



**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
STANDARD BRED LICENSEE JAMES WHELAN**

REASONS FOR DECISION

1. The Decision dismissing this Application was released September 11, 2009, with Reasons to follow. These are the Reasons.

The Parties

2. James Whelan (Whelan), a career horseman, skilled, experienced and respected on the track and in the committee room. Woodbine Entertainment Group (WEG) a top-of-the-line racing operation unexcelled in North America, owner and operator of the Woodbine and Mohawk tracks.

The Issue

3. The scope of WEG's control over racing activities on WEG tracks by its rules of racing, racing policies and racing contracts.

4. The contention is that WEG has usurped ORC authority and function and purports to act as regulator of the industry absent statutory authority. This is an ancient and oft repeated hue and cry. Now is the time to clarify the respective roles of the ORC as regulator of the industry and the track owners as operators of racing businesses and put this matter to rest.

Onus

5. This case does not turn on onus considerations as the public interest overwhelmingly supports WEG's position. However, for the record, the onus falls on Whelan as the Applicant to prove on a balance of probability by cogent evidence, clear and convincing, that in the public interest the ORC should intervene by overruling WEG's business decision to reject his racing entries absent his execution of an Access Agreement (Lamoureux SB 022/2002). This standard of proof is required before loss or curtailment of long-standing property rights.

The Hearing Trigger

6. In April 2009, Whelan as trainer attempted to enter his horses to race at Woodbine. In conformance with policy, WEG advised that the racing entries would be refused until Whelan as trainer of the horse being tendered for entry, signed the WEG's Access Agreement. WEG took steps to accommodate signing by Whelan through providing copies for his son, Garret, to deliver to his home. Whelan refused to sign. WEG refused the entries.

The Relief Sought

- A declaration that Whelan is not required to execute WEG's current Access Agreement in order to be allowed to enter his horses to race.



- An order requiring the race secretary at WEG tracks to accept Whelan's race entries in accordance with the "Rules of Standardbred Racing".
- An order directing the Judges at WEG tracks to supervise the race secretary to ensure that the "Rules of Racing" are followed and that there is compliance with the above.

The Access Agreement

7. WEG's Access Agreement is appended as a schedule hereto.

The Alternative To This Hearing

8. Of the approximately 2500 horse persons racing at WEG, Whelan alone has refused to sign the Access Agreement. Throughout this protracted matter, he could race immediately:

- If he committed the horses in issue to one of the many trainers who have signed the agreement. (This would include his son, Garret, with whom he is closely allied in racing) or to a trainer who would sign. Under WEG rules, the owner's signature is not required to enter the horse to race.
- If he signed the Access Agreement. Rather than sign, Whelan has elected to race one horse (The Beast from the East) at another venue with additional expense and in the case of one mare, (Whatta Hotty) to breed.

The Chronology

9. In Mid April 2009, WEG's race secretary upon Management instruction rejected Whelan's race entry absent a signed Access Agreement. The rejection was referred to ORC Senior Judge Lawrence who without holding a hearing, directed that the entry be accepted. That race did not fill so no race was held. Whelan tendered two further entries which were refused by WEG.

10. On May 4, 2009, the Woodbine Judges convened a Hearing. Following submissions, the Judges ruled on May 7, 2009:

"In accordance with ORC Rules 1.02, 5.11 and 7.06, Mr. Whelan must comply with WEG track rules if he wishes to enter horses at WEG tracks."

11. On May 12, 2009, the Judges provided Reasons as follows:

"The WEG Standardbred Rule Book indicates that every applicant shall complete an application for Access Rights. "Applicant" under the definitions section means a person who intends to enter any horse or horses in any race or races at a Racetrack. The WEG track rules have been approved by the Ontario Racing Commission. All other trainers participating at WEG tracks have completed and signed the application for Access Rights. The rule has been applied evenly and fairly, with the exception of the temporary exemption to Mr. Whelan. The judges could find no compelling reason or reasons that Mr. Whelan should continue to be exempt from the rules. (this Ruling is based on ORC Rules 1.02, 5.11 and 7.06)."



12. The Judges' decision incorporated an erroneous understanding that the current edition of WEG's rule book had been approved by the ORC in which event the rule regarding Access Agreements would be enforceable by the Judges.

13. On May 25, 2009, pursuant to Whelan's request of May 20, the Executive Director granted a stay of the Judges' Order pending appeal.

14. This is the appeal from the Woodbine Judges' decision. Evidence was heard June 29 and July 16 followed by exchange of written submissions with final submission filed Friday, September 4 as agreed and received by the Panel Wednesday, September 9.

The Stay

15. The Stay accomplished nothing other than returning the parties to their respective positions prior to the Judges' ruling of May 7, 2009, with Whelan free to tender entries and WEG free to refuse them. (Judge Lawrence's direction having been specific to horse and race and having been without a hearing) An Application for interim relief made in the course of this hearing is referenced later herein.

The Background

16. Ontario Harness Horse Association (OHHA) represents a substantial cross-section of Ontario harness horse people. Smaller associations have fragmented from OHHA – at Ottawa, the National Capital Harness Horse Association, at Sudbury, the Northern Horsemen's Association. As a direct result of the tumultuous background to this litigation, the Central Ontario Standardbred Association was formed (COSA).

17. For nine years preceding his resignation on January 12, 2009, Whelan had been president of OHHA. Through his term of office, Whelan provided competent leadership, powerful, passionate and unwavering. Upon issues of fundamental importance for horse people such as race dates, revenue splits and track conditions, he was in the forefront.

18. At most tracks, OHHA was the exclusive bargaining agent for horse people in negotiating contracts between the horse people and the racetracks. OHHA had negotiated the contract at Woodbine which expired December 31, 2008. As the expiry date approached, negotiations between WEG and OHHA for a new contract were in obvious deadlock.

19. Absent a contract with the horse people, WEG would not qualify for a Canadian Pari-Mutuel Agency (CPMA) wagering licence. No license, no wagering. No wagering, no racing.

20. OHHA issued a press release on December 24, 2008, communicating its decision to withhold entries at Woodbine starting with the January 1, 2009 race card and continuing until a contract acceptable to OHHA was signed.

21. That boycott, if successful, would close down harness racing operations at Woodbine from January 1, 2009 for an indeterminate period.

22. WEG'S priority was preservation of its CPMA wagering licence. Anticipating no new contract by December 31, WEG:



- Asserted that the current contract had been breached by OHHA calling a members' boycott instead of continuing negotiations through the 90-day rest period following December 31st.
- WEG treated this as a breach of the Memorandum of Agreement between OHHA and WEG dated March 31, 2003 (extended for one year on December 27, 2007) which called for a 90-day period of exclusive good faith negotiations following the Agreement's expiry on December 31, 2008.
- By letter December 29, 2008 from its solicitors, WEG notified OHHA that by reason of the breach and bad faith, WEG immediately terminated the contract including the 90-day provision.
- Relying on a CPMA precedent, WEG took steps to replace the group contract by contracts with individual horse people racing at Woodbine. To this end, the 2008 amendment to the WEG Rule Book relating to Access Agreements came into being. That amendment was not submitted to the ORC for approval and was not approved by the ORC. That WEG rules are not ORC approved does not render them unenforceable. It simply means that they are unenforceable by ORC Judges and Stewards.

23. The boycott decision produced a major rift between OHHA leadership and OHHA members racing at Woodbine. The boycott was rejected. OHHA members racing at Woodbine distanced themselves from that suggested policy. WEG racing suffered no interruption. Any claimed unanimity by OHHA must relate to OHHA members not racing at Woodbine who had no personal or direct financial interest plus whatever splinter group of WEG horsemen chose to follow the boycott.

24. By letter on December 30, 2008, OHHA through its counsel, asserted that there was no breach of contract much less a fundamental breach entitling termination. That letter referencing the 90-day cure period following December 31 asserted:

- "There is nothing improper with OHHA members voting to not race after December 31 until such time as new racing terms are reached with WEG."
- "OHHA's understanding that there would be no racing after December 31 was expressed to WEG in the past weeks."
- "It is WEG that is acting improperly by intending to hold racing and obtain a betting permit after December 31st in the absence of a contract with OHHA on behalf of the horse people."
- OHHA's understanding that the main reason no new OHHA contract has yet been reached was due to WEG's insistence on a new provision which would improperly restrict OHHA's rights to participate in future ORC hearings."

