



COMMISSION HEARING

TORONTO, ONTARIO – DECEMBER 19, 2011

**IN THE MATTER OF THE RACING COMMISSION ACT S.O. 2000, c.20;  
AND IN THE MATTER OF THE APPEAL AND REQUEST FOR HEARING BY  
ONTARIO HARNESS HORSE ASSOCIATION (OHHA)**

In April of 2004, the Ontario Racing Commission (“ORC”) commenced an investigation to conduct an audit of the Ontario Harness Horse Association (“OHHA”) for the period December 2001 through March 2004, including retaining Deloitte & Touche LLP.

On April 13, 2004, the ORC notified OHHA of the following:

Deloitte have been retained to carry out certain audit and related activities...They will work with investigators from the Commission’s Investigative Unit...As the investigation and inquiry is being carried out under the Act, subsection 18(3) of the Act may be used. That subsection authorizes the Director to require payment for the reasonable costs from the licensee.

On June 11, 2004, the Executive Director of the ORC issued Ruling Number SB 133/2004 wherein it suspended OHHA as a purse account manager for refusal “to provide the information, documentation and materials required” pursuant to the Rules of Standardbred Racing and the *Racing Commission Act*.

OHHA appealed Ruling Number SB 133/2004.

On August 18, 2004, the ORC issued Ruling Number GEN 11/2004 wherein a Panel of the ORC dismissed the OHHA appeal and refused to lift the OHHA suspension, subject to the following conditions:

*OHHA is ordered to provide to the Executive Director (Acting), documents that it has already agreed to disclose but had not yet disclosed, together with employment contracts, minutes of Board of Directors meetings, and reports/correspondence prepared by Tinkham & Associates LLP for the period 1999 to date, for the purpose of the investigation as described in the Ruling;*

*The suspension of the licence will continue until lifted by Ruling, either of the Executive Director or of the Commission. OHHA retains the right to reapply for lifting of the suspension when appropriate disclosure has been made as required by the Executive Director.*

On November 1, 2004, the Executive Director of the ORC issued Ruling Number 294/2004 wherein the suspension of OHHA as purse account manager was lifted further to OHHA satisfying the condition enumerated in Ruling GEN 11/2004.

On February 14, 2005, the ORC sent a letter to OHHA to notify it that its purse account licence was granted subject to eight conditions, including the following:

Pursuant to section 18(3) of the Act, OHHA shall pay \$100,000 to the Director under the Act, in a form acceptable to the Director under the Act for payment, representing compensation for costs incurred by the ORC arising from the inquiry and investigation referenced in the Acting Director’s letter to Walzak dated April 13, 2004. This amount is to be paid in full by the end of the term of this licence”.



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On September 8, 2011, the Executive Director of the ORC issued Ruling Number SB 127/2011 wherein the Director ordered that:

OHHA shall, on or before September 16, 2011, pay \$100,000 to the ORC, representing compensation for costs incurred by the ORC arising from the inquiry and investigation referenced in the Acting Director's letter dated April 13, 2004 and the 2005 Purse Account Manager's Licence issued to OHHA on February 14, 2005.

On September 14 and 22, 2011, counsel on behalf of OHHA submitted its Notice of Intention to Appeal and Notice of Appeal of Ruling Number SB 127/2011 respectively.

On November 9, 2011, a Notice of Hearing was issued to notify the parties that the appeal would be heard on December 12, 2011.

On December 6, 2011, the Chair consented to the matter being adjourned to December 19, 2011.

On December 19, 2011, a Panel of the Ontario Racing Commission consisting of John Macdonald as Chair, and Commissioners David Gorman and Dan Nixon was convened to hear this matter.

Andrew Finkelstein appeared as counsel on behalf of OHHA. Jennifer Friedman appeared as counsel for the Administration of the ORC.

Upon reviewing the exhibits filed, hearing the testimony of Wendy Hoogeveen, Steve Lehman, Troy Moffatt, Detective Sergeant Steve Schandlen, John Walzak, and Brian Tropea, and upon reviewing the written submissions of counsel, the Panel allowed the appeal as follows:

- 1) The amount of \$100,000 for the investigations made were 'reasonable costs of the inquiries' on the basis of the expenses of Deloitte and the time and expenses of the ORC in connection with the investigations. The ORC is entitled to inquire into the character, financial history and competence of an applicant and to charge for the costs of such inquiry;
- 2) The terms for the 2005 PAM licence were not consented to and this failure to accept by OHHA therefore ended the claim by the ORC for the charge of \$100,000 for costs for the application renewal.
- 3) In the opinion of the Panel, the determinative factor was that OHHA did not give its consent to the terms as proposed.

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

DATED at Toronto this 31<sup>st</sup> day of May 2012.

