Ontario Racing Commission

BEFORE: The Honourable Mr. Justice M. D. Parayeski

COUNSEL: M. Grosso, appearing for the Applicant

B. van Niejenhuis, appearing for the Respondent

A. Finkelstein, appearing for the interested party Aaron Waxman

HEARD: March 23, 2011

ENDORSEMENT

[1] In essence, there are two motions before me. One is by the applicant, who asks that I do the following:

1) deny the respondent its motion to set aside the interlocutory injunction granted by Madam Justice Milanetti on February 4th, 2011;
2) declare that the respondent is in contempt of that injunction; and
3) order the respondent to pay to the applicant purse monies won by horses owned or connected with him following the granting of the injunction.

[2] The respondent asks that I declare that the injunction ought not to have been granted in first instance, and that I order it to be set aside.

[3] Some background is important. The applicant is a trainer, owner, and racer of standardbred horses. On February 3rd, 2011, he had some horses entered into races at the Kawartha Downs track. One of those horses was disqualified from racing that day because it was brought to the paddock late in accordance with the track's rules. This displeased the applicant. When another of his horses won a race, he proceeded to the winners' circle, and threw

what can accurately be described as a temper tantrum. He gestured obscenely to the judges and repeatedly swore at them. This was done in full view of the audience at the track and was captured on television camera. The camera or cameras in question exist to facilitate transmissions to off-track betting establishments. It is not clear to me whether the broadcast of the tantrum was cut off or whether it was completed. The applicant admits the behaviour and that it breached the rules of the Ontario Racing Commission. The judges present at Kawartha Downs suspended the applicant until a hearing in regard to his conduct could be held. They did so as persons to whom the Commission had delegated certain powers given to it, in turn, by the *Racing Commission Act, 2000*. By means of that *Act*, the Commission is granted a broad mandate to "govern, direct, control and regulate horse racing" in Ontario. It does so, in part at least, by enforcing the "Rules of Standardbred Racing", which are made under the *Act* referred to.

[4] Rather than await the hearing or pursuing the grievance procedure set up by that Act, the applicant sought an injunction from this Court on the following day, i.e. February 4th, 2011. He did so after giving the respondent approximately 90 minutes notice. Not surprisingly, the Commission could not and did not respond at the initial return of the application. The applicant's explanation for the short notice is that he was faced with a suspension that affected his ability to earn a living and acted accordingly on an "emergency" basis.

[5] The application was heard by Madam Justice Milanetti based upon materials filed by the applicant and submissions made by his counsel only. Her Honour granted an interlocutory injunction that stayed the "revocation" of the applicant's "licences" pending a return date of February 17th, 2011 and which allowed the applicant to enter his horses into races until that date.

[6] On the return date of February 17th, 2011, Mr. Justice Lococo accurately recognized that the hearing would take longer than could be accommodated on a regular motions list, and it was put over for a long motion or motions. Those motions are the ones before me.

[7] The applicant argues that I lack jurisdiction to hear the respondent's motion that seeks the setting aside of the injunction. I disagree. It is axiomatic that a respondent who fails to respond to a motion brought against him because of inadequate notice should be given an opportunity to do so, and that he ought not to have to exercise that right as an appellant, as suggested by the applicant. That is why *Rule* 37.14 (b) exists.

[8] The question at this point becomes whether the injunction would likely have been granted had there been materials and argument from both sides. I note that the applicant's initial affidavit, which was used the hearing before Madam Justice Milanetti, is selective to a considerable degree. While in the affidavit the applicant admitted to making a "profane hand gesture" while in the winners' circle, he failed to mention the shouted obscenities. He made no mention of the audience or of the television cameras. It is important to note that when cross-examined upon that affidavit, the applicant admitted that what he did was in violation of the Commission's rules. There is no issue that there exists a breach on the part of the applicant. The only underlying issue, therefore, is whether the penalty imposed at the track was appropriate. It is important to remember, however, that my function, at this stage, is not to conduct a judicial review of what the Commission's track judges did that day.

[9] Assessing whether the injunction ought not, or would not, have been granted on a full hearing entails review of the basic tests for such relief in the context of the complete facts as now presented. In order to be granted an injunction, the applicant had to show that:

a) there existed a serious issue to be tried;
b) that irreparable harm would occur to him should the injunction not be granted; and
c) that the balance of convenience favoured the granting of the injunction.

[10] With respect to whether there was a serious issue to be tried, the applicant has failed to convince me that his application was not premature inasmuch as he had not started, much less exhausted, the administrative relief under the legislation that created and empowered the Commission in the first place. Briefly, that process involves review of the evidence and the hearing of argument by Commission judges, followed by an appeal to the Ontario Racing Commission Panel. At that level, the hearing is conducted on a *de novo* basis, with the full protection of the *Statutory Powers Procedures Act*, and with the prosecution bearing the onus of proof. Whatever frankly confusing interim measures have been undertaken in the meantime, there can be no question whatsoever that the Panel hearing has not yet been conducted, if indeed it ever will be.