25. On December 31, 2008, OHHA by its solicitors, wrote to the CPMA advising:

- No agreement for 2009 had been reached by OHHA and WEG.
- In the writer's opinion, no agreement was in place for the purposes of sections 85(4)(f), 90(1)(d) and 94(f) of the Pari-Mutuel Betting Supervision Regulations for racing commencing January 1, 2009, and hence WEG would not qualify for a wagering licence after that date.
- In the writer's opinion, access waiver forms by individual horse people signed over the past year to obtain backstretch access stickers were not a proper contract with horse people for purposes of CPMA regulations.



26. WEG asserted that OHHA had breached an essential term of the Agreement. WEG further asserted bad faith on OHHA's part by attempting to disrupt racing at Woodbine in order to inflict economic harm on WEG when the Agreement called for good faith negotiations.

27. When racing continued without interruption, Whelan resigned his OHHA presidency effective January 9, 2009.

28. Vice President Bill O'Donnell (O'Donnell) succeeded Whelan as president. On behalf of OHHA, O'Donnell attempted to negotiate a contract with WEG. Before this could be accomplished, O'Donnell's leadership was challenged within the Executive Committee and he resigned in March. Vice President Darryl MacArthur succeeded him as president, (confirmed April 30th).

29. Under that new leadership, funding for this proceeding by Whelan was authorized. The appeal from the Judges' ruling went forward. This decision resulted in a further major OHHA division, this time within the leadership. Eight members of the twenty-seven member Executive Committee resigned.

30. Through the intervening months, horse persons at Woodbine formed COSA with O'Donnell as founding president.

31. On July 30, 2009, a News Release to trade journals announced that COSA had concluded a five-year horse people's agreement with WEG continuing current revenue sharing and maintaining a minimum of 235 race days annually.

32. By letter of August 28, 2009, OHHA by its counsel Frank Roth requested an emergency hearing before the ORC so that OHHA could challenge the validity of the COSA Agreement with WEG. ORC Appeals were then being scheduled in November. A hearing date has been set for October 2nd.

Whelan's Objections

33. Whelan's objections to WEG's rules and policies are as follows:

- The Access Agreement is not a negotiated contract;
- The ORC Rules of Racing do not require licensees to sign the Access Agreement; (this assertion is undisputed by WEG or the ORC Administration)
- The Access Agreement provides that the horse person will abide by all of WEG's Rules and Policies;
- WEG's right to revoke access rights and deny the right to race at WEG tracks
- Those denials of access may be without notice or reason existing or being given and without a Hearing;
- WEG's right to determine what may be injurious to the sport of horseracing or not to be in the best interests of the sport of harness racing;
- WEG may impose punishment for such conduct including suspensions of privileges, loss of fees and eviction from the premises;
- Thereby the horseperson contracts that he/she will have no recourse for such action by WEG;
- Purse distribution, racing dates and track surface issues hitherto were negotiated between OHHA on behalf of the horse people and WEG. These provisions, as is the case with all WEG rules, can be unilaterally revised by WEG upon 10 days' notice.



- The track surface provision provides no assurance that the surface will be suitable and safe for racing;
- The WEG Rule Book provides that the Access sticker must be in the applicant's possession "*at all times while on the premises.*"
- That not all horse people have been required to sign Access Agreements. Owners have been exempted;
- WEG usurps the ORC's right to decide whether a horse person is allowed to race;
- The Access Agreement gives WEG the power to discipline. The disciplinary function is exclusively for the ORC;
- The Access Agreement ignores due process considerations. There is no procedural fairness by way of notice, particulars, disclosure, a hearing with rights to cross examine opportunity to lead evidence, testify and make submissions;
- Whelan is said to be forced to sign these contractual provisions which are objectionable;
- The Access Agreement cannot be a condition precedent to racing at WEG.

34. Those assertions are colourful, inciteful and good canon fodder for the troops if insurrection or boycott is the objective. With the utmost deference to those who think otherwise, the Panel is driven to the conclusion that those propositions are fatally flawed.

35. The correct analysis flows from understanding the concepts of:

- Property rights.
- Track Rules which are inextricably intertwined with property rights in this case.
- The true nature of ORC licensing in terms of "entitlement" and "qualification".

Property Rights

36. Inherent in the right of ownership of real property are the following subordinate rights:

- Exclusive possession.
- To grant permission to others to enter on and use the property for certain purposes.
- To withdraw that permission.
- To do so without a hearing, without advance notice, without reason, without explanation.
- To attach conditions to the use of the property.
- To determine if those conditions have been breached.
- To make that determination without hearing, advance notice or explanation.
- To withdraw permission following such breach.
- Having withdrawn permission to remove the person by lawful means.
- To thereafter exclude that person.
- That person's entitlement to use the property depends entirely upon permission.
- To exercise those property rights without providing due process.

37. By the very nature of due process, the owner as one of the parties to the dispute lacks not only the ability but the impartiality to provide due process. Litigator and adjudicator must be mutually exclusive.

38. There would be neither illegality nor impropriety if the owner expressed those rights in writing for the benefit of prospective users. This could be accomplished in the form of rules or policies. The written



expression of those conditions could be highlighted for emphasis by use of bold print and upper case letters – as WEG did in its rules of racing.

39. Whatever WEG's purpose underlying that format, the result is obvious – an emphatic, robust declaration that WEG standards are inflexible.

40. There is no error in principle for WEG to issue an incontrovertible statement that:

- The quality of its racing product will be of the highest standard.
- As a condition precedent to participation, be prepared to conform to that standard if you wish to participate at that level with opportunity to benefit from WEG's rich purse structure for over night events, stakes races and special events.

41. The regulator has no place in business decisions or business contracts not engaging the public interest. In the Flamboro Downs case (1996 ORC D No. 5) the ORC chair states:

“A combined reading of the decisions in ORC v. The Jockey Club Limited and the majority judgement in HBPA v. ORC indicate that the ORC has no jurisdiction to affect the contractual rights of parties as that does not involve an administrative act. In our view, that limitation extends to the interpretation and enforcement of contracts which deal with common law rights of a private nature over which Courts would ordinarily exercise inherent jurisdiction. To provide the Commission with such jurisdiction would require clear statutory authority which is absent in this case.”

42. In matters unrelated to racing, the ORC has no power to abridge WEG's long-established property rights. For those unoffended by Biblical reference, the Garden of Eden operated on similar principles:

- Enter and enjoy the bounty
- obey the rules
- or be cast into exterior darkness (a precursor of track rules)

43. Essentially, WEG has codified its property rights. Those rights were implicit in ownership and existed fully before they were stated in writing as track rules or policies. The advantage in having them in written form is that they are specific and there is notice of them. The Access Agreement is a written declaration of existing property rights plus the 2008 modification relating to revenue splits and race dates. Those modifications will be the subject of further comment.

44. WEG's property rights remain absolute until the racing element is introduced into the equation. Thereupon two principles come into play:

- As identified in the Sudbury Downs case (Ontario Harness Horse Association v. Ontario Racing Commission 2002 62 OR (3d) 44 ONT. C.A.) and the cases which it was spawned, the ORC as industry regulator has power to supersede property rights in defined circumstances.
- As regulator, the ORC safeguards due process through provision of procedural fairness and natural justice.



45. It is essential to understand that WEG's rights as expressed in the Access Agreement are restricted to matters within the ambit of that Agreement. The following must be clearly understood. WEG refers to conduct which it may determine

- "to be injurious to the sport of horse racing" or
- "not to be in the best interests of the sport of horse racing."

46. That determination by WEG relates only to the context of racing at WEG and permission to race at WEG tracks. It is not a determination in the overall sense that ORC consequences will flow from such a finding by WEG.

47. WEG's determination of such misconduct relates only to its property rights to exclude or temporarily suspend the right to be on its property. That right of exclusion is subject to being displaced by the ORC on Sudbury Downs principles.

WEG Sanctions Are Confined To Property Rights

48. WEG's reservation of its Access Rights is blunt, unconditional and unrepented. This is not an exercise in public relations. It is unequivocal declaration of:

- WEG's Access Rights requirements.
- That WEG will be the sole judge of any breach of rules founded on those Access Rights.
- That WEG access sanctions will be imposed in consequence of a breach.
- WEG will be the sole Judge of the extent and nature of those consequences as they relate to racing on WEG tracks.
- Those sanctions relate only to the rights to exclude and remove for trespass.
- Those sanctions will have no effect on an ORC licensee's ability to race elsewhere.
- The determinations of breach by WEG have no effect on compliance or otherwise with ORC Rules of Racing.

49. The only WEG sanction for breach of WEG rules that is not squarely within trespass law is found in Section 7.1(ii):

"Loss of any or all fees"

50. For clarity, this relates to prepaid race eligibility fees. If a WEG suspension prohibited a horse from racing in a certain event, then prepaid entry or sustaining payments would be forfeited. This is simply a redundancy as a restatement of the conditions of a particular racing event which invariably provide for no right of recovery once the payment is made regardless of whether the horse starts or not. Clearly any dispute on this issue would relate primarily to racing and so would be reviewable by the ORC under Sudbury Downs principles.