BY ORDER OF THE COMMISSION

  
John L. Blakney  
Executive Director



### FACTS AND REASON FOR DECISION

1. The Commission panel of Commissioner John Macdonald as the Chair, and Commissioners David Gorman and Dan Nixon held a hearing at the request of the Ontario Harness Horsemen's Association ("OHHA") with respect to its appeal from SB Ruling 127/2011 of the Executive Director ordering OHHA to pay \$100,000 as a purse account manager. The payment was stated to be made to the Ontario Racing Commission ("ORC") pursuant to Section 18(3) of the Racing Commission Act (the "Act") basically as compensation for costs incurred by the ORC arising from an inquiry and investigation. The ORC stated the obligation to pay was in accordance with the 2005 Purse Account Manager's Licence dated February 14, 2005. The Notice of Appeal filed on behalf of OHHA set out the grounds for the appeal. That licence was never issued.

2. At the conclusion of the hearing the Panel requested argument be done by written submission with all to be completed before the end of January 2012. A tentative schedule of dates was then agreed to.

3. There were two preliminary matters dealt with, one being exclusion of witnesses that was granted. The second one resulted in an order that the ORC produce the fee charges involving various notices to applicants pursuant to Section 18 (3) of the Act without identifying the specific applicants (Exhibit 3, tabs A through H). Those tabs contained letters without any identifying address. They were all for various applicants to the ORC for possible licenses. The amounts later disclosed ranged from \$11,000 to \$55,000 (no amount for tab E) with dates varying from February 10, 2003 to August 27, 2010.

#### Witnesses

4. The Administration called as witnesses, Wendy Hoogeveen, Director of Industry Development and Support (formerly Manager of Information Services), Steve Lehman, C.A., its Chief Administrative Officer, Troy Moffat, an ORC Investigator and Detective Sergeant Steve Schandlen who was also an ORC investigator. OHHA called John Walzak its former Chief Operating Officer and Brian Tropea, the current General Manager of OHHA. Mr. Lehman was also (June 2004 to January 2007) the Chief Financial Officer of OHHA at the time of the investigation that is part of the subject matter of the proceedings.

5. Wendy Hoogeveen explained the operation of the licenses, how they were applied for and the terms thereof with the investigations that were necessary when an application is made to the ORC. The application for 2005 contained more conditions and higher standards than for the previous years. The fees for applications varied. She acknowledged that OHHA had not agreed to the terms for a 2005 Purse Account Manager's licence.

6. OHHA had employed Steve Lehman as its internal auditor with one of his responsibilities being the Purse Account and its reconciliation and to examine the conduct of its former controller. Steve explained the reports of the accounting firm retained to do an investigation of the OHHA accounting and the role of the auditors for OHHA. He explained that the Purse Account Manager's licence had been deferred by the ORC. The cost incurred for the investigation had not been waived and the \$100,000 cost recovery claimed by the ORC for a 2005 licence was not noted by OHHA as a contingent liability. He explained the position of the ORC that such amount would need to be paid before any licence would be granted by it to OHHA.

7. John Walzak reviewed the suspension of the Purse Account Manager's licence in 2004, its reinstatement and that he had signed the application for a 2005 licence to keep the OHHA options open.



He referred to the discussions with the Executive Director on the \$100,000 claimed as a diversion of funds. There was no consent to the terms of the licence as requested (see letter of February 14, 2005 - Exhibit 1 tab 22) by John Blakney for the ORC. Mr. Blakney had acknowledged to him that there was no rule violation.

8. Brian Tropea pointed out the options that OHHA had and that there was no decision to proceed. He stated that OHHA did not consent to the terms requested by the ORC so that no licence was granted for 2005.

### **Decision**

9. The appeal is allowed for the reasons set out below.

10. The section of the Act that is relevant is set out in full as follows:

#### **“Inquiries Section**

18(1) The Director may make those inquiries and conduct those investigations into the character, financial history and competence of an applicant for the licence or the renewal of a licence that are necessary to determine whether the applicant meets the requirements of this Act and the regulations.

#### **Corporations, partnerships**

(2) If the applicant is a corporation or partnership, the Director may make the inquiries into or conduct the investigations of the officers, directors or partners of the applicant.

#### **Costs**

(3) **The applicant shall pay the reasonable costs of the inquiries or investigations or provide Security to the Director in a form acceptable to the Director for the payment.** (Emphasis added)

#### **Collection of information**

(4) The Director may require information or material from any person who is the subject of the inquiries or investigations and may request information or material from any person who the Director has reason to believe can provide information or material relevant to the inquiries or investigations”.

