



**Superior Court of Justice
Divisional Court
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Facsimile Transmittal

To:	Brendan van Niejenhuis and Andrea Gonsalves Andrew Finkelstein	416-593-9345 416.865.7380
From:	Romana Juránková	Date: April 30, 2013
RE:	Ontario Racing Commission v. Ontario Harness Horse Association	
Court File No.: 493 /12		Pages (including coversheet): 8
Cc:		
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NOTE: Please find attached a copy of Endorsement with regard to the above-noted matter. If you have any questions please feel free to contact the Divisional Court office at 416-327-5100.

CITATION: Ontario Racing Commission v. Ontario Harness Horse Association, 2013 ONSC 2069
DIVISIONAL COURT FILE NO.: 493/12
DATE: 20130430

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
SWINTON, HERMAN and SPROAT JJ.

B E T W E E N :)
)
ONTARIO RACING) *Brendan van Niejenhuis and*
COMMISSION, as represented by) *Andrea Gonsalves*, for the
the DIRECTOR UNDER THE) Applicant
RACING COMMISSION ACT,)
2000)
Applicant)
)
- and -)
)
ONTARIO HARNESS HORSE) *Andrew Finkelstein*, for the
ASSOCIATION) Respondent
)
Respondent)
) Heard at Toronto: April 4, 2013

ENDORSEMENT

SPROAT J.:

[1] On this application for judicial review the Applicant challenges the May 31, 2012 decision of a Panel of the Ontario Racing Commission (“the Panel”). The

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Panel concluded that the Respondent was not obliged to pay \$100,000 incurred by the Director of the Applicant in conducting a 2004 investigation of the Respondent.

[2] In 2004 the Respondent held a licence as a Purse Accounts Manager ("PAM") issued by the Applicant. In April – November 2004, the Director of the Applicant conducted an investigation of the Respondent which involved retaining an accounting firm. It was common ground that the reasonable cost of the investigation was \$100,000.

[3] As a consequence of a dispute about disclosure during the investigation, the Respondent's PAM licence was suspended from April – November, 2004. The Respondent did not resume acting as a PAM after the suspension was lifted. The term of the licence expired December 31, 2004.

[4] In early 2005, the Director of the Applicant had a series of discussions with representatives of the Respondent concerning the \$100,000 in costs and whether, and on what terms, the Respondent would apply for a PAM licence for 2005. Subsection 20(1) of the *Racing Commission Act, 2000*, S.O. 2000, c. 20 ("the Act") provides that a licence is subject to terms proposed by the Director to which the applicant consents.

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[5] By letter dated February 14, 2005, the Applicant "granted" the Respondent a PAM licence subject to terms including the payment of \$100,000. The Respondent was asked to sign the letter to signify its "consent" to the terms. The Respondent did not sign the letter. The Respondent never acted as a PAM after its suspension in April, 2004.

[6] The Panel heard evidence from a number of witnesses as to the discussions between the Director and the Respondent and concluded that the Director gave the Respondent three options which, for practical purposes, can be described as follows:

- (a) to renew the PAM licence and pay \$100,000; or
- (b) to challenge the right of the Director to recover \$100,000 as investigatory costs and request a hearing; or
- (c) to not renew the PAM licence in which case the \$100,000 would not be payable.

[7] The Panel concluded that the Respondent did not agree to the terms for the 2005 renewal of its PAM licence which had the effect of ending the claim by the Applicant for \$100,000 in costs.

[8] It was not until 2011 that the Applicant took the position that the Respondent still owed \$100,000. On September 11, 2011, the Director of the

Applicant made a formal order requiring payment of \$100,000. The order referenced an April 13, 2004 letter from the then Director to the Respondent confirming the nature and extent of the investigation to be conducted and the February 14, 2005 letter from the then Director describing the terms of the 2005 PAM licence respecting payment of \$100,000. This was the order the Respondent appealed to the Panel.

[9] I now turn to the law. We are satisfied that the standard of review of the Panel decision is reasonableness, as the Panel was applying its home statute. See *Ontario Harness Horse Association v. Ontario (Racing Commission)*, 2012 ONSC 2198.

[10] The Applicant submitted that sub sections 18 (1) and (3) of the *Act* impose a mandatory repayment obligation which the Panel, by its decision, nullified. These sub sections provide as follows:

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

...

(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.

[11] We have real doubts as to the applicability of section 18 given that, at the time the investigation was conducted, the Respondent was a licence holder and not an "applicant". It is not, however, necessary to decide that issue.

[12] It was conceded by counsel for the Applicant, properly in our view, that under sub section 18 (3) the Director of the Applicant has a discretion whether to require payment of investigatory costs.

[13] As stated the Panel concluded that the Director had given the Respondent three options, one of which was to not renew the PAM licence and not pay \$100,000. The Panel then concluded at para. 32 that:

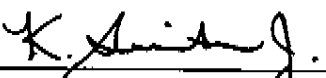
The terms for the 2005 PAM licence were not consented to and this failure by the OHHA therefore ended the claim by the ORC for the charge of \$100,000 for costs of the application renewal.

[14] As conceded, the Director had a discretion to not require any payment of investigatory costs. It follows he had a discretion to put the three options he did to the Respondent. The Respondent chose the option of non-renewal and non-payment. The conclusion reached by the Panel that this ended the Applicant's claim was in our view not only reasonable but correct.


[15] As such the application for judicial review is dismissed. Counsel agreed on the amount of costs and it is, therefore, ordered that the Applicant pay costs of \$13,500 inclusive of HST to the Respondent within 30 days.



SPROAT J.



SWINTON J.



HERMAN J.

RELEASED: APR 30 2013

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DIVISIONAL COURT FILE NO.: 493/12
DATE: 20130430

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

ONTARIO RACING COMMISSION, as
represented by the DIRECTOR UNDER
THE *RACING COMMISSION ACT, 2000*

Applicant

- and -

ONTARIO HARNESS HORSE
ASSOCIATION

Respondent

ENDORSEMENT

SWINTON, HERMAN, AND SPROAT JJ.

RELEASED: April 30, 2013