Track Rules

51. Refined to its essence Whelan's objection to WEG's conduct is that by purporting to make rules relating to racing conduct WEG has transgressed on the exclusive authority of the ORC as Industry Regulator.



52. This contention is inconsistent with the fundamental concept of track rules. The error in the Whelan submission is demonstrated by the definition of track rules.

- “Rule 2.58:Track Rules means rules posted by Associations to govern conduct of racing and participants at that Association’s Raceway. Track rules may be adopted in whole or in part by the Commission.”
- “Rule 2.04:Association means a person partnership association or corporate body licensed by the Commission to conduct a race meeting. (WEG is such a corporate body).”

53. The authority for and utility of track rules is beyond controversy. Their genesis is statutory in Section 11(2) RCA 2000 (ORC adoption of rules and procedures of Racing Associations). The rationale underlying that genesis is simply statutory recognition of property rights. On that basis the right to make track rules is unassailable. Track rules are referenced in the ORC Rules of Racing as follows:

Rule 1.02 (Approval by the Director)

Rule 1.03 (Supremacy of ORC rules or directives in case of conflict with track rules)

Rule 7.06 (Track Rules approved by the Director may be enforced by the Judges).

54. For purpose of this discussion, two elements of the definition of track rules are significant.

- Firstly, the authorized subject matter of track rules is “to govern conduct of racing and participants”.
- Secondly, the area of influence is confined to the property of the track which made the rule. Hence any exclusionary sanction for breach of the track rules would relate solely to that track. The sanction would have no effect on the licensee’s status to race at other tracks.
- This is in contra-distinction to a sanction imposed by the ORC for breach of its Rules of Racing. An ORC suspension is an unconditional exclusion from the grounds of all associations where a licence is required and disqualification from any participation. Rule 6.10.01.
- The term “suspension” in the WEG rules has a limited meaning. WEG has no power to suspend an ORC licensee. Only the ORC has power to do so. WEG’s power is restricted to withdrawal of and thereby suspension of that licensee’s privilege to race at WEG.
- The result, there is overlap in the use of the term “suspend” by WEG and by the ORC. As explained the subject matter of the suspension is entirely different.

55. Accordingly, the time-honoured indictment that by making track rules as it did, WEG is usurping the statutory function reserved to the ORC as Industry Regulator is, on a plain reading of the definition of track rules and on a full understanding of track rules, wrong. That indication of the falsity of the indictment is further supported by ORC Rule 1.03 which confirms the dominance of the ORC rules and thereby points away from their exclusivity.

“Rule 1.03: Should any provision of these rules or any Commission directive conflict with any track rule, the appropriate Commission rule or directive shall govern.”

56. The ORC Rules of Racing neither impose limits nor set guidelines for the scope of track rules which “govern conduct of racing.”



57. Ideally to encourage wagering, racing should be honest, in accordance with the Rules of Racing, competitive and with full fields. Track rules protecting and promoting those elements conform to ORC standards and objectives.

Approval of Track Rules in Issue

58. Regarding ORC approval or otherwise of WEG track rules, the ORC Director of Racing wrote to “Jamie Martin, Woodbine Entertainment” on January 24, 2008, as follows: “We are in receipt of your track rules and same are hereby approved.”

59. Due to paucity of words and ideas, the precise meaning of that communication is unclear.

60. The most recent edition of the WEG rules spawned in the shadow of loss of the CPMA wagering licence appeared in the fall of 2008 and included provision for Access Agreements. This addition to the rules which is under examination in this proceeding was not submitted to ORC for approval and clearly as stated earlier herein, has not been approved by the ORC.

Entitlement

61. Whelan’s misconception and assertion that his ORC licence “entitles me to race at any ORC licensed track in this province” is at the root of this virulent dispute.

62. An understanding of the true nature of an ORC licence is essential to resolution of this matter. An ORC licence is no more and no less than an official permission to engage in certain conduct in ORC regulated activities – that is “qualification” to participate.

63. No right is created for a licensee to present himself at a particular track and assert in defiance of the rules at that track:

- Here is my ORC licence.
- Here is my horse’s proof of eligibility to meet the racing conditions for a particular racing event.
- I will abide by ORC rules of racing.
- I am not subject to your track rules.
- I demand that you accept my racing entry.

64. Whelan stated in evidence that his ORC licence “entitles me to race at any racetrack in Ontario.” The term “entitles” is an overstatement. A more precise exposition would be that the licence qualifies him to race at any track in Ontario. Having become qualified, when does he become entitled to race at a certain track?

65. The answer is tied to “track rules”. As discussed earlier it is beyond controversy that track proprietors have a right to make track rules governing conduct of racing on their property. If the licensee is in compliance with those track rules, then he/she is entitled to race at that track. The ORC as Regulator of racing and racetracks establishes rules regarding the conduct of racing generally and at all tracks. The eligibility rules governing horses permitted to race are consolidated in Chapter 11 of the ORC rules.



Due Process In Relation To Track Rules

66. The concept of “due process” interpreted to mean procedural fairness and natural justice is firmly rooted in Canadian jurisprudence. The term “due process” is much more common in U.S. jurisprudence. The Fifth Amendment to the Constitution of the United States includes:

“No person shall “be deprived of life, liberty or property without due process of law.”

67. The term “due process” has come into common use in proceedings before Ontario Racing Commission adjudicative Panels. In that forum it has become a term of convenience.

68. There is neither legal burden on nor capacity by the track operator to provide due process in relation to that track’s rules.

69. With our Administrative Law system, neither is there power by which a track operator could preclude an ORC licensee from procedural fairness or natural justice. That recourse is always available through appeal to the ORC and thence to the Divisional Court for Judicial Review.

70. WEG’s position is “these are the rules under which we operate. They are based on our common law and statutory private property rights. If you wish to compete for our purses conduct yourself according to our standards. Thereby we protect or improve what we have. All ORC licensees who race to these standards and whose horses meet the conditions are welcome. None is obliged to come or to stay. No one is forced to surrender any rights. Everyone is free to go elsewhere.” If there is perceived failure of procedural fairness or natural justice the licensee’s remedy is by recourse to the ORC. The Sudbury Downs case provides for intervention in matters primarily related to racing.

71. This distinction must be in the forefront:

- conducting a racing business
- governance and regulation of the racing industry

72. From this distinction flows application of the Biblical imperative, “*Give unto Caesar the things that are Caesar’s...*” *The equivalent is “give unto WEG the things that are WEG’s.”*

Denial of Due Process

73. The ORC is created by statute and has neither power nor entitlement beyond that conferred by statute. There is no inherent or residual power such as that enjoyed by the Superior Court.

74. Section 6, RCA 2000 directs the use of the statutory powers conferred on the ORC (“exercise its powers and perform its duties in the public interest and in accordance with the principles of honesty and integrity and social responsibility.”) In compliance with that imperative, the ORC abjures any encroachment on procedural fairness, natural justice or due process. That level of commitment is expressed in the Hamather case as follows:

- “Though the heavens fall – licensees must not be denied due process.
- “Regulation lacking procedural fairness would be a total failure to comply with the standard of honesty, integrity and social responsibility.”



75. The Statute creates an obligation to act to s. 6 standards. It permits neither power to decline nor to delegate that function. In result, for licensees, due process is to be found at the ORC.

76. WEG, whether by contractual rights with a licensee or otherwise, has power to extinguish neither the licensee's right to due process nor the ORC obligation to so provide.

77. Preconditions to the ORC right to hold a hearing and to intervene are founded on the Sudbury Downs case as follows. The issue must be "primarily racing". It must relate to "the good of racing generally". The public interest must be served by holding a hearing. That public interest consideration embraces all facets of the broad spectrum of horse racing.

78. This bedrock existence and availability of "due process" for licensees appears to be unrecognized, misunderstood, ignored, obscured or suppressed. That failure to recognize and acknowledge contributes to this litigation.

79. Two vital principles emerge:

- The Regulator has the statutory authority and obligation to provide due process with no right to delegate. Hence tracks have no such capacity.
- Tracks cannot by contract or otherwise terminate, avoid, qualify or diminish that right to due process. Any such attempt falls before the scythe of the Regulator's statutory authority and obligation. The supremacy of statutory authority trumps contractual provisions which purport to curtail "due process". The ORC obligation to regulate to S. 6 standards represents the licensee's guarantee that ORC governance and regulatory authority over horse racing supersedes WEG's contractual and property rights.

