CITATION: Registrar of Alcohol, Gaming and Racing v. Aspden, 2019 ONSC 1940
DIVISIONAL COURT FILE NO.: 364/18
DATE: 20190329

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MORAWETZ R.S.J., R.D. GORDON R.S.J., THORBURN J.

BETWEEN:	
Registrar of Alcohol, Gaming and Racing Applicant	*Brendan van Niejenhuis* and *Lindsay Board*, for the Applicant
– and –	
Tammy Aspden, Linda Wellwood and Anne Shunock and Horse Racing Appeal Panel Respondents	*Jason Squire* and *Lindsay A. Woods*, for the Respondent Tammy Aspden, Linda Wellwood and Anne Shunock *Bryan Finlay, Q.C.* and *Marie-Andree Vermette* for the Respondent Horse Racing Appeal Panel
	HEARD at Toronto: February 4, 2019

THE COURT

Overview

[1] The Applicant, Registrar of Alcohol, Gaming and Racing (the "Registrar") applies for judicial review of two decisions of the Horse Racing Appeal Panel (the "Panel").

[2] The genesis of this dispute is a race in which the first place horse tested positive for a prohibited drug and was disqualified by the track judges. The Registrar subsequently issued an order waiving compliance with the rules requiring disqualification, effectively restoring the horse's first place finish.

[3] In its decision dated May 18, 2018, the Panel overturned the decision of the Registrar and reinstated the result first determined by the track judges. In a subsequent decision dated June 29, 2018, the Panel ordered the Registrar to pay costs of $7,500.

[4] The Applicant does not argue that the Panel's decision on the merits was unreasonable. Rather, it takes issue with the Panel's determination that it had the authority to make the decision.

Background Facts

[5] Tammy Aspden, Linda Wellwood and Anne Shunock (the "Respondents") are licenced race-horse owners. Their horse "Magic of Brussels" placed second to the horse "Heathers Shadow" at Georgian Downs on June 7, 2015. After the race, a drug test revealed that Heathers Shadow tested positive for the prohibited drug Oxilofrine. As a result, and in accordance with rules 9.13 and 18.08.01 of the *Rules of Standardbred Racing*, the track judges disqualified Heathers Shadow and ordered the first place monies redistributed to the Respondents.

[6] In 2016, the federal authority responsible for testing and reporting on prohibited substances in horse racing advised the then Ontario Racing Commission staff that Oxilofrine had not been administered to Heathers Shadow but arose as a natural metabolite of Ephedrine, a drug that had been lawfully administered.

[7] In response to this information the Registrar, on October 6, 2016, issued an order modifying the decision of the track judges. He waived compliance with the *Rules of Standardbred Racing* that required disqualification thereby effectively reinstating the first place finish by Heathers Shadow and entitling its owners to the first place purse.

[8] By that time, the purse money had been redistributed to the Respondents. They refused to return the funds and appealed the decision of the Registrar to the Panel.

[9] The Panel determined that it had jurisdiction to hear the appeal and that the evidence did not support the Registrar's decision. Although the Panel determined that no one had administered Oxilofrine to Heathers Shadow and that its owner and trainer were free of blame, the fact remained that the horse had raced with a prohibited Class II drug in its system and therefore had an unfair advantage over the other horses in the race. The Panel effectively reversed the ruling of the Registrar and confirmed the disqualification of Heathers Shadow.

[10] After receiving submissions on costs, the Panel concluded that the Registrar acted unreasonably during disclosure proceedings leading up to the appeal hearing and ordered the Registrar to pay costs of $7,500.

Jurisdiction

[11] This court has jurisdiction to hear an application for judicial review of the decisions of the Panel by virtue of sections 2 and 6(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J. 1.

Standard of Review

[12] The Applicant has urged us to accept that the standard of review in this matter is correctness because it involves a true question of jurisdiction or a question regarding the proper jurisdictional lines between two administrative decision makers.

[13] We disagree.

[14] In recent years, the Supreme Court of Canada has steadfastly held that true questions of jurisdiction will be exceedingly rare and that, as a general rule, the interpretation by the Tribunal

of its own statute closely connected to its function and with which it will have particular familiarity is presumed to be a question of statutory interpretation subject to deference on judicial review. In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 SCR 654 Rothstein J. put it as follows:

> [34] The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[15] Justice Rothstein went on to say that the correctness standard would continue to apply to the decision of a tribunal interpreting its own statute where the issue is a constitutional question, a question of law that is of central importance to the legal system as a whole and that is outside the adjudicator's expertise, or a question regarding jurisdictional lines between competing specialized tribunals.

[16] In this case, the Panel is established and given its authority under the *Horse Racing Licence Act*, 2015, SO 2015, c 38 (the "*Act*"):

> 7.(1) The Horse Racing Appeal Panel is established under that name in English and Comite d'appel des courses to chevaux in French.
>
> ...
>
> (6) The Panel may, subject to this Act and the *Statutory Powers Procedure Act*, determine its own practice and procedure.
>
> ...
>
> 8.(1) If the rules of racing provide for an appeal to the Panel, a person who considers himself aggrieved by a decision of a steward, judge, veterinarian, race track official, racing association official, licensing agent or officer or employee of the Commission may appeal the decision to the Panel and the hearing of the appeal shall be held in accordance with the Panel's rules of procedure.

