



COMMISSION HEARING

TORONTO, ONTARIO – JANUARY 26, 27 & 28, MAY 4 & 21, 2009

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

**AND IN THE MATTER OF THE APPEAL OF
DANIEL WAXMAN AND VANDALAY RACING**

On May 10, 2006, the Executive Director issued a Notice of Proposed Order to suspend the licence of Daniel Waxman ("Waxman") and Vandalay Racing ("Vandalay").

On May 19, 2006, Waxman and Vandalay appealed the decision of the Executive Director.

On January 26, 2009, a Panel of the ORC, comprised of Chair Rod Seiling, Vice Chair James Donnelly and Commissioner Pam Frostad was convened to hear the appeal. Subsequent hearing dates included January 27 and 28, 2009 and May 4 and 21, 2009.

Trudy Mauth appeared as Counsel for the Administration. David Moore appeared as Counsel for Waxman and Vandalay.

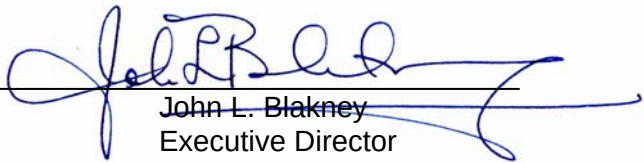
David Moore filed a motion with the Panel seeking an Order staying the proceedings for "excessive delay" and failure to make "full and complete disclosure" or in the alternative, for further disclosure with adjournment pending such disclosure.

Upon hearing the evidence of Troy Moffatt, Micheal Elchyshyn, Maureen Harquail, Anthony Williams, Brian Greenspan, Jill Makepeace and Daniel Waxman, reviewing the exhibits filed and upon reviewing and considering the written closing submissions, the Panel dismisses the Motion to Stay filed by Waxman and Vandalay.

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

DATED at Toronto this 5th day of January, 2010.

BY ORDER OF THE COMMISSION


John L. Blakney
Executive Director



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MOTION

Background

1. Standardbred licensees Daniel Waxman (Waxman) and his business Vandalay Racing (Vandalay) were the subjects of a Notice of Proposed Order to suspend their Ontario Racing Commission (ORC) licenses for 5 years with imposition of a \$100,000 fine pursuant to Sections 21 and 22 RCA 2000 for violation of the hidden ownership rule (11.08 – *horses not under lease must race in the name of the bona fide owner*).
2. In further consequence of the alleged violation, the Executive Director seeks an Order disqualifying the horses, ALL AMERICAN PAYDAY, ALL AMERICAN REBECA, FOX VALLEY SHAKER, DREAMLANDS REVENGE (Name change to LIVESTRONG), HYPERION HANOVER, UNCOMMON SCENTS AND LOYAL OPPOSITION from races in violation of the rule with resultant forfeiture of purse money and redistribution thereof to the credit of owners of horses so entitled under the Rules of Racing.
3. The claim by the ORC Administration is that although registered to Daniel Waxman as owner, these racehorses were actually owned by Robert Waxman who maintained control over and was financially responsible for them and received purse money earned by them. Purse earnings currently withheld pending determination of entitlement by these proceedings, approximate \$500,000.
4. The Administration case against Daniel Waxman is that he falsely purported to be the owner of these horses and concealed the identity of the true owner, his father, Robert Waxman.
5. Waxman and Vandalay requested a Hearing to review the Executive Director's action [section 22(3) R.C.A. 2000]. On the return date for that Hearing this Motion proceeded.

The Motion

6. This is a Motion by Daniel Waxman and Vandalay for an Order staying these proceedings for "excessive delay" and failure to make "*full and complete disclosure*" or in the alternative, for further disclosure with adjournment pending such disclosure.
7. The grounds alleged are:
 - Excessive delay.
 - Unreasonably delayed and only partial compliance with a Disclosure Order by Justice Lane.
 - Suppression of or failure to disclose particulars relating to a 33-month ORC investigation of Robert Waxman (April 2002 – January 2005).
 - Improper refusal to make further disclosure regarding purse money withheld.
 - Resultant prejudice to Waxman.

Chronology

8. Relevant time lines are:
 - March 6, 1955, Robert Waxman born.
 - August 4, 1981, Daniel Waxman born.
 - 1982 Robert Waxman was first licensed by the ORC. Thereafter he conducted an extensive racing business.



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- April 14, 2004, Robert Waxman's racing privileges were suspended in Pennsylvania as a result of outstanding financial obligations.
- April 23, 2004, Daniel Waxman, age 22, was first licensed by the ORC. In his applications for an ORC licence, Daniel Waxman made declarations as follows: 2002 Occupation "student", 2003 Occupation "student", 2004 Occupation "student". In his personal Income Tax Returns, Daniel Waxman declared income as follows: 2001 \$105.91; 2002 "0"; 2003 \$1,009.41. Daniel Waxman asserted that, not being taxable, he did not file an Income Tax Return for 2004.
- May 13, 2004, Robert Waxman's racing privileges in Illinois were suspended in reciprocity with Pennsylvania.
- May 18, 2004, Vandalay Racing was first licensed by the ORC.
- May 31, 2004, ORC Investigator Moffatt was assigned to investigate ownership of the Waxman horse "*Loyal Opposition*".
- October 28th 2004, Notices of Garnishment for \$2,836,078 were filed by Morris Waxman with all Ontario racetracks for purse earnings of horses owned by Robert Waxman. The garnishee on its face was in force for the following six years.
- December 19, 2004, Robert Waxman was arrested on charges of fraud said to involve about \$28,000,000. That trial was scheduled to begin in March 2009 in Hamilton. For reasons not before this Panel that proceeding resulted in a mistrial. The trial is pending.
- March 6, 2005, Robert Waxman's ORC licence expired and has not been renewed.
- September 5, 2005 – The Mohawk Judges directed the withholding of purse money for "*Loyal Opposition*".
- May 12, 2006 the Notice of Proposed Order was served on Daniel Waxman.
- May 19, 2006, Daniel Waxman requested a Hearing before the ORC.
- August 16, 2006 a Notice of Hearing was issued setting October 23 & 24, 2006 for the Hearing.
- October 11, 2006 Waxman moved before the ORC Panel for further disclosure.
- October 12, 2006 a Ruling that disclosure had been adequate was made. Chair Tanaka ruled that in the event there was no existing statement or "will say" for a witness, counsel for the ORC was not obliged to disclose the substance of the anticipated evidence.
- Upon Judicial Review, the ORC standard as stated by Chair Tanaka did not receive favour and was found to "understate" disclosure obligations. Justice Lane dealt with the two issues as follows:
 - "*The investigators' reports have now been produced.*"
 - Issued an Order (The Lane Order) requiring "*the production of either a statement from or counsel's summary of the evidence anticipated to be given by each witness to be called.*"