80. This ORC intervention process is in progress with delivery of these Reasons. Here is Whelan engaged in a brimming cup of due process, available to him, whether or not he signed WEG's Access Agreement.

81. The Whelan submissions are in error in contending that due process is denied in consequence of the aggressive cast of the WEG contract. The aggrieved party has upon request, opportunity for review by WEG's Vice President Standardbred Racing. Failing relief there, he/she has immediate access (depending on urgency) to the ORC adjudicative structure:

A hearing by ORC judges.

An application for a stay by the ORC Director pending a hearing before a Commission Panel.

An appeal by de novo procedure before a Commission Panel.

Judicial Review by the Divisional Court exercising its supervisory function as a branch of the Superior Court of Ontario. The next level in appropriate cases being the Ontario Court of Appeal.

82. Provisions in the Access Agreement for revenue splits and race date allocations being primarily racing issues would certainly have been subject to ORC review had there been any attempted abuse by WEG.



WEG Acknowledgement Of The Right To Due Process

83. WEG fully participated before the ORC in its exclusion cases against Friedman (SB 025/2007), Hamather (SB 017/2008) and Chiaravalle (SB 027/2008). In those cases, WEG's exclusion rules were unchanged from those now challenged by Whelan.

84. Neither in those cases nor in this Whelan case has WEG contended that its rules authorizing exclusion without notice, cause or recourse were effective to deny the aggrieved person a hearing before the ORC. In consequence, Friedman, Hamather and Chiaravalle had full ORC hearings and one, Hamather, went on to Judicial Review.

85. By that conduct, WEG has acknowledged that notwithstanding the powerful expression in its rules, the right to due process remains secure.

WEG's Right To Protect Its Business Interests

86. The waiver of liability provisions, management of risk, release and indemnity provisions in the Access Agreement have been said on Whelan's behalf to be "not the provisions that are being challenged in this case."

87. Those provisions although not in dispute are important for another reason. They demonstrate the potential impact of a bad business decision on WEG's operations. Absent such as the waiver of liability and indemnity provisions there would be no equitable and commercially viable management of the risk in a high risk industry.

88. Liability exposure incidental to the business of horse racing and maintenance of back stretch facilities has been a major and long standing business consideration. WEG experienced barn fires at Mohawk in the 1990s and at Woodbine in August 2002.

89. On July 16, 2004, WEG's insurance broker and risk consultant forwarded to WEG a cautionary letter advising that few in the insurance industry were willing to underwrite this type of liability exposure. Reference was made to premium levels becoming no longer commercially viable. The importance of WEG's commitment to risk management was stressed. That risk management was achieved in part by Rules and Regulations relating to users of the premises and to auditing management procedures. The cautionary note concluded: "In essence no underwriter will want the risk and price the insurance accordingly."

90. Badly managed risk exposure has the potential to put WEG out of the racing business. David Willmot (Willmot), Chairman and CEO at WEG testified:

"Our Board is absolutely immovable in the stance that without liability insurance the exposure and the risk to our company is too great. It is today we are reasonably financially viable. The exposure is simply too great and we will not conduct racing and I couldn't say it more strongly".

91. Willmot further testified:

"We are a regulated business but that only changes the nature of our operations to some degree. It does not remove our fundamental rights and duty as a business to try and remain viable."



92. Willmot's declarations relate directly to the statement of WEG's corporate mandate as expressed in WEG's 2008 Annual Report as follows:

“Decisions of the Board and management and levels are taken in the goal of enhancing the corporation's financial stability. Courses of action which might be viewed as beneficial to some component of the industry but which are not financially prudent for the corporation will not be pursued, only by adhering to this discipline can the directors discharge their respective fiduciary obligations to the corporation.”

93. WEG directors have the right and obligation to manage their business responsibly within the law. Thereby protection of the purity of their racing product and its reputation is a legitimate concern.

94. WEG markets horse racing at the highest level. Good business practice dictates effective measures must be taken to maintain quality control of its product – horse racing. Damage to that product, sufficient and sustained, poses a threat to WEG's business on a scale comparable to liability risk exposure. Absent public confidence in racing integrity, there is no market demand for wagering which apart from slots revenue, funds the industry. In consequence, quality control of racing is a high priority.

95. More than fifty years ago it was recognized by the Ontario Court of Appeal that racing must not be adversely affected by those who participate in it. As stated by Justice Roach:

“One only has to look at the powers granted to the Commission to grasp and understand the wide scope of administrative powers granted to it, all with the manifest intention that the Commission should regulate horse racing as it affects those who participate in it and the public who patronize it, and that as a public sport it shall not be adversely affected by those who participate in it or any odium cast upon it. Morrissey v. ORC 1958 Can LII 20

96. A fundamental precept underlying this analysis is that WEG's aspiration for fair and competitive quality racing is compatible with ORC governance and regulation of the industry. WEG's high standards are aligned with the public interest in protecting wagering which, slots aside, sustains the racing industry and its many cottage and related businesses and suppliers.

WEG Standards

97. If the barometers of success be attendance and mutuel pools, WEG tracks aside, harness racing is on life support in the form of slot revenues. Invariably the wagering handle is inadequate to sustain the operation. The malaise is widespread as evidenced by the terminal distress of the Industry in Quebec and Alberta. Those provinces have no WEG.

98. Against that landscape, WEG sustains its viability and vitality. The inference follows that the public seeks racing to WEG standards, honest competitive, quality racing with full fields and integrity to the optimum standard. Metaphorically WEG is the spine of the Industry.

99. Complaint against WEG track rules is said to be supported by the fact that other tracks do not impose such exacting standards. On that basis, the Windsor track rules were filed and are appended hereto.



100. The contention that other Ontario tracks do not follow WEG protocols, rules and policies is completely devoid of force. Anyone with even the most rudimentary knowledge of racing must be aware that in Canada WEG with its racing facility, integrity standards, quality of racing, wagering handle and purse structure stands alone. There is no valid comparison with other tracks. Some tracks are so far down the list as to be almost off the charts.

101. In terms of racing environment and racing prosperity, WEG is Elysian Fields. WEG tracks are the ultimate proving ground and financial pinnacle for Ontario Harness Racing. WEG raised the bar across the racing spectrum. WEG's success is not a fortuitous event which just happened without work or purpose. That result is founded on exemplary standards rigidly enforced over the years.

102. The Industry decline has been sustained notwithstanding the two massive financial injections provided by the Provincial Government in the form of the wagering tax rebate and slot revenues. The stated purpose of those injections was to sustain rural economy. The peril is that racing may come to be seen as a pipeline from casinos to that rural economy. Racing patrons are in danger of becoming such a rare commodity that they barely factor into that equation. If the fair and competitive elements of racing are sufficiently eroded, the government may ponder a more equitable means of channeling slots revenue to rural beneficiaries.

103. Apart from the manna from heaven in the form of slot revenues, racing is funded by the wagering dollar. The vast majority of mutuel handle is a product of some form of handicapping. That handicapping is premised upon analysis of past performance. Past performance may relate alone or in concert to the horse, driver, trainer, owner, breeding, and so on. Inconsistent chart lines reduce the semi-science to a crap shoot. If the public loses confidence in the chart lines, the handicapping basis and with it the wagering dollar leaks out of the bottom.

104. WEG vigilance in relation to standards is not without good cause. There is and probably always has been an unethical element in horse racing which bears watching. Within that element is a faction dedicated to defiance of the rules of racing. The format is to shoot-up the horse with illegal stimulant seeking advantage in endurance or speed. The objective is to use a substance beyond current detection capabilities, to mask the substance so as to preclude detection or to time the dosage to render detection chances remote. This is the wraith against which honest rule-abiding horse persons must compete for purses. The existence and activity of that unprincipled sub-culture is bruited in every backstretch community at every race meet. Specific instances are difficult to ferret out and more difficult to prove. The fallout from that activity is destruction of fair, honest and competitive racing. The chemists and drug mechanics exist. The bane of the industry – some flourish. The very vulnerability of one's own racing stock makes whistle-blowing a high risk activity.

105. The ORC is committed to combat illegal medications and substances. Detection procedures plod along in the wake always caught in an exercise of catch-up. The result of such activity is to drag racing down to the lowest common denominator. There is no description for that activity other than "cheating". The cheater moves on. The taint of cheating remains with the track. Is it wrong for WEG to address that unsavory element in emphatic terms applicable to all - "Don't kill any skunks in our backyard."?

