Ontario
Racing
Commission

RULING NUMBER COM GEN 001/2010

COMMISSION HEARING TORONTO, ONTARIO – APRIL 13, 2010

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

AND IN THE MATTER IN THE APPEAL AND REQUEST FOR HEARING OF GEORGIAN DOWNS

On February 11, 2010, the Director issued a Notice of Decision and Ruling SB 038/2010 wherein he denied a request from the Ontario Harness Horse Association ("OHHA") to transfer $40,000 from the Georgian Downs purse account to Great Canadian Gaming Corporation to pay for track maintenance for January and February 2010.

On February 26, 2010, OHHA filed a Notice of Appeal and on March 3, 2010, Georgian Downs filed its Notice of Appeal.

On April 13, 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. Andrew Staniusz appeared as Counsel for OHHA and Chris Roberts appeared on behalf of Georgian Downs.

Upon considering the evidence of Wendy Hoogeveen, Steven Lehman, Michael Sinclair and Don Amos, reviewing the exhibits filed and upon hearing the closing submissions, the Panel denied the appeal and upheld the Director's decision.

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

DATED at Toronto, this 20th day of April 2010.

BY ORDER OF THE COMMISSION

John L. Blakney
Executive Director

REASONS FOR DECISION

Overview

1. Georgian Downs (Georgian) appealed a decision of the Director of the Ontario Racing Commission (ORC), SB No. 038/2010 (Ex.1, tab 4) wherein he denied a request from the Ontario Harness Horse Association (OHHA) to transfer $40,000 from the Georgian Downs purse account to the track, for track maintenance for both January and February of 2010. The OHHA supported the appeal based on a common interest.

Background

2. On January 21, 2010, the Director of the ORC received a letter (Ex.1, tab 1) from OHHA to approve a request for $40,000 to be paid from the Georgian Downs purse account to Georgian Downs for track maintenance. The funds were to be utilized to ensure that the racetrack at Georgian Downs would remain open for training for both January and February of 2010. In actual fact, the proper procedure for such a request would have been to have the track make such an application as the purse account manager. This procedural error did not have any bearing on the Director's decision.

3. Attached to the request was a copy of a contract (Ex.1, tab 2) between OHHA and Georgian Downs Racetrack Availability Licence that sets out the terms and conditions for the undertaking between the parties. According to Andrew Staniusz, legal counsel for OHHA, the contract between OHHA and Georgian which recognized OHHA as the sole horse people representative gave the association the right to enter into the contract as to the distribution/use of purse funds. Chris Roberts, Manager of Georgian Downs submitted that the Commission had no right to interfere in a commercial transaction between the parties and therefore it should be "a slam dunk" approval by the Commission.

4. Mike Sinclair, a trainer, who races at Georgian Downs and is stabled ten minutes from the track, submitted that the impetus for the payment came from the horse people with the objective to save trainers costs by not having to keep their respective tracks in "training" condition.

5. A petition (Ex. 6) that was signed by forty-two horse people on March 2, 2010, almost two months after the Racetrack Availability Licence agreement was concluded, was submitted as proof of support by horse people in the OHHA district 5. District 5 is the geographic area in which Georgian is located. Don Amos, President of OHHA, thought that District 5 has at least one hundred members. Mr. Sinclair submitted that about fifty percent of the horse people who race at the track are not members of District 5. It was contended that this support demonstrated approval would be in the best interests of the horse people.

6. Maureen Harquail, legal counsel for the ORC, submitted that the Panel should uphold the Director's ruling as the three reasons outlined in that ruling were valid. They are as follows: the request did not meet the requirements as set out in SB Rule No. 7.16.05, the 2010 race date application by the track did not communicate the track's intention to close the track during January and February and the possible impact on the industry as it relates to purse monies given the ongoing race date moratorium process underway.

7. Mr. Roberts submitted that tracks do not provide information as part of their race date application as to what their respective track availability will be for training. Furthermore, he contended that Georgian closed its track for training in 2009 when it raced the same approved schedule and that tracks that do not have stabling onsite close their tracks when not hosting live racing.

8. Wendy Hoogeveen, Director of Industry Development and Support for the ORC, confirmed the rationale behind the Director's ruling on the matter. She also made reference to the precedent setting aspect if the request had been approved.

9. Ms. Hoogeveen also referenced Policy Directive No. 5/2007 (Ex.1, tab 9). This directive, which limited the use of purse account funds to pari mutuel events, was enacted by the Board in response to a request to use purse monies for a non-betting promotional race at Kawartha Downs. Use of purse monies for HPI purposes at some tracks does not run afoul of the rules /policy she submitted, as they relate to wagering on races and the benefits accrue to both the track and horse people.

10. When questioned about the permitted use of purse account funds at Sudbury, Ms. Hoogeveen responded that provision had been allowed back in 2003 but that communication had already been made to the parties that it would not be considered on a go forward basis.