9. The matter was scheduled for an ORC Hearing January 26, 27 and 28, 2009. Discussion of the causes of that protracted passage of time follows.

Motion to Stay

10. About mid-January 2009, counsel for Daniel Waxman in the ORC proceeding received information from Robert Waxman's criminal counsel, (Brian Greenspan) relating to disclosure in the criminal proceedings for the period April 2, 2002 to January 2005. During that period Robert Waxman was also subject to ORC investigation relating to breaches of the Rules of Racing.



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11. Although use of the criminal information was proscribed, by Mr. Greenspan's undertaking restricting use of that disclosure to the criminal trial, an associate in Mr. Greenspan's office compared the criminal disclosure and the ORC disclosure in the Daniel Waxman ORC proceedings for that time frame and deposed:

- ORC investigators were obtaining information regarding Robert and Daniel Waxman between April 2002 and January 2005.
- ORC investigators Elchyshyn and Moffatt met with RCMP on numerous occasions and engaged in many telephone conversations in which information was exchanged, including identification of potential witnesses relevant to and involving Daniel Waxman.
- There is a reference in the ORC disclosure to the existence of a criminal investigation. This reference reappears in several investigative reports, the earliest dated May 16, 2005, in which the following is stated:

"The ORC Investigative Unit was aware of a pending criminal investigation and as such decided to hold off the ORC investigation until the arrest was made so as not to jeopardize the criminal investigation."

12. Upon receipt of that disclosure information from Mr. Greenspan's office, this Motion was launched returnable on the date fixed for the ORC Hearing (January 26, 2009) relating to the Daniel Waxman hidden ownership issue.

The Counter Motion by ORC Counsel

13. Daniel Waxman's Motion for disclosure came forward on short notice necessarily incidental to the timing of discovery of the 33-month issue.

14. Counsel for the Administration having no reasonable opportunity to file responding material and seeking to avoid adjournment of the Hearing on the merits, filed a Motion seeking dismissal of Waxman's Motion for non-compliance with ORC Rules of Procedure (five days notice required for a Motion).

15. The ORC disclosure made no reference to this 33-month interval. Counsel for Waxman is not to be faulted for failure to detect the issue prior to information from Mr. Greenspan's office.

16. On the face of the material filed, it would be contrary to fairness, natural justice and the public interest to dispose of the Motion to Stay on technical grounds. The gravity of the underlying proceeding relating to licensing, substantial purse money and a significant fine require a hearing on the merits. Serious issues are in play. A high standard of justice is required (*Kane v U.B.C.* 1980 1 SCR 1105). For those reasons, the Counter-Motion was summarily dismissed.

17. In fallback position, counsel for the Administration sought leave to call viva voce evidence in lieu of filing material in response to the Motion to Stay. Counsel for Waxman objected. The issue was resolved as follows:

- In consequence of no reasonable opportunity to file responding material, permission was given to call viva voce evidence.
- In order to provide opportunity to prepare cross-examination, cross-examination was deferred overnight.



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In Camera Proceedings

18. A request by counsel for Waxman to proceed “in camera” was declined. Relief was granted by an Order prohibiting publication of Daniel Waxman’s financial status as disclosed by letter from a Kentucky bank December 23, 2008, or his status with the Kentucky Bar Association as referenced by letter from the Kentucky Office of Bar Admissions, May 1, 2008.

Adjournment

19. In result, the Motion to Stay proceeded on January 26, 27 and 28, 2009, and was then adjourned along with the Hearing to March 25, 2009, to provide opportunity for counsel for Waxman to seek a Court Order authorizing appropriate access to the criminal disclosure. (the WAGG Application)

20. On March 25, 2009, matters were further adjourned to accommodate the still outstanding WAGG Application. The Motion to Stay continued on May 4 and resumed and was concluded on May 21 subject to closing submissions. By letter May 20, counsel for Waxman requested opportunity to provide written submissions which were agreed to be due: June 22 by counsel for Waxman, July 6 by counsel for the Administration, July 10 Reply by counsel for Waxman. As subsequently noted herein the Reply submission was filed by counsel for Waxman on December 8, 2009.

The Current Disclosure Issue

The disclosure issue for current resolution has three elements:

- Compliance with Justice Lane’s Order.
- The claimed suppression of or failure to disclose information obtained in the 33-month investigation of Robert Waxman together with information gleaned from contact with criminal investigators.
- Information underlying the retention of purse money.

The Interval prior to the Lane Order (October 21, 2006)

21. The Administration activity was:

- August 6, 2005, Ms. Harquail was appointed Commission Counsel.
- Until the appointment in August 2007 of part-time (20 hours per week) Counsel, Tony Williams, she was the entire legal staff.
- Her responsibilities extended to providing legal advice to the Executive Director and Senior Management.
- Issues in the day to day operation of the Administration included licensing, contracts, general legal advice, advice relating to investigation of breaches of the Rules, matters incidental to adjudications dealing with racing misconduct and drafting new and amended Rules of Racing.
- Counsel Harquail was required to review the 12 binders of materials, later described by Counsel Tony Williams as “*eight feet high*”, in order to assess whether reasonable grounds existed for issuance of the Notice of Proposed Order of May 10, 2006. In terms of potential



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purse re-distribution separate decisions for each horse were required in the context of the entire evidence.