[11] Chief Justice Callaghan in the case of the *Ontario College of Art* v. *Ontario (Ontario Human Rights Commission)* case (1993), 11 O.R. 3d 798 (Div. Ct.) warns against taking a piecemeal approach to the review of administrative action. At page 800 of that decision, he wrote: "It is preferable…to allow such matters to run their full course before the tribunal and then consider all legal issues arising from the proceedings at their conclusion".

[12] The applicant's request for an injunction was premature, and, in my view, was likely to have been dismissed if that argument had been advanced, as no doubt it would have been had the respondent participated in the hearing before Madam Justice Milanetti.

[13] Secondly with regard to whether there existed a serious issue to be tried, it must be remembered that penalty only is at stake. The conduct itself and its constituting a breach of the

applicable rules are admitted. Suspension is an available penalty, and case law such as the decisions in *Scott* v. *ORC*, 2009 CanLII 34782 (Div. Ct.) and *McNamara* v. *ORC*, 1998 CanLII 7144 (Ont. C.A) makes it clear that deference is owed to the Commission in its attempts at regulating the racing industry.

[14] Concerning whether there would be irreparable harm to the applicant should the injunction not be granted, I disagree with his counsel when she asserts that interruption of his ability to race horses and thus earn a living automatically constitutes irreparable harm. There is nothing before me that suggests that the suspension was intended to be permanent, or that it is likely to be once the Commission's hearing process is finalized. Any losses of income and reputation in the meantime are calculable and compensable, and thus are not truly irreparable. Difficulty in assessing damages does not mean that assessment is impossible. The Court deals with such assessments continuously.

[15] As to the third factor, i.e. that of the balance of convenience, the determination would have been which of the parties would likely suffer greater prejudice should the interlocutory injunction be granted or not. To be sure, had the injunction not have been granted, the applicant would have had his livelihood interrupted because suspension prevented him from racing his horses. That is a serious, albeit not irreparable, problem. On the other hand, granting the injunction put the Commission into the position of having its authority and ability to manage racing in the public interest lessened. To have this Court effectively step in and waive consequences for the applicant's unquestionably discreditable behaviour, however briefly, would meaningfully undermine the powers granted to the Commission by the legislature. That is an even greater problem, in my view. I find that the balance of convenience test favours the Commission.

[16] Accordingly, I am prepared to declare that the interlocutory injunction ought not to have been granted, and that it would not have been had there been a full presentation of evidence and argument. Accordingly, I set it aside.

[17] Notwithstanding my ruling, it is prudent to address the issue of the contempt alleged by the applicant in respect of conduct by the Commission while the injunction was in existence. Briefly, the injunction permitted the applicant to go on racing horses until the return of the application (see the handwritten addition to paragraph 3 of the order of Milanetti, J. dated February 4th, 2011). Since the granting of the injunction, the applicant has entered horses into various races, and some of those horses have won. The respondent has refused to pay out purse monies to the applicant for those wins. The applicant describes this as wilful disobedience to the spirit of the injunction, and analogizes the situation to one where an employer is ordered to reinstate an employee but then refuses to pay him for work done. The respondent admits that it hasn't paid the purses to the applicant, and says that it is simply preserving the *status quo* pending the ultimate determination at the end of the Panel hearing and any allowed judicial review. If ultimately the suspension stands, the respondent argues, then the applicant's racing of horses following the imposition of his suspension would be forbidden. His "wins" would not be recognized, and the purse monies would be owed to the owners of horses that came in behind those connected to the applicant. The respondent has not paid out the purses to such other owners, and is holding them effectively in trust. I find that, by so doing, the respondent is indeed preserving the *status quo* pending the ultimate determination. The injunction granted by Madam Justice Milanetti was never intended to be the ultimate disposition of the issues in this case. I am convinced that what the respondent is doing does not constitute the kind of behaviour that makes up civil contempt. If the respondent had paid out the purses to others and/or did not recognize its

obligation to make payments in accordance with the end result, I should have seen things very differently. I decline the applicant's request that I declare the respondent in contempt and to order payment of the purse monies to him.

[18] A relative of the applicant, one Aaron Waxman, attended the hearing before me with counsel on March 23rd, 2011. He was permitted to submit an affidavit and to make brief submissions, with the acquiescence, if not consent, of the named parties. He alleged that he had taken ownership of one of the applicant's horses on the day following the interim suspension in return for a debt owed to him. Accordingly, he says, he and not the applicant was the owner of that particular horse, and any purses payable in respect of it should not be subject to the freeze imposed by the respondent. He did not ask for an order for payment to him, but, rather, only wished to support the applicant's position that the freeze should not exist. The affidavit filed was delivered without there being an opportunity for cross-examination, and, accordingly, I place little weight upon it. In any event, whether or not Aaron Waxman does or does not have a separate cause of action is not something that I was asked to address, nor am I willing to do so gratuitously in the context of this hearing.

[19] Should the parties be unable to agree on costs, they may make brief (not more than three type-written pages each) written submissions to me on or before April 30th, 2011. Such submissions, if any, should be sent to my chambers at the John Sopinka Court House in Hamilton.

PARAYESKI J.

Date: March 28, 2011