106. WEG has more to lose and so more to protect.



WEG Conduct

107. Daily WEG acts responsibly in management of its property rights as it does in management of its business and racing affairs. On occasion when WEG has exercised its authority to ban (Friedman, Hamather, Chiaravalle) there has been a serious racing issue at stake and WEG' response to that issue has been reviewed by the ORC.

108. WEG's interest and the public interest in racing have been well served by WEG's vigilance and initiative in protecting its racing standards. There is a broad and powerful element of the public interest served by WEG maintaining its premiere performance and status.

109. The ORC must exercise appropriate intervention to guarantee there are no abuses of WEG's powers. Any disciplinary action by WEG must not relate to ORC violations and must relate solely to WEG rules. Property rights include no right by WEG to impose a fine and WEG claims no such right.

110. In cases of encroachment on ORC jurisdiction such as search and seizure WEG has been instructed that the field is fully occupied by and is the exclusive jurisdictional responsibility of the ORC.

Public Interest

111. The public interest includes the many facets of the racing industry such as:

- persons directly and indirectly engaged in racing at WEG
- those racing elsewhere
- those hoping to participate in the industry
- racing patrons
- track owners
- track employees
- the public interest in a viable racing industry
- the overriding general public interest in a just society

112. Considerations included in this dispute:

- 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 imperiling 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.



113. The burden imposed on horse people is no more than compliance with rules designed to protect the quality of WEG's racing product.

114. The ORC's public interest obligation embraces:

- Viability of the racing industry.
- Opportunity by licensees to participate freely, openly and honestly within the rules.
- Principles of due process and protection against imposition of penalty absent fault.
- The quality of the racing product.
- Honest drug free racing.

115. The over-arching public interest is overwhelming in support of maintenance of racing to the highest standard. Given that there is no diminution of access to due process, the balance of probability scale clearly and abundantly favours WEG's position.

In Terrorem Argument

116. Whelan's contention is that under WEG's authority to change its rules on 10 days' notice WEG had authority to change revenue splits and race dates provisions incorporated into the Access Agreement.

117. Inclusion of those provisions in the Access Agreement must be seen as exigent compliance with CPMA licensing requirements and in no way a grasp for extension of power. That those provisions were cosmetic compliance with CPMA requirements is obvious. The seemingly draconian term was a toothless façade. CPMA accepted that response by WEG notwithstanding OHHA's objection.

118. The Whelan contention carries a sinister connotation verging on an "in terrorem" argument. "The dam has burst. We shall all perish." The facts are:

- The amended Access Agreements have been in place since January 1, 2009. (The original Access Agreements date back to about 2003.)
- From that date to the COSA Contract, WEG had seven months plus to make any such changes and has not done so. The COSA five-year Agreement now renders the revenue sharing and race dates issues moot.
- None of the CPMA related terms was unilaterally imposed. WEG simply continued the terms of the last negotiated contract with horse people until a new contract was negotiated in August 2009. That COSA contract continued the same revenue split for five more years and settled upon a minimum number of race dates for the same period.

119. This counter play by WEG in cosmetic response to CPMA requirements while maintaining the revenue split and race date status quo was a reasonable response to a critical situation. WEG's interest and the broad public interest coincided on the issue of maintaining WEG racing as a viable industry. The cosmetic intrusion on bargaining rights was expedient and nothing was lost by that bridging action.

120. Lurid contentions decrying loss of due process and of bargaining rights for revenue splits and race dates were no more than straw men, a non-existent foe conjured up to be struck down Don Quixote style.



A Coercive Contract

121. The terms of the Access Agreement were not negotiable. That the contract or agreement was inflexible does not render it coercive. No one was obliged to sign. An invitation was extended to all licensees with horses meeting eligibility terms – “Race here if you wish but if you do so, you race to WEG’s standards.”

Negative Consequences

122. Negative consequences are claimed to have befallen Whelan following his refusal to sign the Access Agreement. In a word those consequences are no more than racing life without WEG tracks. Options include racing elsewhere (in the US if for comparable purses). The actual disposition of his horses was, “The Beast from the East” went to Meadowlands. “Whattahotty” was bred. Turning the horses out would have been another option. Racing at WEG was always an option – available by simply agreeing to accept WEG standards.

Loss of Livelihood

123. Closing submissions on behalf of Whelan state (paragraph 6) - “They (horse people) signed because they had to. Their livelihoods depend on racing and so it is not an option to not race which is the situation they would be in if they refused to race.”

124. This of course is not correct. Other racing options exist with substantial purse money in Ontario such as Grand River, Georgian Downs, Woodstock, and in the United States, Ohio, Pennsylvania, New York, New Jersey, and so on.

125. Whelan was not compelled to sign the Access Agreement and has not signed. By refusing to do so he has not been deprived of his livelihood.

Whelan Does Not Seek Personal Access

126. A further objection, well down the list in terms of significance, is the assertion that Whelan does not seek personal access. Rather he seeks access for his horse and equipment in care of the trainer. The Access Agreement relates to persons and personal property. The horse is Whelan’s property as is the equipment. So the Access Agreement is required. If Whelan seeks to enter the restricted backstretch area, he must have the access sticker on his person.

“The Horse People That I Represent”

127. Whelan during his testimony referred to “the horse people that I represent”. That reference was not explained and must be examined in this context:

- This proceeding is not brought by Whalen in a representative capacity.
- OHHA did not seek intervenor status.
- By inference Whelan does not represent the OHHA members racing at WEG tracks who rejected his call for a boycott.
- By inference he does not represent the COSA members racing at Woodbine.



- There is no evidence that he represents any of the approximately 2500 horse people who race at Woodbine.
- There is no evidence of a rank and file poll or referendum of OHHA members on this issue.
- There is no evidence of support for this proceeding by the many horse people linked to OHHA by dependency upon their RSP, insurance and health benefits.
- On the evidence all that is clear is that when the funding vote was taken by the executive committee a majority of those present supported the funding.

Interim Relief

128. This hearing proceeded on June 29, 2009 and July 16, 2009. Written submissions followed.

129. On July 31, counsel for Whelan forwarded a Notice of Motion to the ORC seeking interim relief, pending a decision in this matter. Counsel advised that he would be absent on holiday to August 17 and was available for the Motion during the week of August 17.

130. The Motion proceeded on the first date convenient for all, August 25, and was dismissed on that date with Reasons to follow. By that date written submissions on the main issue had been received from counsel for Whalen, counsel for WEG and counsel for the Administration. The only outstanding submission was a reply by counsel for Whalen due September 4.

131. The civil criteria of triable issue, irreparable harm and balance of convenience are instructive. Certainly there is a substantial issue in balance. The balance of convenience is not so clear. There are many racing options for Whelan, one of them being WEG tracks if he so chooses. WEG's authority may be diminished by an interim order. That authority is central to control over its racing product. This was an issue to ponder but not necessarily to be decided because the Application failed on other grounds.

132. When the motion for interim relief was argued, the proceeding before this Panel was obviously winding down rapidly.

133. Racing opportunities for harness horses are scheduled at weekly or longer intervals.

134. If the race does not fill or if for some reason the horse does not race, a week or two of racing may be missed (one start or possibly two) – not an uncommon racing event. This is roughly the time span behind the hearing of the Application for interim relief (August 25) and release of the decision on the Application (September 11).

135. The time element was brief. During that period, the harm could be ended by very simple action by Whalen. There was no demonstration of irreparable harm.

Disposition

136. For these reasons, the Application was dismissed.

“Binding Up The Wounds”

These comments are gratuitous, made in passing.



137. James Whelan's intelligence, resolute character and passionate pursuit of principle and achievements for the benefit of the industry rank and file demand respect and admiration.

138. Whelan's commitment to the industry has been enormous. It is his passion and his full-time occupation. In that capacity, he has long been a significant player on the race track and in the boardroom. His racing and ORC records have been excellent – a credit to the industry.

139. His charismatic energy attracts supporters fiercely and irretrievably committed to the extent "my country right or wrong, my country". If commitment is made on a policy issue, pursuit thereof is unrelenting. The result, a surging force unleashed. Positions polarize. The battle escalates to "scorched-earth" proportion. The result is similar to Irish Alzheimer' where everything goes but the grudge.

140. OHHA has done much to enhance the status and prospects of industry participants through programs for OHHA members and by prudent application of its funding. With the utmost respect, OHHA, a proud institution, is in danger of losing its way in the uncertain corridors of litigation, litigation which implacably burns holes in deep pockets and scars the tissue of relationships.