- The Administration attempted to move the matter forward to a Hearing as follows:
 - o July 21, 2007, two months after the May 19 request for a Hearing, Counsel Harquail made initial disclosure of 12 volumes to counsel for Waxman – plus a thirteenth volume relating to telephone records. The 12 indexed (Table of Contents) volumes were - volumes 1-7 which dealt individually with each of the 7 horses - volume 8 contained Investigator Moffatt's notes under four headings - volume 9 contained tax and corporate records - volumes 10 -12 contained documents provided by Waxman's lawyers Ruby and Edwardh (at that time) in response to a Notice to Produce.
 - o August 16, 2006, issued a Notice of Hearing returnable October 23, 2006.
 - o September 19, 2006, production of a witness list on a pretrial hearing.
 - o October 18, 2006 disclosure of 14 investigative reports – 12 of which had been produced earlier.

The interval following the Lane Order October 21, 2006

22. Awareness by the ORC of the extent of the disclosure obligation has been an evolving process as the gap between administrative and criminal procedure narrows.

23. Counsel Harquail had originally complied with disclosure obligations to ORC standards. That compliance was ratified by Chairman Tanaka's Ruling. ORC practice at the time was to disclose only witness statements that "*were actually prepared.*"

24. The gravity of the issues coming before ORC Panels has lead to full awareness of the positive obligation to ensure the fairness of the ORC process. At stake are the appearance of justice and the fairness of the Hearing. All information relevant to the conduct of the case should be disclosed. Minimally that disclosure should include copies of all witness statements and notes of the investigators. That disclosure must be timely to enable adequate preparation and defence. (*Markandey v Ontario* 1994 O.J. No. 484 O.C.J.G.D.)

25. Relevance relates to a reasonable possibility of being useful in making full answer and defence from a defence perspective. Potential relevance is determined in relation to its use by the defence. That which is clearly irrelevant need not be disclosed. *R. v Chaplin* 1995 1 SCR 727.

26. With that background, counsel for the Administration, although not steeped in criminal procedure, undertook disclosure in compliance with the Lane Order by producing a sub-binder for each witness, identifying the documents which that witness would reference in testimony.

27. With limited institutional resources, the time consumed was related to the volume of material and the care taken in organizing, indexing and referencing by topic for disclosure. The sub binders were subdivided to deal separately with each horse. The task had been huge, involving a review of a Banker's Box of documents (4,000 pages) in random order produced by Ruby & Edwardh and review of the entire voluminous ORC files and binders. Documents were identified, co-related and assembled with painstaking precision. That organization as disclosed to Waxman has the capacity to render the case less complex and more manageable for all.



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28. On June 28, 2007, the sub-binders were disclosed with the “will-says” for the witnesses Troy Moffatt, April Campbell, Brett Revington, Erv Miller, George Brennan, Mitchell Sholnick and Tom Artandi. Each “will say” referenced certain documents in a sub binder for that witness. Thereby the previously provided disclosure had been re-organized by witness for ease of reference. By way of example the index for the document book prepared for the witness Troy Moffatt is appended hereto together with the index for the horse *Fox Valley Shaker*. Standing alone, those “will-says” were substandard for disclosure. However taken, as they must be, in the context of the relevant sub-binder, the presentation was dramatically different. The sub-binders convey the substance of the anticipated evidence.

29. The disclosure by Counsel Harquail was comprehensive in terms of documents. The names of the proposed witnesses were disclosed. The “will says” were supplemented as ordered by Justice Lane. The supplementary disclosure was comprehensive and meticulous in that in terms of organization, indexing and referencing to topics, it went far beyond minimum requirements.

30. This was not classic format for discharge of the disclosure obligation. Although lacking in form, the disclosure was more than adequate in content.

31. On August 7, 2007 Counsel Tony Williams was retained on a part-time basis by the Administration to have responsibility among other things for the Waxman file, it being clearly beyond the capacity of Commission Counsel in light of other responsibilities. Williams reviewed the file for 10 hours in August and 20 hours in September.

32. Activity by Counsel for Waxman subsequent to the Lane Order of October 21, 2006 was:

- In the 8 months plus leading up to Counsel Harquail's disclosure of June 28, 2007, there was no communication from counsel for Waxman. At no time was suggestion made to the ORC that the matter should move forward more expeditiously.
- In the 3 months plus following that disclosure (June 28/07 to October 11/07) there was neither objection by nor communication from counsel for Waxman. Silence for eleven months.

33. On October 12, 2007, counsel for Waxman responded by letter to “*your recent calls to me*” (Darla Wright, Executive Assistant in the Legal Department had been calling in attempts to arrange a hearing date):

- Objecting to the adequacy of disclosure pursuant to Justice Lane's Order.
- Expressing the view that it was inappropriate to set a Hearing date absent completion of disclosure.
- Indicating no availability for a Hearing prior to Jan 15, 2008.

34. In relation to the fixing of a hearing date, *R. v. N.N.M.* provides at para. 37:

“Even when the Crown has clearly failed to make mandated disclosure the defence is not necessarily entitled to refuse to proceed to the next step or set a date for trial.” R. v. N.N.M. 2006 O.J. No. 1802 Ont. C.A.

35. By reason of letter from Counsel for Waxman on October 12 Counsel Williams was aware that no hearing date could be set before January 15, 2008. On November 1, 2007, counsel for Waxman responded to ORC enquiries about Hearing dates in January 2008:



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"In my view it is inappropriate for Hearing dates to be set. ... "I will speak to my client to ascertain his availability and will respond further...."

36. As a carry-over from his former Crown Prosecutor obligations, Counsel Williams was engaged on a criminal jury trial which proceeded in October and November. Thereafter through to January 2008, he was engaged in a series of ORC rule violation Hearings – November 29, December 13, December 18, January 3 (2 hearings), January 14 (Aminorex charges against 14 licensees consolidated into one hearing) and January 31.

