

Court File No.: 236/07

Released: 20070928

**ONTARIO
SUPERIOR COURT OF JUSTICE**

DIVISIONAL COURT

Re: ONTARIO HARNESS HORSE ASSOCIATION

Applicant

- and -

**ONTARIO RACING COMMISSION, WINDSOR RACEWAY INC. and
FLAMBORO DOWNS HOLDINGS LIMITED**

Respondents

Before: Jennings, Gans, and Swinton JJ.

**Counsel: Arlen K. Sternberg and Frank Cesario for the Applicant
Brendan Van Niejenhuis for the Ontario Racing Commission
Jeff Cowan and April Brousseau for Flamboro Downs
Christopher Kruba for Windsor Raceway**

Heard at Toronto: September 24, 2007

ENDORSEMENT

[1] The Ontario Harness Horse Association (“OHHA”) has brought an application for judicial review of a decision of the Ontario Racing Commission (the “Commission”) dated December 20, 2006, which approved a specific number of race days and a calendar for 2007 at two Ontario racetracks – Windsor Raceway and Flamboro Downs.

[2] The OHHA alleges that the Commission breached its duty of procedural fairness, and it erred in failing to award party status to the OHHA.

Background

[3] The Commission has the power, pursuant to s. 7(b) of the *Racing Commission Act, 2000*, S.O. 2000, c. 20 to govern, control and regulate the operation of race tracks in

Ontario. Section 6 of the Act requires the Commission to exercise its powers and perform its duties in the public interest.

[4] The *Rules of Standardbred Racing, 2005* require the operator of a raceway to obtain Commission approval of race dates each year. Both Windsor and Flamboro sought approval for a reduced number of race dates for 2007 from the number of race dates in 2006. A three member panel of the Commission held a two day hearing, in which OHHA was permitted to call witnesses, cross-examine witnesses and make oral submissions. In a decision dated November 28, 2006, the panel rejected both applications and invited the racetracks to make a fresh application. As well, the panel rejected OHHA's request for party status.

[5] Each racetrack submitted another application in early December, which was circulated by the Commission. OHHA indicated that it opposed any reduction in race dates from the 2006 dates, and that it relied on its earlier submissions, the evidence and the law. It is evident from an email sent by OHHA's counsel that OHHA expected the same panel to hear the new applications.

[6] A decision was made by the five members of the Board of the Commission. Two members of the earlier panel participated. However, the term of office of the third member, Chair Lynda Tanaka, had expired. The new Chair and two other members of the Board participated in the decision.

[7] The reasons of the Commission, dated December 19, 2006, indicate that "no new material information had been provided related to the issues", and therefore, a public hearing was not required. The Commission reviewed the written material before it, which included the exhibits from the earlier hearing but apparently not a transcript of the proceeding. The Commission also reviewed a summary prepared by the Administration, which included four proposed actions. Although the Administration had taken no position on the first applications, it recommended approval of 111 live race days for Windsor and 225 live race days for Flamboro. The Commission approved those numbers and a calendar for each track. OHHA was not informed that the Administration was taking a position on the applications.

Delay

[8] The respondents submit that the application for judicial review should be dismissed because of unreasonable delay.

[9] A court may decline to grant an application for judicial review because of undue delay. In doing so, the court will consider a number of factors: the length of the delay, the reasonableness of any explanation offered for it, and the prejudice caused by the delay to the respondent and to the public interest (Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, looseleaf), p. 3-76).

[10] In this case, the Commission made a decision in late December, 2006 that approved the number of race days and the calendar for those race days for the year 2007. That decision and the composition of the Commission were known to OHHA by mid-January, 2007. Windsor and Flamboro have been working with the approved calendars throughout the calendar year.

[11] Clearly, then, there was urgency in bringing on this application for judicial review. However, OHHA did not launch this application until May 2007, some five months into an annual calendar, and the supporting affidavit was not sworn until August 1, 2007. It did not seek to bring the application on an urgent basis, with the result that the application was heard September 24, 2007, long into the 2007 calendar year.

[12] OHHA has not provided a satisfactory explanation for the failure to act prior to May, 2007. Moreover, Windsor and Flamboro have provided evidence of the prejudice to them if the decision on the 2007 race dates and calendars were to be overturned at this point in the racing season. For example, Flamboro has shown that it has no room to add in further dates at this point, since the calendar contemplates racing 5 days a week until the end of the year. That was the amount of time that OHHA had sought on a 52 week basis. We find that there would be substantial prejudice to the race tracks if the Commission's decision were overturned at this point.

[13] OHHA suggested that it seeks only to have the Commission consider the number of race days and the calendar for the remainder of the year. However, if it were to show that there had been a denial of procedural fairness, the Commission's decision would be a nullity, and the whole issue of 2007 racing days would have to be revisited.

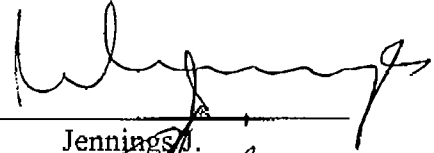
[14] In our view, the prejudice to OHHA is not such that the delay in pursuing this application should be ignored. OHHA submits that it was denied procedural fairness because three of the members of the Commission who participated in the hearing did not consider all the material that OHHA had requested be put before the panel, and because the Commission had a summary and recommendation from the Administration that was not disclosed to OHHA in advance.

[15] The staff memo presented to the Commission summarized the issues to be considered. Nothing in the memo raised new issues, which OHHA had not previously addressed.

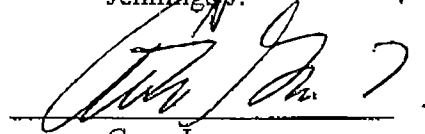
[16] There is reason for concern about the way in which the Commission proceeded, given OHHA's expectation that all the material from the earlier hearing would be before the decision-makers. That expectation was made known to the Commission in OHHA's follow-up submission. The preferable practice would have been for the Commission to disabuse OHHA of its belief that the original panel was seized, and ask if on that account, it wished to make further submissions. That said, however, OHHA'S position opposing any reduction in race dates in 2007 was presented to the Commission, as were its written submissions and the exhibits from the earlier proceeding.

[17] Moreover, although it was denied formal party status by the first panel, OHHA was given extensive rights by them to participate in that hearing, to call witnesses and to cross-examine.

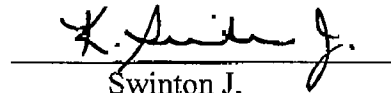
[18] For these reasons, the application for judicial review is dismissed on the ground of undue delay. Costs are fixed at \$7,500.00 to the Commission and at \$4,000.00 each to Windsor and to Flamboro.



Jennings J.



Gans J.



Swinton J.

Released: September 28, 2007

AND IN THE MATTER OF the decision of the Ontario Racing Commission of December 15, 2006 in which the Commission approved and ordered racing schedules for 2007 of 111 days of live racing at Windsor Raceway and 225 days of live racing at Flamboro Downs

DIVISIONAL COURT

BEFORE JENNINGS J, GANS J, SWINTON J

DATE SEPT 24/07

DISPOSITION - THIS ~~APPEAL~~

APPLICATION IS dismissed for reasons contained in a written order rendered released Sept 28/07. Costs awarded as set out in that order.

[Handwritten signature]

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

Proceeding commenced at Toronto

APPLICATION RECORD
(application to be heard September 21, 2007)

Torys LLP
Suite 3000
79 Wellington St. W
Box 270, TD Centre
Toronto, Ontario M5K 1N2
Arlen K. Stenberg LSUC#: 42344D
Tel: 416.865.8203
Fax: 416.863.7380

Solicitors for the Applicant