### **Investigations**

11. There were irregularities discovered in the accounting at OHHA and particularly with respect to the Purse Manager’s accounts. The ORC became aware of this and appointed the accounting firm of Deloitte & Touche LLP (“Deloitte”) to do an investigation and review of OHHA’s accounting on April 6, 2004. There had been unspecified complaints lodged with the ORC about the accounts at OHHA. The investigation was conducted by Deloitte with the eventual co-operation of OHHA and its accounting firm, Tinkham & Associates LLP (“Tinkham”). The latter firm reported on the irregularities and particularly as to a number of cheques issued by OHHA that had been re- endorsed by someone other than the payee.

12. As a result of the irregularities (Purse accounts were not reconciled) and co-operation concerns with OHHA the ORC had suspended the licence granted to OHHA as a Purse Account Manager (“PAM”) on June 11, 2004. The suspension of OHHA as a PAM was lifted by a Ruling dated November 1, 2004 (Exhibit 1 tab 20). Tinkham had reported on February 2, 2004 and February 4, 2004 (Exhibit 1 tab 5) that 96 out of the 109 cheques made payable to certain casual employees were endorsed over to a person other than the payee. 85 of the 96 cheques were endorsed to the former Controller, 6 were



endorsed to an OHHA Coordinator and 5 to an unknown person (total endorsed \$156,575). The period involved covered December 2002 to December 2003. They also reviewed the period December 2001 to November 2002 and found that 32 out of 56 cheques payable to casual employees were endorsed totaling \$36,545.

13. The report of Deloitte on their investigation dated February 1, 2005 is shown in Exhibit 2, tab 1. 18 pages of the report were in this exhibit with some schedules not attached. They referred to the irregularities in the purse account and that the purse bank account was never reconciled. The amount of \$314,000 was written off as uncollectible and recorded as an expense by OHHA. There are other items of expenses where documentation was not found to support same. They were later (November 20, 2007- Exhibit 2, tab 3 p 74) advised by OHHA that new procedures were put into place for control purposes.

### **Costs**

14. There were 2 billings by Deloitte totaling \$79,393.86 at tabs 17 and 24 in Exhibit 1. The Panel is of the view that the amount of \$100,000 for the investigations made were "reasonable costs of the inquiries" on the basis of the expenses of Deloitte and the time and expenses of the ORC in connection with the investigations. The ORC is entitled to inquire into the character, financial history and competence of an applicant and to charge for the costs of such inquiry. "The \$100,000 was not a fine. This was the amount payable as one of the conditions for the issuance of the 2005 PAM licence."

### **Licenses**

15. The terms of the PAM Licence for 2003 were referred to in a letter from the ORC to Mr. Walzak on February 28, 2003. Tinkham, the accountants for OHHA, replied to that letter on August 27, 2003 advising as to "a number of areas where the OHHA policy and procedures are incomplete, insufficient or not functioning as documented. We have reported our finding to OHHA management."

16. On January 5, 2004, the ORC, by its then Executive Director, Jean Major, advised Mr. Walzak that the PAM licence to OHHA was granted for 2004 with the expiry to be December 31, 2004. The terms of the licence were attached (Exhibit 1 tab 4). Such terms were consented to by OHHA under date of January 29, 2004 (Exhibit 4 tab 9).

17. The ORC requested \$100,000 to recoup its costs in the investigation pursuant to a letter contract form to OHHA on February 14, 2005 (Exhibit 1 tab 22) for the PAM licence for 2005. This was sent by the Executive Director with the amount payable in a form acceptable to him representing compensation incurred by the ORC arising from the inquiry and investigation referred to in a letter to Mr. Walzak dated April 13, 2004 (Exhibit 1 tab 9). The amount was to be paid in full "By the end of the term of this licence".

### **OHHA Board Meetings-** All excerpts are from Exhibit 4

18. The board of directors of OHHA considered the payment request by the ORC as part of the licence terms at various meetings with some comments as set out below:

19. Tab 16 - January 3, 2005, the referencing was that the cheque writing program would not be retained on January 1, 2005. OHHA requested a delay granting the licence so that they could review the report from the investigator and auditor.



20. Tab 18 - February 5, 2005, John Blakney, the ORC Executive Director attended the meeting and read the findings of the investigation. The "Remedies and terms were presented as well". He referred to "A diversion of future OHHA funds \$100,000 is considered appropriate and is payable to the ORC." When asked by one board member if the \$100,000 was defined as a request or as a fine, Mr. Blakney was reported as saying that "it is considered a diversion of fund, rather than calling it a fine. But it could be termed a penalty."

21. Tab 21 - Audit committee report to the board dated March 30, 2005, referred to their "pursuit of resuming the Purse distribution function."

22. Tab 22 - April 1, 2005, under the 2005 budget summary there was a reference to "the diversion of funds to the ORC to reinstate our purse manager's licence." They referred to – "By postponing resumption of the purse managers' licence, we can defer the \$100,000 ORC diversion and avoid an additional half year of purse distribution program costs."....