37. Counsel Williams spoke to counsel for Waxman by telephone on December 28, 2007 advising that he did not share the opinion of non-compliance with the Lane Order and attempted unsuccessfully to set a Hearing date.

38. With Counsel Williams acting as General Counsel *pro tem* during Commission Counsel Harquail's leave of absence, (January to April 2008 as a candidate in a Federal by-election), Counsel Mauth was retained on April 11, 2008 as Special Counsel with responsibility only for the Waxman file.

39. In relation to the protracted inactivity by Counsel for Waxman, *R. v. Dixon* 1998 1 S.C.R. 244 provides:

"Just as the Crown's disclosure obligations are on-going and persist throughout the trial process, so too does defence counsel's obligation to be duly diligent in pursuing disclosure. To do nothing in the face of knowledge that relevant information has not been disclosed will, at a minimum, often justify a finding of lack of due diligence, and may, in certain circumstances support an inference that counsel made a strategic decision not to pursue disclosure."

The Chronology Following Counsel Mauth's Appointment

- | | |
|--------------|--|
| Apr 11, 2008 | The file was assigned to Counsel Mauth - 12 binders plus 8 sub binders were delivered to her office. |
| Jul 7, 2008 | Counsel Mauth wrote counsel for Waxman suggesting a Hearing date during the week of Nov 24, 2008. |
| Aug 8, 2008 | Counsel Mauth wrote Counsel for Waxman enquiring: <ul style="list-style-type: none">• Was he still retained?• His availability for a Hearing week of Nov 24, 2008? |
| Oct 2, 2008 | Counsel Mauth wrote counsel for Waxman - <ul style="list-style-type: none">• Providing "will says" supplementary to those provided June 28, 2007 by Harquail.• providing disclosure re purses withheld |
| Oct 4, 2008 | Counsel for Waxman responded requesting further disclosure and enquiring: <ul style="list-style-type: none">• Were "will says" updated?• if so, disclosure of any further investigative notes• further disclosure re purses• particulars underlying Moffatt's assignment to investigate ownership on June 28, 2004• transcript of the Moffatt/Daniel Waxman interview of October 12, 2005. |



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Oct 30, 2008	Counsel Mauth responded denying the request for further purse disclosure, providing the Daniel Waxman transcript, responding to the request relating to reasons underlying assignment of Investigator Moffatt enquiring about a Hearing date week of Dec 8, 2008.
Dec 12, 2008	Counsel Mauth wrote suggesting Hearing dates Jan 26, 27, 28 & 30.
Jan 6, 2009	Counsel Mauth wrote providing continuing disclosure updating statement by Investigator Moffatt and again enquiring about the Jan 26 date.
Jan 19, 2009	Counsel Mauth wrote enquiring about the Jan 26 Hearing date.
Jan 20, 2009	Counsel for Waxman wrote advising of his Motion to Stay, returnable in three days, requesting further disclosure and introducing the 33-month issue. This was the first communication since October 14, 2008.
Jan 22, 2009	Counsel for Waxman wrote enclosing his Notice of Motion for a Stay and suggesting adjournment based on the 33-month issue. Jan 23, 2009 Counsel for Waxman wrote regarding his Motion returnable Monday, Jan 26, 2009.
Jan 23, 2009	Counsel for Waxman wrote enclosing the Kathleen McArthur affidavit for use on the Motion Jan 26.

40. The Administration response to Justice Lane's Order has been by:

- Counsel Harquail's material forwarded June 28, 2007.
- Supplementary and updating material by Counsel Mauth October 2, 2008, October 30, 2008 and January 6, 2009 in compliance with the duty of ongoing disclosure.

41. From that supplementary disclosure flowed two results:

- Counsel for Waxman maintained the position that further disclosure was required and no Hearing date was possible until disclosure was complete.
- The Administration contending that disclosure was complete and up to date, sought to get on with fixing a Hearing date.

42. If dissatisfied with sufficiency of the "will says" provided by Counsel Harquail, June 28, 2007 or as subsequently provided by Counsel Mauth, October 2, 2008, counsel for Waxman could have moved before the Divisional Court or the Racing Commission to determine whether there had been compliance with the Lane Order.

43. Following neither course, counsel for Waxman applied his own standard of compliance and maintained his refusal to set a Hearing date. That action practically paralyzed progress on the underlying Hearing.

The 33-month Issue (April 2, 2002 – January 2005)

44. The disclosure demand in this time frame does not relate to the Daniel Waxman investigation. The demand relates firstly to an ORC investigation of Robert Waxman and secondly to the criminal investigation of Robert Waxman.

45. The submission supporting the claim for further disclosure relating to the Robert Waxman criminal investigation is not complex. Briefly stated, it is that documents relating to Robert Waxman's



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disposition of horses or financial circumstances prior to his dealings with Daniel Waxman have potential relevance to the assertion of hidden ownership.

46. Brian Greenspan testified, indicating that the fraud allegations related to the activities of various corporations, three of which are in the United States. He estimated the number of documents at 24,250 comprised of 750,000 to 900,000 pages. In the course of trial preparation in early January 2009, he became aware of contact between the criminal investigators and ORC investigators. Through the electronic “call” system used in crown disclosure, he or his staff was able to identify contacts as follows:

- Fifty-two contacts, either meetings or phone calls between fraud investigators Bellemey and Cummings and ORC investigators re Daniel Waxman, including 17 contacts with ORC Investigator Schandlen and one contact with ORC Investigator Pellarin. The most recent of such contacts being March 30, 2007.

47. Mr. Greenspan’s Junior Counsel, Jill Makepeace, gave evidence of comparing the ORC disclosure and the Crown disclosure and finding the contacts identified by Mr. Greenspan. As well, she stated there were two references to Daniel Waxman, one by ORC Investigator Schandlen, one by ORC Investigator Moffatt.

48. The contacts referenced by Mr. Greenspan and Ms. Makepeace were not in ORC files and were not included in the ORC disclosure re Daniel Waxman.