(2) On hearing the appeal, or without a hearing if the circumstances referred to in section 4.1 of the *Statutory Powers Procedure Act* apply, the Panel may confirm or vary the decision being appealed or set it aside.
(3) The Panel shall not inquire into or make a decision concerning the constitutional validity of a provision of an Act or a regulation.
(4) A decision of the Panel under subsection (2) is final and not subject to appeal.

[17] Section 1 of Ontario Regulation 61/16 prescribes the qualifications for persons appointed to the Panel and includes requirements that panel members have experience, knowledge or training in the subject matter and legal issues dealt with by the Panel. In making its decision the Panel was interpreting its own statute with which it would have particular familiarity.

[18] The Panel was not considering a constitutional question nor a question of central importance to the legal system as a whole.

[19] The question does not involve jurisdictional lines between two competing specialized tribunals; rather, the question is whether the decision of the Registrar is reviewable on appeal to the Panel or by the Divisional Court on judicial review.

[20] There being no true question of jurisdiction and no question of jurisdictional lines between competing specialized tribunals, the standard of review is reasonableness.

The Finding of the Panel

[21] The Panel cited section 8 of the Act as the source of its powers and noted that the Registrar is an officer and employee of the Commission.

[22] The Panel also cited rule 24.01 of the *Rules of Standardbred Racing*, which provides that any person aggrieved by a decision or ruling of the Judges, Registrar or delegated officials may appeal the decision or ruling to the Panel.

[23] The Panel determined that the decision of the Registrar in question was made in the exercise of his powers under rules 1.09 and 6.16 and that, accordingly, the appeal was properly made to it pursuant to rule 24.01. It proceeded with the appeal by way of hearing de novo, as provided for in its rules of procedure. As noted above, although it agreed with the Registrar that no one had intentionally administered Oxilofrine to Heather's Shadow, the fact remained that it was a prohibited drug found in the horse's system that would have given it an unfair advantage over the other horses in the race.

[24] The Panel accepted jurisdiction and reversed the Order of the Registrar. In a subsequent decision regarding costs, the Panel assessed costs of $7,500 against the Registrar, finding that it had acted unreasonably during pre-hearing disclosure proceedings.

Analysis

[25] The question before us is whether the Panel's determination that it had authority to hear the appeal from this particular decision of the Registrar falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[26] Section 5 of the *Act* provides that the Commission, through the Registrar, shall make rules for the conduct of horse racing in any of its forms, and the rules may provide for any matter over which the Registrar may exercise power under this *Act*. It is to be noted that in the case of any conflict or inconsistency between the rules of racing and the Act, the *Act* is to prevail to the extent of the conflict or inconsistency.

[27] The Registrar takes the position that all of his decisions are made, in the end, through the statutory powers granted to him under section 2(a) of the *Act* to govern, direct, control and regulate horse racing in Ontario in any or all of its forms. He says that this includes any powers set out in and exercised by him under the Rules, and that, accordingly, all such decisions are reviewable only by way of judicial review. He notes that section 8 of the *Act* does not specifically include the Registrar as a person from whom an appeal would lie to the Panel, thereby confirming that no such appeal may be made.

[28] Although the position advanced by the Registrar may be reasonable, it does not necessarily render the decision of the Panel unreasonable.

[29] It is clear that the decision of the Registrar in this case was not made pursuant to the plenary powers granted to him under section 2 of the Act. Rather, the Registrar himself was specific that the exercise of his power was being made pursuant to rules 1.09 and 6.16. By rule 24.01 of those same rules (rules made by the Commission through the Registrar) an appeal of such a decision lies to the Panel.

[30] That section 8 of the *Act* does not specifically refer to the Registrar does not render the Panel's decision unreasonable. The appeal powers under section 8 require the following: (1) That the rules of racing provide for an appeal to the panel; (2) That the appellant be a person aggrieved by the decision; and (3) That the decision in question have been made by, among others, an officer or employee or the Commission.

[31] In the case before us, it was reasonable for the Panel to determine that all three of the requisites were met. The decision in question was made pursuant to the rules and the rules specifically provide for an appeal to the Panel. The Appellants were persons who were directly affected and aggrieved by the decision. The decision in question was made by the Registrar, who was an officer and employee of the Commission.

[32] On this analysis, the Panel's conclusion that it was the appropriate venue for appeal was, at the very least, reasonable.

The Costs Decision

[33] The Panel's rules of procedure allow it to order costs in the event a party to proceedings before it has, among other things, acted unreasonably.

[34] In this case the Panel determined that the Registrar, or those who represented him, acted unreasonably in withholding from the Respondents disclosure to which they were entitled. That was a factual determination available to the Panel on the evidence before it and is entitled to deference.

[35] The manner in which the costs decision was arrived at was not procedurally unfair and reflected a reasonable and proportionate approach to the issue. The Registrar had notice of the request being made by the Respondents and was given a reasonable opportunity to know and address the position being taken by them. We see no basis upon which to find the costs order unreasonable.

Conclusion

[36] The application for judicial review is dismissed. The Respondents are entitled to their costs of this appeal from the Registrar, fixed at $15,000. No order is made with respect to the costs of the Panel.

Morawetz, R.S.J.

R.D. Gordon, R.S.J.

Thorburn J.

Released: March 29, 2019

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REASONS FOR JUDGMENT

THE COURT

Date of Release: March 29, 2019