11. Steve Lehman, Chief Administrative Officer for the ORC, provided uncontested testimony that all the purse deductions currently occurring at Georgian as per the purse account statement for the track (Ex.4) are permitted under SB Rule No. 7.16.05. He also confirmed that the race date moratorium process has evolved into potential use of purse funds on a go forward basis. Mr. Lehman also submitted that the Commission has dealt with other unusual requests for purse account disbursements but this was the first one that was related to track operational costs.

12. Neither Ms. Hoogeveen nor Mr. Lehman was aware that Georgian had closed its track for training in 2009. Mr. Lehman submitted that given the 2009 race date approval for Georgian was a "pilot", it would have been normal to expect that Georgian would have kept its track open for training for the two months in question. Neither was aware if the Director or some other Commission official had contacted the track or OHHA to make inquiries for more information on the request.

Issue

13. Did the Director err in his interpretation of SB Rule No. 7.16.05 as it related to the OHHA request to use purse account monies at Georgian Downs to cover track maintenance costs? Was he operating within his authority to order Georgian to keep the track open for training? Should the Commission simply "rubber stamp" such a request given that both parties support the intended use of the purse funds? Would approval of the request potentially impact on the outcome of ongoing discussions related to purse account funds in the race date moratorium process?

Decision

14. After carefully listening to the testimony and reviewing the evidence and submissions, the Panel denies the appeal.

Reasons for Decision

15. Horse people earn their respective livelihood by competing for purse monies. Their ability to "stay in business", i.e. hire and pay employees, purchase goods and services and reinvest is directly dependent on a secure and stable purse disbursement system.

16. The ORC has a fiduciary responsibility to ensure the purse account operates to the benefit of all horse people. It is for this reason that the Commission has promulgated rules such as SB No. 7.16.05 and established policies such as Directive No 5/2007.

17. Subsections (a), (b) and (c) of SB Rule No. 7.16.05 have no application to the issue. Therefore, the issue falls to be determined under subsection (d). That subsection has dual pre-conditions. They are the Director's approval and the payment must be for the benefit of racing or provide benefits to all or a sizeable proportion of horse people who participate at meetings of the association.

18. As the rule is drafted, the Director is not compelled to approve all proposed payments which meet the "benefits standard". That "benefit" requirement is merely a threshold to gain access to the ultimate requirement, that is, Director's approval. That approval is governed by the impact on the overall good of racing as a whole. On these facts, the "benefit" or "threshold" requirement has clearly not been satisfied. Therefore, the Panel concludes the Director correctly interpreted and applied the rule.

19. The claim that the request had unanimous industry support is wrong. To suggest that forty-two signatures out of hundreds who race at the track plus the track itself and OHHA, all who had a financial interest/benefit in the proposal, represent unanimous support is simplistic at best and misleading.

20. Requests to use purse account funds for non-pari mutuel purposes have been rejected by the Commission in the past. Policy Directive No. 5/2007 addresses this matter directly and was intended to provide greater clarity to all the stakeholders. There can be no question the request fails to meet this test.

21. The referenced Sudbury stall credit agreement of 2003 offers no precedent setting support for the request. It predates the aforementioned policy. Furthermore, as Ms. Hoogeveen testified, the parties have already been notified that arrangement will not be approved on a go forward basis.

22. The Panel, in making its decision was not concerned about creating a precedent as was suggested. Rather, its concern was making the correct decision based on the evidence before it. A bad decision can be precedent setting and problematic.

23. References were made to purse funds being utilized to support HPI programs at some tracks. HPI programs, being pari-mutuel related, meet the criteria as set forth. Their respective level of success is totally unrelated to approval under the rules as set forth.

24. The Panel notes and recognizes there are other deductions from the purse account such as insurance and medication task force funding that are permitted by the Commission as outlined by Mr. Lehman. Those deductions clearly meet the "benefit" threshold test.

25. It does matter whether Georgian failed to disclose it intended to close its track for training when it made application for its 2009 live race dates. It may have been an oversight or it may have been tactical. The track correctly submitted that tracks are not required to inform the Commission as part of their respective race date application when their track will be available for training for horse people. However, it failed to recognize the significance that Georgian was granted permission to change its 2009 live race date schedule as a pilot project. The Commission granted approval for this pilot via a public hearing in Ruling COM GEN 003/2008. At the time, OHHA vigorously opposed the concept. No disclosure was made by Georgian of its intention to close the track for training for January and February nor did it mention that it would require supplemental funding to keep the track open for those months. Had the Panel, who rendered the decision, been made aware that the track would not be open for training for horse people during those time frames it may well have attached conditions to that approval. Given these circumstances, it is reasonable to conclude that Georgian should have disclosed its intent as it relates to the availability of the track for training and for the Director to have ordered Georgian to keep the track open for training.