49. There were two investigations of Robert Waxman in this interval – one by police relating to the fraud charge, the other by the ORC relating to an entirely separate allegation of hidden ownership which resulted in a finding on May 31, 2004, of violation of Rule 11.08 by Robert Waxman resulting in a fine \$5,000.

50. The ORC allegation against Daniel Waxman does not rely on information generated over that time frame in relation to misconduct by Daniel Waxman’s father. That Robert Waxman ORC file, known as the RKW file, contains information garnered by contacts with trainers and others in the horse business on matters relating to Robert Waxman (example Trainer Robert McIntosh proceeding toward an auction sale in 2003 to sell horses and equipment owned by Robert Waxman for an overdue training account of several hundred thousand dollars).

51. Ontario Provincial Police Constable Elchyshyn was seconded to the Gaming Unit of the ORC from January 2002 to February 26, 2005. He was the lead Investigator into the prior hidden ownership violation by Robert Waxman – the R.K.W. file. On April 8, 2002, Elchyshyn met with ORC Investigator McKinney in relation to investigation of suspected misconduct by Robert Waxman. As a result of a CPIC hit on Waxman, (Canadian Police Information Centre), Elchyshyn learned of an RCMP investigation of Robert Waxman for matters other than his ORC activity (RCMP Project Over Value). On April 16, 2002, Elchyshyn met with RCMP investigators and learned that there were civil law suits against Robert Waxman that may relate to his horses. A broad ranging ORC investigation of Robert Waxman over several years dealing with his personal and financial circumstances followed.

52. Elchyshyn’s investigative notes indicate RCMP contacts in April, July and October 2002 as well as a meeting September 22, 2002, regarding a document dated April 16, 2002, none of which related to Daniel Waxman.



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53. The evidence was that on matters relating to horse racing, criminal investigators would direct enquiry to ORC investigators. For example, on August 26, 2004, the criminal investigators did get information from Elchyshyn about Robert Waxman's horses relating to value for purposes of judicial interim release (bail).

54. Elchyshyn's duty book notes from March 23, 2002 to August 15, 2005 and from September 11, 2005 to November 3, 2005, were photocopied and introduced into evidence. A further photocopy of those notes supplemented by explanatory notes by Elchyshyn was also disclosed. Accordingly, all of Elchyshyn's records were disclosed in the course of this Motion.

55. In relation to contacts with Robert Waxman fraud investigators, Investigator Moffatt testified that he recalled only 2 meetings with criminal investigators (David Cummings) and a couple phone calls. He recalled no detail of those meetings and confirmed that all his notes were disclosed and he has no other memory.

56. Witnesses ORC Counsel Harquail, ORC Investigator Moffatt, and ORC Counsel Williams testified that they were unaware of and encountered no current file or indication of an ORC file for Robert Waxman for the 33-month period. Accordingly, there was no reference to the investigation of this prior rule breach by Robert Waxman in the Daniel Waxman hidden ownership disclosure.

57. The WAGG application which put these proceedings on pause from January 28 to May 4 produced one reference to Daniel Waxman as follows:

A note from Criminal Investigator David Cummins to ORC Investigator Steve Schandlen August 27, 2004 *"Dan Waxman is writing entry for cheques on an account at the 5th Third Bank of Lexington."* (\$1,000,000 credit – horse liens)."

58. In relation to WAGG application, the evidence of ORC Investigators Elchyshyn and Moffatt, was that whatever contact by meeting or conversation there may have been with the criminal investigation of Robert Waxman, no information relative to the Daniel Waxman investigation was gained or developed and hence none was disclosed. Investigator Elchyshyn testified that his investigation was unrelated to the Daniel Waxman investigation and started years prior. The issue of communication between ORC investigators of Daniel Waxman and criminal investigations was fully canvassed on this Motion through the evidence of Moffatt and Elchyshyn. The end result was affirmation of the original position that no such disclosure was required. Other than that it served to buttress that aspect of the Moffatt and Elchyshyn evidence, the WAGG application was unproductive.

59. The ORC Robert Waxman investigation over the 33-month interval had been twofold. Firstly, relating to misconduct within the racing sphere (hidden ownership). Secondly, a "due diligence" investigation into activity apart from racing bearing on integrity considerations underlying licensing eligibility. Neither the RKW investigative file nor the RKW due diligence file was disclosed.

60. The "Due Diligence" designation has capacity to mislead. The term imports no more than a background check to identify factors that may bear upon a licensing decision. Of interest would be such as dishonesty, fraud, general criminal activity, failure to meet financial obligations, antisocial behaviour, moral turpitude and the like. This investigation would be done prior to licensing. There could be updates on a random basis or for cause. The inference from a licence being granted is that the due diligence screening disclosed no impediment.



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61. Over a period of several years, Robert Waxman's actions attracted the attention of Criminal investigators, Securities Commission Investigators and ORC Investigators. In result, there were civil lawsuits, criminal proceedings and ORC proceedings relating to his conduct or misconduct. That layering of long term investigative activity is a fertile well-spring of irrelevancies certain to obscure, confuse and confound.

62. To pursue Robert Waxman's activities in unrelated areas is clearly irrelevant, nonproductive and serves to deflect and delay proper activity. This claimed basis for disclosure is without merit.

The Potential Relevance Issue

63. The Notice of Proposed Order and the Administration Factum correspond closely to pleadings in a civil case. Factual allegations therein are not evidence and remain to be proven.

64. In drafting the Notice of Proposed Order and Factum and thereby framing its case against Daniel Waxman, the Administration has referenced factual allegations relating to Robert Waxman. He is subject to no charge in this proceeding. The relevance of evidence of Robert Waxman's activity is to provide a context for assessment of Daniel Waxman's conduct and underlying state of mind. For the purpose of identifying that contextual background, the following appears in the Administration Factum:

"In order to understand the proceedings against Daniel Waxman, it is important to first understand some background involving his father."