141. OHHA or OHHA related actions relative to WEG include:

A trade journal has reported those of the following which are beyond the evidence:

- On December 23, there was an unsuccessful call by OHHA for a boycott of WEG races.
- On December 30, there was a second failed boycott call.
- On January 4, OHHA called off the boycott.
- On January 8, WEG issued a Press Release identifying that OHHA had written a letter to members of the Provincial Parliament asking them to instruct the Ontario Lottery and Gaming Corporation to withhold WEG's slot machine revenue until WEG contracted with OHHA. (apparently seen by WEG as virulent, unfair and unwarranted, unlikely to be described as good faith negotiation)

142. Further steps taken by OHHA

- Attempted prevention of renewal of the CPMA wagering licence by written objection directly to the CPMA.
- Launching this Application challenging WEG rules and policies.
- Scheduling an OHHA challenge before the ORC relating to the validity of the COSA/WEG Contract.

143. A profoundly disturbing statement of policy has emerged from WEG in response to those tactics. Willnot testified:

"I think we all had differences of opinion perhaps given certain factual situations of where those limitations on our business and enter into private contracts that protect and enhance our business. I think we may disagree on that and it may take decades of litigation before we determine exactly the extent of those imitations in very new circumstances."

144. This litigation is no more than the current manifestation of conflict gripped to the death by both parties. Determination to prevail produces new phases of the same struggle – much as Hercules



engaged in his twelve labours striking off one hydra head and being confronted by two more. Compromise finds no refuge in this environment.

145. The stakes are monumental. If WEG withdraws from harness racing, an impoverished industry would be left in the wake – almost wholly dependent on the slot flow. The current hostilities are so narrowly focused that the parties seem blind to alternatives. WEG waves the red flag of provocative and inflammatory invective in its contractual boiler plate. OHHA responds perhaps with more sail than rudder. If those track rules provided notice that “due process” remained available through the ORC, they may be more palatable.

146. Justice Roach in the Morrissey case made reference to a “private vendetta” related to “a very prominent figure horse racing in Ontario”. His observation was “*It is not the function of the Court to decide whether that was the purpose or not, but counsel has referred to facts that would seem to lead to that conclusion*”.

147. Lawsuits generally may be classified as “constructive” or “destructive”. This one drops into the latter category with a thud.

148. The strategy underlying strike action may warrant review. The former economic impact for tracks has been reduced by slots churning coin practically unabated throughout a strike. Costs associated with operating racing disappear - a result that unfortunately some tracks relish and perhaps might cheerfully perpetuate. Patrons suffer although perhaps to a lesser extent because of the diminished patron base. The peril is that disenchantment with strike action may render that smallish patron base smaller. Who is left to be the loser? - horse people, their tradesmen and suppliers. If there is in fact a reduced bargaining power for horse people through strike action in this slot era, does that suggest the best interests of racing lie with cooperation rather than confrontation?

149. In the Flamboro Downs case the ORC Chairman states:

“In order for the racing industry to properly function and thrive in these days of mounting competition in the gaming and entertainment sectors, it is essential that all participants in racing conduct themselves with integrity and honour. It is equally essential that the long standing hostility and bickering that have sapped so much creative energy and so many resources from both Flamboro and its horse persons be resolved. Both parties must genuinely strive to resolve their differences and go forward together. It is not in the best interest of racing and in the public interest that chronically hostile relations continue to exist between horsepersons and racetracks.”

150. In the concluding sentence of Abraham Lincoln’s second inaugural address as President of the United States, the following appears in reference to the four years of devastation suffered through the American Civil War:

“With malice towards none, with charity for all, with firmness in the right – let us strive on – to bind up the nation’s wounds – and cherish a just and lasting peace among ourselves.”

151. In his “house divided speech” of June 16, 1858, Lincoln refers to the pending dramatic crisis on the slavery and secession issues for his country whose citizens “shall nobly save, or meanly lose, the last best hope on earth”. Elsewhere during the speech he delivered this observation: “A house divided against itself cannot stand”. Is anything to be learned from the wisdom of 145 years ago? As this



divisive issue proceeds through the justice system, harken back to Abraham Lincoln and the rationale and rhetoric that cast him in immortality.

152. Given the robust appetites for litigation it is unlikely that this will be the day when the Industry turns its back on this ice age of confrontation, desperation and litigation, and moves forward through conciliation and co-operation to get on with racing. It should be.

153. The choice between decades of litigation and decades of prosperity through racing well directed by its partners should not be difficult.

Demands On The ORC Adjudicative System

154. This Hearing with:

three factums;
two volumes of documents,
three case books,
twenty exhibits,
three hearing days,
590 pages of transcript,
Written final submissions by three parties,
a volume of excerpts from the transcript,
a written reply submission on behalf of the Appellant,
the Panel's in-camera adjudicative session to review, debate and decide the issue and finally,
formulation of these lengthy Reasons calls into focus a new reality for the industry.

155. Territorial or jurisdictional disputes such as this are but one phase of hearings that have become more time-consuming, more complex and more frequent. In consequence, the ORC hearing system with its limited resources in terms of personnel, time and funds, is subject to unrelenting stress. Current demands on the system call for response.

156. Two results flow:

- If the industry demands "more" in terms of adjudicative function it will fund that "more". For that purpose, levies could be increased or licensing fees could be subject to some form of adjudication surtax.
- The process of adjudication will come under review. Considerations of time conservation could precipitate change. Perhaps such as:
 - More disciplined Hearings with permissiveness and latitude under careful scrutiny.
 - Introduction of an Agreed Statement of Facts system designed to immediately identify issues and avoid repetitive narratives in evidence. The Applicant could be required to submit a proposed Statement of Facts. The Respondent would be obliged to identify the facts in issue and failing doing so he/she would be deemed to have admitted the Applicant's Statement of Facts. Facts once admitted or deemed to have been admitted would not be subject to future proof or challenge.



- Reformatting Reasons for Decision in skeletal form as follows:

- Statement of the issue
- Brief comment on essential evidence
- Finding of facts
- Statement of principles involved
- Application of principles to the facts
- Result
- Penalty, if applicable, with reasons

- reconsideration of present forbearance relating to recovery of costs thrown away by adjournments or frivolous proceedings.

To The Administration

157. As a final observation, the status of all track rules, WEG and otherwise, as approved by the ORC or otherwise should be confirmed and recorded.

DATED this 2nd day of October 2009.

James M. Donnelly
Vice Chair

Attachments

Schedule – WEG Rules
WEG's Purse Distribution Covenant
WEG's Race Scheduling Covenant
WEG's Application for Access Rights – Standardbred
Windsor Raceway Track Rules
ORC Standardbred Rules (2)

Schedule

WEG Rules

Portions of WEG's standard bred rule book (Rules of Racing) relating to trespass exclusion and Access Agreements are:

1.1 (a) it is a privilege, not a right, to use the premises and race at the racetracks. Any conduct determined by WEG, in its sole and absolute discretion, to be injurious to the sport of horse racing or not to be in the best interests of the sport of horse racing, may result in the imposition of a penalty in accordance with Section 7.1 of these Rules and Regulations.

1.1(b) WEG RESERVES THE RIGHT UNDER THE TRESPASS TO PROPERTY ACT (ONTARIO) AT ANY TIME TO DENY ADMISSION TO ANY PART OR PARTS OF THE PREMISES TO AN APPLICANT OR ANY OF HIS AGENTS, SERVANTS, EMPLOYEES, INVITEES OR ANY PERSONS UNDER HIS CONTROL, IN THE SOLE AND ABSOLUTE DISCRETION OF WEG, WITHOUT ANY REASON OR CAUSE EXISTING OR BEING STATED OR GIVEN. Nothing in these Rules and Regulations shall in any way limit any other rights which WEG may have, whether at common law or in statute, including without limitation under the Occupiers' Liability Act (Ontario) or the Trespass to Property Act (Ontario).

1.1(d) All persons using the Premises will abide by the lawful direction of all Security Officers for the purposes of protecting any and all patrons on the Premises.

1.4 WEG's purse distribution covenant.

1.5 Race scheduling covenant.

(both Rule 1.4 and Rule 1.5 included in exhibits filed)

2.1 Every applicant shall have in their possession at all times while on the Premises a valid ORC Licence for the current year with a valid Stable Area Access Sticker for the current year affixed on the back of it.

2.2 Every person who desires to be admitted to the Stable Area is required to have in their possession at all times a valid Stable Area Access Sticker. A failure of any person to produce their Stable Area Access Sticker may, in the sole and absolute discretion of WEG, result in the person being evicted from the Premises and/or the loss of their racing privileges.

2.3 The Stable Area Access Sticker must be renewed annually and is effective for 12 consecutive months.

2.4 Stable Area Access Stickers will be issued by WEG's security department, at no cost to the person requesting the Stable Area Access Sticker.