26. An integral part of the Panel's decision to allow Georgian's 2009 pilot project to proceed was a requirement to report back. The Panel notes Georgian has not complied with that requirement. Had Georgian complied, the Commission would have been aware of the track closure. The Panel recommends that the Commission Administration follow up on this deficiency.

27. The onus is on the licensee not the Commission to provide all and any pertinent information related to a request for an approval or ruling. To suggest that the Commission must call the applicants to gather information that should have been submitted with the request demonstrates a fundamental misunderstanding of the process. The onus was on the parties to contact the Commission if they believed that they had supplemental information available that could have been helpful in the decision making process.

28. The ORC has a fiduciary responsibility as it relates to the purse funds at all racetracks in the province of Ontario. Tracks are designated as "purse account managers". The funds each track manages are held in trust; the terms are defined by SB Rule No. 7.16.05. Since the funds are held in trust, there is a duty imposed on those who deal with those funds of good faith. That good faith extends to both access and to the propriety of the amount of any disbursement. To suggest the request should have been a "slam dunk" indicates a lack of understanding of the essence of good faith when dealing with trust funds.

29. The procedure of Georgian and OHHA contracting for the expenditure of horse people's trust funds via the Racetrack Availability Licence is wrong in both form and substance. The form is wrong in that prior to concluding the contract no opportunity was provided to the

guardian of the trust fund to examine the reasonableness of the transaction or its terms. The substance is wrong because the parties to the contract, either separately or in concert, do not have any lawful right to direct the use of the trust funds. That procedure, without notice to the custodian, is presumptuous at best and should be discouraged by some deterrent measure. The assertion that the Commission ought not to interfere in the commercial contract between Georgian and OHHA is patently wrong. In this case, there is a third party, one who has a profound interest given its fiduciary responsibility and was never consulted.

30. The Commission does have a policy of not becoming involved in commercial disputes between parties unless the health and welfare of the horse may be at risk, the safety of participants would be at risk or to protect the public interest. In this case, the contract is not just between two parties and therefore the claim in invalid. The Commission is compelled to act to protect the public interest in this matter.

31. If Georgian required more revenue to operate its facility, the proper and normal place to obtain those funds is through the contract tracks and horse peoples' representatives such as OHHA negotiate for the disposition of revenues. The evidence indicates that the track was aware at the time this contract was being negotiated that it required additional funds to keep the track open for January and February. That process is open and transparent with opportunities for all horse people to have a voice. Commonsense dictates that the Racetrack Availability Licence benefited some horse people, at best 50%, to the detriment of many others who race at the track. It is not reasonable to expect they should have their respective earning power reduced to benefit those who stable in close proximity to the track. The Panel attaches little weight to the petition as an indication of support.

32. The Director referenced, in his decision, the potential impact this issue might have on the industry as a whole. He was correct to recognize that the ongoing race date moratorium process may result in a statement/recommendation on the appropriate use of purse funds. The work of the groups tasked with this responsibility should not be encumbered by this issue, an issue that clearly does not meet the test of either the rules or policies as they currently exist. The over-riding consideration for those rules and policies is the public interest in the well being of the industry as a whole.

33. The ORC was denied the opportunity to make an assessment in advance. The contract was dated January 6, 2010. The first communication with the ORC was January 21, 2010. The agreement did not contain a clause it was conditional on ORC approval. As per the testimony, it was assumed the ORC should rubber stamp the contract for the disposition of funds to which neither party to the contract was entitled. The Director's decision was soundly based on both principle and the public interest.

34. Reference during summation was made towards the Administration and we quote "that is simply untruthful." A person needs to remember that the right to disagree includes the opportunity to assert that the other party is wrong. It is a far more serious allegation as it relates to "truthfulness". This introduces the element of wilful moral culpability. There is no evidentiary basis for the assertion. The false accusation is hurtful and demeans the accuser.

35. Closing submissions also contained a number of personal opinions, i.e. it seems impossible to me. These opinions are not evidence, therefore they are irrelevant as it relates to decision

making. If they are to have value (evidentiary status), the person should testify under oath and be exposed to cross-examination as it relates to the validity of the claimed opinions.

36. The final statement in the track's closing, "I have a difficult time frankly and with respect believing that this Administration or this Panel is in a better position to evaluate the benefits to horse people than the horse people themselves." The starting point is that what that person believes or claims to believe is absolutely irrelevant and has no proper place in the record of these proceedings. The Panel has the ability to recognize that the argument advanced by the speaker must collapse because the foundation which is claimed for the argument does not exist. That foundation is that horse people universally endorse the request.

37. The Panel has the ability to recognize and abide by the duty owed to other horse people beneficially entitled to the funds. The Panel also has the ability to recognize that none of Georgian, OHHA or the forty-two petitioners whom they represent has the right to contract for the payment of money held in trust in the purse account. Neither, it should be added, does the amount of the funds held in the purse account matter when it comes to dealing in "good faith".

DATED this 20th day of April 2010.

Rod Seiling
Chair