65. The components of the ORC invocation of factual background relating to Robert Waxman are:

- Robert Waxman raced extensively and at high levels while licensed by the ORC.
- His son, Daniel Waxman, was a teenager with no horses registered in his name. As a student, he disclosed modest income on his Annual Income Tax Returns.
- Robert Waxman had significant financial difficulties as evidenced by the long-standing fraud investigation, the suspensions in Pennsylvania and Illinois, the Morris Waxman garnishee for \$2,836,078 and the McIntosh efforts to sell stock and equipment by auction in 2003 to satisfy his training bill of several hundred thousand dollars against Robert Waxman
- Concurrent with or soon following these financial dealings, Robert Waxman left the racing business.
- In the process of ending his racing business, Robert Waxman divested himself of both horses and sums of money for horse purchases.
- In the same time frame, Daniel Waxman obtained ORC licences in his name and in the name of Vandalay Stables.
- Daniel Waxman was a beneficiary of that divestiture of money and horses.
- Robert Waxman continued to direct and control the racing stables operated in the name of his son, Daniel Waxman and in that capacity, paid accounts and received profits.

66. The ORC Administration contention is that the transfers of the ownership registrations for the horses were sham transactions. Robert Waxman continued as actual owner. Daniel Waxman was owner by registration only. Daniel Waxman was no more than a façade masking Robert Waxman's continuing racing operation. If the contention is correct, there is a violation of the hidden ownership rule of racing which carries penalty and purse redistribution consequences.



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67. The continuing contention has been that Robert Waxman's prior activities relating to horses have potential relevance to his real or purported disposal of racing assets in the course of departure from the racing business. Factors for consideration in assessing the validity of that claim for further disclosure include:

- That huge mass of information is not a product of the Daniel Waxman hidden ownership investigative activity.
- The claimed relevance is premised in large part on the acquiescence of ORC witnesses in cross-examination as quoted in the Reply argument.
- The correct test was not put to those witnesses (a reasonable possibility of being relevant) *Deloitte Touche* 2002 O.J. 2350.
- That decision on relevance is within neither the function nor the competence of those witnesses.
- Although those witnesses may have agreed in the context that "anything is possible", since they did not investigate those suggested areas, the conclusion is that they did not consider the "possibility" to be a "reasonable possibility".
- How Robert Waxman responded over the years to the vicissitudes of the horse business from time to time lacks temporal nexus to the apparent divestiture of his racing business to a family member at a time of significant financial distress. His activities before his racing problems crystallized with the garnishee clearly have no relevance to his response to that impediment to receipt of racing purse money.

Prejudice

68. As an element of prejudice, counsel for Waxman asserted that the purse funds were in a non-interest bearing bank account. In the course of final submissions, counsel for the Administration reported that the funds have always been in an interest bearing account.

69. The starting point is that non-payment of \$500,000, if owing, must carry some measure of prejudice. The next step is that Daniel Waxman is under obligation to mitigate any harm done. The obvious and direct relief would be to proceed expeditiously to a Hearing – a reasonable course of action with a half million dollars at stake. To willfully or negligently fail to take reasonable remedial measures or to willfully promote delay downgrades the degree of prejudice. That alleviation could, depending on the circumstances, neutralize the prejudice.

70. The \$500,000 in issue did not belong to Waxman. That money was not taken from him. The funds are purse winnings with entitlement circumscribed by the Rules of Racing. Absent compliance with the Rules, Waxman has no right to the \$500,000. If he was in breach of a rule requiring purse redistribution, then he suffered no loss. His entitlement had been questioned. Relief was by ORC Hearing. Pursuit of that objective by Waxman is difficult to discern.

71. In terms of prejudice other than financial, Daniel Waxman did not immediately withdraw from racing. After the Notice of Proposed Order on May 10, 2005, he continued to race in New Jersey and "probably Pennsylvania and Illinois" with purse earnings exceeding \$50,000 in 2007 and less than \$50,000 in 2008. He permitted his ORC licence to expire in August 2008. Currently he is not under suspension in Ontario. He successfully completed his law school program, was called to the Kentucky Bar and has practiced as an associate with a Lexington firm for about two years. The Kentucky Bar Association is monitoring this proceeding in relation to his licensing status.



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72. In terms of adverse publicity as a component of prejudice, there was no evidence that press or media reports were occasioned or contributed to by any ORC action other than the various phases of the investigation. Any media attention was precipitated by Daniel Waxman's activity and its legitimate investigation.

73. On October 23, 2008, the Fifth Third Bank Kentucky Inc. called for payment of three loans to Vandalay Racing LLC. Particulars of the loans are detailed in the letter which is an exhibit in the Waxman Motion record. There has been no evidence as to when the loans were made, on what security, or the disposition of the security. There was no evidence to identify the profitability or otherwise of this racing enterprise. No figures or documentation were introduced to demonstrate the financial status of the operation when the horses were registered to Daniel Waxman or when the purses were withheld. This demand for payment follows the purse retention (September 5, 2005) by three years.

Delay

74. Factors for assessment of unreasonable delay are identified in *R. v Morin* [1992] 1 S.C.R. 771:

- The length of delay
- Waiver of time periods (not applicable)
- Reasons for delay including –
 - o Inherent time requirements of the case
 - o Actions of the Prosecution
 - o Actions of the Defence
 - o Limits on institutional resources
 - o Other reasons for delay
 - o Prejudice to the person charged

75. The inherent requirements of this case coupled with limited institutional resources have been a major factor. Management of the mass of material has been time consuming. This characteristic is documented in recent terms by counsel for Waxman's letter of July 2, 2009, requesting an extension of time for written submissions on this Motion explaining.

"Reviewing the transcripts and drafting the submissions took considerably longer than expected."

76. Waxman was confronted with a choice, proceed with the Hearing or not proceed. With detailed disclosure of the ORC evidence in 2006 and 2007 coupled with his knowledge of the events, he was in position to assess his prospects of success. If those prospects were deemed unfavourable, was the option as suggested by counsel for the Administration in closing argument - Do nothing, establish delay through complexity and hope the case would "go away"? All of which would protect his licence to practice law in the short term and potentially in the long term. In this context Waxman testified:

"I would love it if it would just go away. Obviously that would be my preference rather than having to go through and fight it and spend."