23. Tab 23 - May 9, 2005, there was a reference to the purse manager's licence and the ORC conditions to be deferred to discuss at a separate meeting.

24. Tab 24 - May 30, 2005, the cheque writing program was discussed with the conditions placed on the licence by the ORC. The contentious condition "is the \$100,000 cost of the audit". Mr. Blakney suggested supporting a proposal whereby OHHA would divert those funds into programs for horse people. The program possibilities were outlined.

25. The minutes then stated:

26. "Alternatives on this issue are:

- Pursue cheque writing program and put \$100,000 into programs
- Challenge the \$100,000 and request a hearing
- Not to pursue the cheque writing program (we then don't owe the money)".

27. The board passed a motion to pursue the cheque writing program. A proposal was to be brought back to the board.

28. Mr. Blakney was not called as a witness by the ORC and in the view of the Panel the alternatives set out in the above tab 24 succinctly set out the choices that were available to OHHA on the PAM licence matter.

29. OHHA did apply for a PAM licence for the year 2005 (Exhibit 6) sworn by Mr. Walzak on December 22, 2004. The standard application fee was paid. The application was apparently filed on December 24, 2004 but was not pursued since the conditions imposed by the Executive Director of the ORC as set out in the application form (Exhibit 1 tab 22) letter contract was not signed, consented to and returned by OHHA to the ORC.

### **The Licence Terms**

30. The new terms (Exhibit 1, tab 22) proposed on February 14, 2005, for a PAM licence not in previous licenses relate to the investigation. They were as follows:



“3. Within the term of this licence, OHHA shall, to the satisfaction of the Director under the Act, implement policies dealing with expenses incurred by OHHA directors and staff in carrying out OHHA activities. For greater clarity, this shall include, for example, what expenses may be claimed, on whose behalf, and expense limits including mileage rates. OHHA’s policies shall also provide that equivalent cost reimbursements shall not be permitted.

4. With respect to all expense claims by OHHA directors and staff, OHHA shall ensure that:

- (a) reasonability checks on mileage claims shall be performed;
- (b) supporting documentation for out of pocket cost must be submitted otherwise payments will not be processed.

5. OHHA shall fully cooperate with an independent audit of OHHA's practices and procedures with respect to purse account management, including with respect to issues identified and described by Tinkham & Associates in its letter to the Director dated October 17, 2003, which audit shall be performed at OHHA's expense by an auditor appointed by the Director under the Act and completed before the end of the term of the licence. Furthermore, OHHA shall fully cooperate with an independent audit of compliance with terms 3 and 4 set out above, which audit shall be performed at OHHA's expense by an auditor appointed by the Director under the Act and completed before the end of the term of this licence.

6. OHHA shall not make any changes to the employees who perform the activities of the purse account manager without first informing the Director under the Act of the proposed change. OHHA agrees that the Director under the Act may, if the Director determines it to be necessary, carry out background checks of any person proposed to perform the activities of the purse manager, with respect to such person's credit history and any history of bankruptcy, record of offences or part professional disciplinary proceedings.

7. OHHA shall not make any changes to the directors or officers of the purse account manager without first informing the Director under the Act in writing of the proposed change.

8. Pursuant to Section 18(3) of the Act, OHHA shall pay \$100,000.00 to the Director under the Act, in a form acceptable to the Director under the Act for payment, representing compensation for costs incurred by the Ontario Racing Commission arising for the inquiry and investigation referenced in the Acting Director's letter to John Walzak dated April 13, 2004. This amount is to be paid in full by the end of the term of this licence.”

### **The Decision**

31. There was no evidence as to whether or not the first 7 terms were acceptable and especially items 3 through 7. Item 5 would also be expected to have a financial impact on OHHA in addition to item 8.

32. The only item of the above terms in the application form that was of concern to OHHA appears to have been number 8. The refusal of OHHA to agree to the terms proposed by the ORC resulted in no licence for a PAM being granted to it for 2005. The imposition of the \$100,000 charge for the investigation requested under Section 18 (3) of the Act was a term that OHHA did not accept. There was no acceptance of the letter contract terms by OHHA. The terms for the 2005 PAM licence were not consented to and this failure to accept by OHHA therefore ended the claim by the ORC for the charge of



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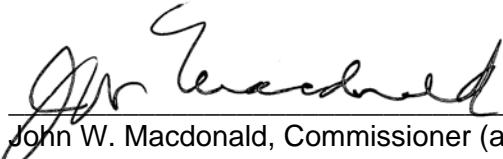
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\$100,000 for costs for the application renewal. In the opinion of the Panel the determinative factor was that OHHA did not give its consent to the terms as proposed.

33. The appeal is therefore allowed.

DATED this 31<sup>st</sup> day of May 2012.

  
John W. Macdonald, Commissioner (as Chair)

  
David Gorman, Commissioner

  
Dan Nixon, Commissioner