2.5 In order to obtain a Stable Area Access Sticker, an individual must hold a valid and current ORC licence.

2.6 To obtain a Stable Area Access Sticker, the Applicant must attend at WEG's Security Department Office and present the following items:

- i. current licence issued by the ORC; and
- ii. if a Groom, hotwalker or stable hand, evidence of employment in the horseracing industry satisfactory to WEG.

2.7 Personnel at WEG security office will:

- i. review the ORC licence and evidence of employment (if applicable);
- ii. require the individual to execute a Waiver of Liability in the form set out at Form A;

and thereafter, in its sole and absolute discretion, issue the relevant Stable Area Access Sticker.

2.10 WEG reserves the right to revoke a Stable Area Access Sticker holder's Stable Area Access Sticker at any time, or from time to time, in the sole and absolute discretion of WEG and without notice or reason OR upon any person ceasing to be a servant, agent, employee or invitee or an accredited individual or under his charge or control, the Stable Area Access Sticker of such person will be forthwith delivered to WEG for cancellation.

6.1 The Rules of Racing in effect at the time any race is raced shall govern the race and any and all Entries will be received only with the understanding and on the agreement of the Applicant that the Rules of Racing govern.

6.8 a) To enter a horse in a race at WEG all Applicants must contact WEG and provide all the information required by Form E or Form F, as the case may be, annexed to these Rules and Regulations.

b) All Applicants entering a horse in a pacing or trotting series must complete a stakes nomination form provided by WEG for each seasonal stakes series throughout the year.

c) Failure to follow the proper entry procedures outlined above may result in the disqualification of a horse and driver from a race and/or suspension of privileges.

7.1 A violation of any of the Rules and Regulations may lead to the imposition of a penalty or penalties including:

- i. suspension of privileges;
- ii. loss of any or all fees; and/or
- iii. eviction from the Premises.

8.1 Definitions

“Applicant” means a person who intends to enter any horse or horses in any race or races at a racetrack and all applicants for Stall Accommodation and shall include:

- i) a trainer or second trainer,

“Stable Area” includes those places within the premises comprising of the stables, track kitchens, racing offices, training areas, tack rooms, saddling areas including paddock and walking ring, and dormitories.

“Stable Area Access Sticker” means the permit or permits issued by WEG from time to time pursuant to Part II of the Rules and Regulations.

4

WEG's Purse Distribution Covenant

- (a) WEG covenants with each Applicant that, subject to the other provisions of this Section 1.4, WEG shall distribute purse amounts to standardbred horsemen participating in Races and the minimum amount of the aggregate purse distribution which WEG shall distribute in each year to the purse account of the standardbred horsemen participating in Races shall be calculated as follows:
 - (i) fifty percent (50%) of the gross revenue derived by WEG during such year from its share of the monies wagered at WEG facilities (including off-track locations) on standardbred races (including all inter-track, simulcast, teletheatre or other form of remote betting involving standardbred racing); PLUS

- (ii) fifty percent (50%) of the host fees earned by WEG on the sale of standardbred races originating at Racetracks; PLUS
 - (iii) fifty percent (50%) of the net breakage revenue resulting from the application of sub-sections (1) and (2) of Regulation 164 of the *CPMA Regulations*; PLUS OR MINUS, as the case may be,
 - (iv) interest on underpayments of purses calculated weekly on the amount of such underpayment before interest, as at the close of business each Saturday, based upon the interest rates in effect on the first banking day after each Saturday as provided by the Bank of Nova Scotia, Toronto Main Branch. Interest on overpayments of purses will be calculated monthly and reflect financing rates based on WEG agreements with the Bank of Nova Scotia.
- (b) For purposes of the calculation of aggregate purse distribution:
- (i) "gross revenue" shall comprise WEG's commission percentage as approved by the Canadian Pari-Mutuel Agency, less any industry allocations to representative entities, including any allocation determined by the authority of The Ontario Horse Racing Industry Association (OHRIA) Business Plan dated June 10, 1996, and shall be calculated net of takeout adjustments in respect of the HorsePlayer® Rewards Program, Teletheatre Incentive Program and U.S. Common Pool Interface Program;
 - (ii) in the case of standardbred races originating at racetracks other than the Racetracks, gross revenue derived by WEG is net of commissions paid to the host racetrack and related fees; and
 - (iii) all revenue shall be determined in accordance with the relevant provisions of the *Criminal Code (Canada)* and the *CPMA Regulations*.
- (c) In respect of simulcast commission revenues, such revenues will be distributed to WEG and the purse accounts of the relevant horsemen participating in Races based on the following rules:
- (i) winter thoroughbred simulcasts originating from U.S. racetracks during the historical dates of the standardbred winter meet (i.e. early December to mid March) - WEG 50%, standardbred horsemen 25%, thoroughbred horsemen 25%.
 - (ii) thoroughbred simulcasts originating from Hong Kong - WEG 50%, standardbred horsemen 25%, thoroughbred horsemen 25%;
 - (iii) all other standardbred simulcasts - WEG 50%, standardbred horsemen 50%; and
 - (iv) all other thoroughbred simulcasts - WEG 50%, thoroughbred horsemen 50%.

For purposes of this subsection (c), "commission revenue" shall mean gross commission revenue from wagering net of (A) commissions or host fees paid to the host track or the track hosting the pari-mutuel pool, and (B) takeout adjustments in respect of the HorsePlayer® Rewards Program, Teletheatre Incentive Program and U.S. Common Pool Interface Program.

- (d) The amount of interest calculated for purposes of subsection (a)(iv) above shall be determined as follows:
- (i) on the first \$100,000, interest will be calculated based on the overnight deposit rate; and,
 - (ii) on any balance in excess thereof, interest will be calculated based on the thirty (30) day deposit rate.
- (e) Any portion of the aggregate purse distribution for the current year which is not, in fact, paid during the year will be carried over and added to the aggregate purse distribution for the following year; and any

overpayment of purses in the current year will be deducted from the aggregate purse distribution for the following year.

- (f) WEG shall add to the aggregate purse distribution, an amount equal to fifty percent (50%) of the revenues from (i) standardbred uncashed winning pari-mutuel tickets and (ii) thoroughbred uncashed winning pari-mutuel tickets related to the periods referenced in Sections 1.4(c)(i) and (ii) above; it being acknowledged by all parties that if The Unclaimed Intangible Property Act is applied to uncashed pari-mutuel tickets, neither WEG nor the standardbred horsemen will earn any revenue from uncashed winning pari-mutuel tickets.
- (g) If WEG has a valid agreement in place with any horsemen's association or other group representing standardbred horsemen participating in Races which includes a provision for distribution of purse amounts, then, for so long as such agreement is in effect, the purse distribution provisions set out in such agreement shall prevail over this Section 1.4.

Race Scheduling Covenant

- (a) WEG covenants with each Applicant that, subject to the other provisions of this Section 1.5, not less than fourteen (14) days prior to the submission by WEG of its annual application to the Ontario Racing Commission and the Canadian Pari-Mutuel Agency for standardbred and thoroughbred and inter-track dates, WEG shall:
 - (i) post, in an area of general viewing in the backstretch at each of WEG's Racetracks:
 - A. the schedule of live race dates (the "**Live Product Schedule**"); and
 - B. the schedule of simulcast racing product to be displayed by WEG for wagering purposes at its Racetracks and other facilities, including betting theatres, (the "**Simulcast Product Schedule**"),which will accompany such application; and
 - (ii) cause its Vice-President Standardbred Racing to meet and consult with any Applicant who is a standardbred horsemen and who wishes to discuss or comment on such schedules, prior to the submission of such annual application.
- (b) WEG covenants with each Applicant that, subject to the other provisions of this Section 1.5, not less than ten (10) days prior to the beginning of each calendar month, WEG shall post the Simulcast Product Schedule for such calendar month, and cause its Vice-President Standardbred Racing to meet and consult with any Applicant who is a standardbred horsemen and who wishes to discuss or comment on such schedule. For purposes of this Section 1.5(b), WEG will 'post' the Simulcast Product Schedule for such calendar month by:
 - (i) posting such schedule in an area of general viewing in the backstretch at each of its Racetracks; and
 - (ii) making such schedule available for viewing by the general public on its web-site at <http://www.woodbineentertainment.com/schedule/simulcast.asp?SEC=STBD>, or an equivalent or successor web address.
- (c) If WEG has a valid agreement in place with any horsemen's association or other group representing standardbred horsemen participating in Races, which includes provisions in respect of the scheduling of races, then, for so long as such agreement is in effect, the race scheduling provisions set out in such agreement shall prevail over this Section 1.5.