The utterance of a person striving relentlessly for a speedy hearing this was not.



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77. In *R. v Bennett* 1991 3 OR 1993 Ont C.A., Justice Doherty states at para. 26:

"Many accused do not want to be tried at all, and many embrace any opportunity to delay judgment day... An accused is often not interested in exercising the right bestowed on him by s. 11 (b). His interest lies in having the right infringed by the prosecution so that he can escape a trial on the merits... This unique attitude on the part of the accused toward his right often puts a court in a position where it perceives itself as being asked to dismiss a charge, not because the accused was denied something which he wanted, and which could have assisted him, but rather, because he got exactly what he wanted....delay. It hardly enhances the reputation of the administration of justice when an accused escapes a trial on the merits, not because he was wronged in any real sense, but rather because he successfully played the waiting game."

78. *R. v. Sychterz* 2005 O.J. No. 2722 (S.C.J.) provides:

"Any action or inaction on the part of an accused that is inconsistent with a desire for a timely trial is relevant to the assessment of prejudice – a person's inaction could mean they are content with the pace at which the case was proceeding."

79. *R. v. N.N.M.* [2006] O.J. No. 1802 Ont. C.A. provides at para. 37:

"A person charged with an offence should not be able to generate a basis for a Section 11(b) Application (to be tried within a reasonable time) by making a continuous stream of requests for materials that have no potential relevance, even if the Crown agrees to provide them."

80. Waxman's course of action throughout has been at no time to take steps to get to a Hearing. His action either created or permitted delay. An example is the delay in filing written submissions on the Motion to Stay. Not only was the filing five months delinquent but repeated undertakings to file "next week" avoided a deadline being set until the ORC Chair finally intervened. The delay produced the following:

June 23	Counsel Mauth wrote counsel for Waxman requesting a copy of his submissions which were due June 22. Following which counsel for Waxman wrote the ORC advising that submissions would be filed "Monday or Tuesday".
July 2	Counsel Mauth wrote again
July 2	Counsel for Waxman reported that he would file "next week"
July 16	Counsel for Waxman reported that he would file "early next week"
August 14	Counsel for Waxman reported that he would file "next week"
September 10	Chairman Seiling wrote to Counsel for Waxman, pointing out: <i>"The delay in receipt of the written submissions from Waxman/Vandalay is significant. Please advise at your earliest convenience when the Panel can expect to receive your written submissions."</i>
September 21	Counsel for Waxman reported that he would file September 25
November 4	Chairman Seiling wrote to Counsel for Waxman: <i>"The Panel wishes to limit any further delay. The Panel orders and directs that your submissions to the ORC be provided to the ORC Panel on or before November 18, 2009. Ms. Mauth will then deliver her submissions two weeks later on December 2, 2009. Failure to provide submissions as outlined above</i>



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will result in the ORC Panel proceeding to consider and render a decision based on the evidence heard and materials provided to date."

November 18

Counsel for Waxman delivered submissions

December 2

Counsel Mauth delivered submissions

December 8, 2009

Counsel for Waxman delivered Reply submissions.

81. The recurring reference "*next week*" suggests that completion was near at hand. It was not. Was the reason one or more of the following:

- Unavoidable?
- A product of inattention through low priority?
- Deliberate in pursuit of strategic delay?

82. That assessment must not be made by considering in isolation the conduct relating to written submissions. The determination must be based on the consistency of the conduct of the entire proceeding.

83. There is a vacuum of evidence to suggest unavoidability. Given the gravity of the values at risk, a five year full licensing suspension, a half million dollars in purses and a \$100,000.00 fine, inattention through low priority must of necessity be remote in the extreme.

84. Strategic delay throughout remains as a reasonable inference. That conclusion is supported by the persistent reaching-out for complex, voluminous, unrelated material having no temporal nexus to the issue to be decided.

85. Further support is found in the creeping tempo of defence activity from the Lane Order (October 21, 2007) to this Motion to Stay January 26, 2009. Only when the Motion to Stay became a live issue did that tempo increase.

86. Whether the evidence proves on a balance of probability that the delay was deliberate on Waxman's part may be a difficult decision. But more importantly it is an unnecessary decision. The conclusion from the evidence that may safely be reached by that standard is that from Waxman's perspective the delay was not unwelcome.

87. From Waxman's perspective delay of any variety or dimension would be acceptable. Nothing would be done to move the proceeding forward. No objection would be made to the passage of time. Waxman acquiesced in, embraced and nurtured delay. Premised upon acceptance of the fact that the Administration conscientiously sought to move the proceeding, the conclusion is reached that Waxman will not now be heard to seek relief from that which he did not seek to avoid.

Purse Money

88. By memorandum, September 5, 2005. Tom Miller, Senior ORC Judge at Mohawk, delivered the following in reference to "*Breeders Crown Victory by 'Loyal Opposition'*":



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Due to an ongoing investigation as to eligibility of Daniel Waxman's horses, we request that all monies earned by "Loyal Opposition be held until completion of the investigation (this includes trainer & Driver fees)." re Race 8 Saturday, September 3.

89. The Notice of Proposed Order against Daniel Waxman was dated three months prior, May 10, 2005.

90. By letter of October 3, 2008, Counsel Mauth advised that purse money disclosure had been made as a courtesy although deemed irrelevant. By letter October 30, 2008, Counsel Mauth refused further purse money disclosure.

91. The Administration position on disclosure relative to purse money is:

- The Judges made this decision by authority of Standardbred Racing Rules 6.13.02, 6.26, 1.09 and 5.15 and *"Information concerning the reasons for their decision by people not involved in this investigation is not relevant to these proceedings."*
- That Administrative act by the Judges was subject to review under Section 11(7) RCA (as had been pointed out in Counsel Harquail's letter to Counsel Ruby October 17, 2005).
- The Administrative act was also reviewable by Appeal pursuant to Rule 24.01 of the Rules of Standardbred Racing.
- No such Appeal or Review proceeding was taken. The Judges will not be called as witnesses for the Administration. In consequence, it is contended that no such disclosure should be ordered.

92. The purse component is inextricably connected to the claimed "sham" ownership. That aspect has reasonable potential for relevance from the defence perspective. Accordingly, such disclosure is necessary.

93. On October 2, 2008, Counsel Mauth wrote:

"In addition I am providing disclosure relating to the seizure of purses earned by horses owned by your client."

94. On October 30, 2008, Counsel Mauth wrote:

"It is our position that you are not entitled to any further disclosure pertaining to the seizure of purses."

95. On the record before the Panel, it is unclear whether some documents or information remain undisclosed. If so, that disclosure is hereby ordered to be completed within 10 days of release of these Reasons. In order that such disclosure may be as timely as is now possible, this matter will not be continued prior to February 1, 2010. In the Waxman submissions, reference was made to material provided to the Judges by ORC investigators Moffatt and by his superior, McKinney. If such information or documentation exists it should be disclosed.

The Request for a Stay – The Remedy of Last Resort

96. A Stay which equates to acquittal without trial is a remedy of last resort and so may be granted only in the clearest of cases.



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97. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period. *Glencoe & British Columbia* 2000 2 SCR 307.

98. The complexity of the case by nature and volume of evidence is a factor for consideration as well as the Applicant's contribution to delay. Complex cases demanding greater expenditures of time and resources will justify delay longer than acceptable in simple cases (*R. v Askov* 1990 2 SCR 1199).

Result

99. The evidence supports the following:

- From Investigator Moffatt's assignment to this file (May 31, 2004) through the withholding of purses and the comprehensive hidden ownership investigation leading to the Notice of Proposed Order of May 10, 2006 - There is no allegation of ORC delay or lack of diligence.
- From the Request for a Hearing on May 19, 2006 to the first date fixed for the Hearing October 26, 2006 there is no evidence of undue delay.
- Given the institutional constraints, the volume of material and the updated ORC standard of compliance, the interval October 21, 2006 to June 28, 2007 was not unreasonable for discharging the obligation identified in the Lane Order. The process was grinding. The pace was slow, steady and well-motivated. The end product was ground exceedingly fine.
- Thereafter given the institutional responsibilities and demands of this file in terms of time and material Commission Counsel was unable to cope and outside Counsel was retained.
- ORC Counsel's efforts toward forward progress were unfailingly repulsed or ignored by Counsel for Waxman.
- During Counsel Mauth's management of the file there has been neither suggestion nor evidence of unreasonable delay.
- With the Christmas interruption in productivity relating to the delivery of these Reasons the WAGG Motion and the delay in filing submissions have extended this long-standing matter from January 2009 to January 2010.
- Subject to the provisions herein relating to purse money there has been compliance with the Lane Order.
- There has been no failure to meet disclosure obligations in relation to:
 - o Robert Waxman's criminal investigation
 - o The ORC Misconduct file
 - o The ORC Due Diligence file
- There is no evidence of deliberate suppression by the ORC of documents or information that have a reasonable potential for relevance.

100. Hidden ownership is an integrity violation of the Rules of Racing and so strikes at the heart of racing. Standardbred Rule 1.02 provides that "*Racing shall be conducted in accordance with the Rules.*" Standardbred Rule 11.08 precludes hidden ownership. The governance obligation on the Commission is to "*perform its duties in the public interest and in accordance with the principles of honesty, integrity and social responsibility.*" (Section 6 R.C.A.) The public interest weighs mightily in favour of a disposition on the merits for an issue of such fundamental racing importance.

101. Waxman's clamorous call for a stay juxtaposed with his chronic inactivity and resistance to forward progress rings hollow. The burden of proof on a balance of probability is upon the Applicant



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Waxman. No basis for granting a Stay has been established. What has been established emphatically is that the Hearing should move forward. The Motion to Stay is dismissed.

102. Other Parties who may benefit from purse re-distribution have a contingent interest in bringing this matter to conclusion. The orderly discharge of Ontario Racing Commission responsibility requires that this matter proceed with all reasonable dispatch. If by February 1, 2010, the parties have not agreed on Hearing dates, the Panel will fix dates after April 1, 2010, peremptory on both parties.

103. In passing, it is noted that ORC Rules of Procedure may require revision. The disclosure obligation is more broadly based than Rule 3.3 indicates. Rule 3.3 provides:

"A party to a Hearing shall disclose to all other parties 10 days before the Hearing or as otherwise ordered by the Commission the existence of every document and thing that it will refer to or give in evidence at the Hearing."

104. Compliance with that Rule is not sufficient. There must be compliance with the law relating to disclosure.

DATED this 5th day of January 2010.

James M. Donnelly
Vice Chair

Attachments

Standardbred Rules of Racing
Indices

Rules Referenced

Rule 1.09

If any case occurs which is not or which is alleged not to be provided for by the rules, it shall be determined by the Judges or the Commission as the case may be, in such manner as they think is in the best interests of racing. Provided however, the Commission in its absolute discretion may waive the breach of any of the rules, which waiver or breach the Commission does not consider prejudicial to the best interests of racing.

Rule 5.15

The Judges may:

- (a) Declare any horse disqualified or ineligible to race for violations of the rules or for non-compliance with the conditions of any race in which the horse has been declared.
- (b) Demand proof that a horse in any particular race is eligible or that it is not owned or trained in whole, or in part, by a suspended person or has been declared to race by a suspended person. In the absence of satisfactory proof, the Judges may scratch the horse.

Rule 6.13.02

If a suspended, disqualified, unlicensed or ineligible person purports to transfer his or her interest in a horse during such period of ineligibility, the Judges may enquire into any transfer in order to ensure that the racing of a horse is not under the control or influence of the transferor.

Rule 6.26

A participant obtaining purse money through fraud or error shall surrender or pay same to the Commission upon demand, or he/she shall be suspended until such demand is complied with. Such purse money shall be awarded to the party justly entitled to the same.

Rule 11.08

Horses not under lease must race in the name of the *bona fide* owner.

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