WOODBINE ENTERTAINMENT GROUP

APPLICATION FOR ACCESS RIGHTS

STANDARD BRED

To: Woodbine Entertainment Group ("WEG")

I hereby apply, either (a) in my personal capacity or (b) as an employee, agent or representative (an "Agent") of an individual, corporation or other legal entity (the "Principal"), for a limited, non-transferable, revocable licence (the "access rights") to enter upon the lands and premises operated by WEG and the improvements located thereon (the "WEG premises") together with the property (including horses and equipment) in my possession, care, custody or control from time to time during the proposed access.

I undertake and agree to use the access rights, if granted, for the limited purpose of such activities on WEG premises as may be permitted by WEG and, in the case of equine and related activities, to abide by the Rules and Regulations of WEG as amended from time to time.

I acknowledge and agree that WEG reserves the right to revoke the access rights, if granted, at any time in its sole and absolute discretion and without notice, reason or compensation.

I further acknowledge and agree that the term "property", whenever used, includes horses and the term "damage to property" includes injury to or death of horses.

Authority to Sign this Application

Where this is an Application for Access Rights made in my personal capacity, I represent and warrant that I am 18 years of age or older. Where this is an Application for Access Rights made as Agent of a Principal, I represent and warrant that the Principal, if an individual, is 18 years or older and that I am authorized by the Principal to sign this Application for Access Rights and thereby bind the Principal to its terms in the same manner as if this Application were signed by the Principal.

Acknowledgement and Assumption of Risk

I acknowledge that working with and riding horses, handling equine equipment and otherwise engaging in equine activities is dangerous and involves inherent risk of injury and death and loss of or damage to property, and I hereby agree to assume that risk.

Without in any way limiting the generality of the foregoing, I acknowledge that:

- (a) horses have the propensity to behave in unpredictable ways that may result in injury or death or loss of or damage to property;
- (b) the use of equine equipment, including safety equipment, may not reduce the risk of injury or death or loss of or damage to property;
- (c) the condition of WEG premises, including without limitation the racetracks and practice tracks and stables, are imperfect and may contain hidden or unknown hazards that increases the risk of injury or death or loss of or damage to property;
- (d) engaging in competitive activities, including racing, involves unpredictable and unknown hazards and dangers; and
- (e) the use of WEG premises by others or the engaging by others in competitive activities including racing, may result in unexpected or unknown danger that increases the risk of injury or death, or loss of or damages to property.

I acknowledge and agree that WEG makes no representations or warranties, whether written or oral, express or implied, respecting:

- (f) WEG premises or their suitability or fitness for any particular purpose, including without limitation that portion of WEG premises on which any equine events or related activities take place;
- (g) the competence or qualifications of others having access rights to WEG premises, including without limitation their competence or qualifications to engage in training or racing;
- (h) the state of health or safety of horses on WEG premises from time to time;
- (i) the supervision, control or training of horses on WEG premises from time to time, including without limitation their suitability for training and racing.

I acknowledge having been provided with a copy of the Rules and Regulations of WEG and acknowledge that compliance with those Rules and Regulations, as amended from time to time, is a condition of my continued access to WEG premises.

WEG's Purse Distribution and Race Scheduling Covenants

Without in any way limiting any of the above acknowledgements, I acknowledge and accept WEG's covenants in respect of (A) purse distributions set out in Section 1.4 of the Rules and Regulations, and (B) race scheduling set out in Section 1.5 of the Rules and Regulations.

Conditions of Access - Waiver, Release of Claims and Indemnity

In consideration of the grant or proposed grant to me by WEG of the access rights to WEG premises, I hereby waive and forever release WEG and its current and former officers, directors, members, employees and agents (collectively referred to as the "Releasees") from any and all claims of any sort (excepting any claim for want of ordinary care or negligence on the part of WEG or its officers, servants, agents or employees) which I may otherwise now have or may have or acquire in the future, whether or not such claims are within my current knowledge or contemplation, including without limitation all claims arising out of injury, death, loss of or damage to person or property, which directly or indirectly arise out of, relate to, are a consequence of or follow the granting or proposed granting, or the use or proposed use, of access rights by me as contemplated in this Application.

For the same consideration, I undertake and agree not to make any claim or commence any proceeding of any sort against a third party relating to the subject matter of the claims waived and released as set out above that may result in a claim against WEG or any of the other Releasees for damages, contribution or indemnity.

For the same consideration, I further undertake and agree to indemnify and hold harmless WEG and the other Releasees in respect of all claims as against them (excepting any claim for want of ordinary care or negligence on the part of WEG or its officers, servants, agents or employees), including without limitation all claims arising out of injury, death, loss of or damage to person or property as well as the actual legal costs incurred by WEG in responding to such claims, which directly or indirectly arise out of, relate to, are a consequence of or follow the granting or proposed granting, or the use or proposed use, of access rights by me as contemplated in this Application.

READ THIS DOCUMENT BEFORE SIGNING!!!

Date Signed: _____ Location Signed: _____

1. SIGN HERE if you are an individual applying in your PERSONAL CAPACITY:

(Please make sure that your address details are fully completed. You are responsible for notifying security should your address change during the terms of this agreement.)

Witness Signature: _____ Your Signature: _____

Witness Name (please print): _____ Your Name (please print): _____

Witness Address: _____ Your Address: _____

Witness Phone Number: _____ Please check box if this is a new address

Your Phone Number: _____

If you are a GUEST, please set out your sponsor's name: _____

and your Sponsor's Stable Area Access Number:# _____

GUESTS WILL NOT BE PROVIDED WITH A COPY OF THE RULES AND REGULATIONS OF WEG. IT IS THE RESPONSIBILITY OF THE PERSON WHO HAS INVITED SUCH GUEST TO MAKE SUCH GUEST AWARE OF SUCH RULES AND REGULATIONS AND TO ENSURE THE GUEST COMPLIES WITH THOSE RULES AND REGULATIONS.

2. SIGN HERE if you are an employee, agent or representative (an "Agent") of a partnership, corporation or other legal entity (a "Principal"):

Name of corporation, partnership or other legal entity
("Principal"): _____

I am an employee, agent or representative (an "Agent") of the 'Principal' referred to above and I HAVE AUTHORITY TO BIND THE 'PRINCIPAL' TO THIS DOCUMENT BY MY SIGNATURE.

Your Signature
("Agent"): _____

Your Name (please print): _____

Your Address: _____

Your Phone Number: _____

Would you like to receive racing and business related information on Woodbine Entertainment Group? Yes No

FOR WEG USE ONLY: GUEST	<input type="checkbox"/>	YES
	<input type="checkbox"/>	NO
If Guest has Sponsor signed form	<input type="checkbox"/>	YES
	<input type="checkbox"/>	NO

REVISED VERSION 10/06/08

TRACK RULES

The allocation of stalls is made by the Racing Secretary, any unauthorized use of stalls is strictly prohibited.

Any trainer who has an allocation of stalls on the grounds is forbidden from using the receiving barn area.

Any change or transfer of a horse(s) from one stable to another must be reported to the Racing Secretary.

Hay, Straw and feed to be stored in feed room space only.

No bathing of horses in the alleyways – horses bathed at barn ends ONLY.

No Dogs allowed on the grounds.

All race bikes and joggers are to be hung up or stored outside of the barns when not in use; not to be setup against doors.

All manure must be placed in the bins provided. No excess manure on the ground around the bins.

Stable area is to be kept clean and presentable at all times.

No alterations or additions to any building structure or part of them shall be made without the written consent of Windsor Raceway.

All garbage must be put into containers which are situated at both ends of the barns.

Tack rooms are to be kept in a clean and orderly fashion. They must be available to security at all times and open when requested for inspection. Tack rooms are a privilege. They are only used for the purposes of living quarters & storage of extra equipment or personal goods. Any misuse of these rooms or abuse of this privilege will result in immediate revocation of this privilege.

No cars, trucks or trailers permitted in barn area except for deliveries; 20 minutes maximum.

Fire and barn exit doors are to be kept unobstructed.

Trailers belonging to those stables on the grounds are to be parked at the back of horsemen's parking lot.

The provisions of The Liquor Control Act and The Liquor Licence Act will be strictly enforced. Intoxicated persons found in the stable area will be ejected from the property and/or turned over to the local police.

ORC Standardbred Rules

Rule 1.02

Standardbred racing shall be conducted in accordance with the rules, Commission directives, conditions of licenses granted by the Director or the Commission, track rules approved by the Director, any other applicable laws and regulations.

Rule 7.06

Associations shall post track rules in the paddock and the race office. Track rules approved by the Director may be enforced by the Judges and fines or suspensions imposed.