



COMMISSION HEARING

TORONTO, ONTARIO – AUGUST 10, 2009

**IN THE MATTER OF THE RACING COMMISSION ACT S.O. 2000, c.20;
AND IN THE MATTER IN THE APPEAL AND REQUEST FOR HEARING OF
SUDBURY DOWNS RACEWAY**

On June 24, 2009, the Judges at Sudbury Downs issued Standardbred Official Ruling SB 40923 to Sudbury Downs ("SUDBURY"), in accordance with Rules 1.09 and 5.11 of the Rules of Standardbred Racing, with an effective date of June 25, 2009 at 12:01 a.m. as follows:

"Part One: To provide properly bedded and properly maintained stalls for the horses that ship in at no cost at any time to the horse persons.

Part Two: To keep all the horses of any one stable and in any one entity together in one location where it is in the opinion of the Judges reasonable to do so.

Part Three: Any violation of the above Order will result in the assessment of substantial fines and any other additional penalty or penalties deemed appropriate by the Judges and or the Commission at the time."

On June 25, 2009, Andrew MacIsaac filed a Notice of Appeal on behalf of SUDBURY.

On August 10, 2009, a Panel of the ORC, comprised of Chair Rod Seiling, Commissioner David Gorman and Commissioner Pamela Frostad, was convened to hear the appeal.

Jennifer Friedman appeared as counsel for the Administration. Andrew MacIsaac acted as a representative on behalf of SUDBURY.

Upon considering the testimony of Bill Maertens, Chuck Fraleigh, Robert Bodkin, Phillipe Belanger, and Ken Le Drew, reviewing the exhibits filed, and upon hearing the closing submissions, the Panel Ordered as follows:

Part One: Sudbury Downs provide bedding and maintenance for the ship in stalls until its current contract with the Northern Horsemen's Association expires. The matter of cost on a go forward basis is to be resolved between the parties. If they cannot come to an agreement, the Administration of the ORC is to make that determination;


Part Two: the Panel upholds the appellant's appeal. This portion of the decision is conditional on the track's ongoing commitment to assign the stalls as per its present willingness to offer convenience to horse people;

Part Three: Nullified.

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

DATED at Toronto this 19th day of August, 2009.

BY ORDER OF THE COMMISSION


John L. Blakney
Executive Director



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REASONS FOR DECISION

Overview

1. Sudbury Downs appealed the decision of the Ontario Racing Commission (ORC) Judges' Ruling SB No. 40923, wherein the track was ordered in accordance with Commission Rules SB 1.09 and 5.11 to comply with the following: Part one of the ruling read, *"To provide properly bedded and properly maintained stalls for the horses that ship in at no cost at any time to the horse persons."* Part two read, *"To keep all horses of any one stable and one entity together in one location where it is in the opinion of the Judges reasonable to do so."* Part three of the ruling had to do with compliance. It read, *"Any violation of the above order will result in the assessment of substantial fines and any other additional penalty or penalties deemed appropriate by the Judges and or the Commission at that time."*

Background

2. Prior to hearing the merits of the case, the Panel had to deal with a number of procedural matters. Jennifer Friedman, legal counsel for the Administration of the ORC, requested and received from Andrew MacIsaac, Sudbury's Director of Operations and its representative at the hearing, clarification on the dates of the photos contained in Ex. 2, tab 18 and the dates the documents re procedures for cleaning stalls were issued as per tab 15 in Ex. 2. Ms. Friedman also received concurrence from Mr. MacIsaac to add two witnesses to her witness list, Mr. Robert Bodkin, President of the Northern Horsemen's Association and Mr. Phillippe Belanger, a Director of the association. Mr. MacIsaac, a law school graduate, asked for clarification on what were the issues for the hearing. He was informed that they were what were contained in SB Ruling No.40923. He also registered a complaint that the ORC had not followed its own Rules of Procedure. Ms. Friedman reported that she had apologized to Mr. MacIsaac previously, stating that the cause was a combination of a staff mix up and the holidays.

3. Mr. MacIsaac objected when Ms. Friedman started to reference a letter from the Judges to Mr. MacIsaac dated May 30, 2009, regarding backstretch issues. Ms. Friedman agreed not to reference the individual items but stated her purpose was to provide a history and context to the ongoing issues at Sudbury. Mr. MacIsaac accepted Ms. Friedman's condition. Twice during the hearing, he referenced individual issues in that letter but the Panel denied Ms. Friedman the right to then pursue matters which the appellant had introduced.

4. All those who testified agreed on the need to provide bedding in the ship in stalls at Sudbury Downs. Sudbury was appealing, Mr. MacIsaac stated, that although the track was in agreement with the concept of bedding ship in stalls, it did not believe it should bear the cost of the bedding notwithstanding it could afford to pay for it. To the track, the action of the Judges represented interference by the regulator in a contract matter between the track and the NHA. Mr Bodkin and Mr. Belanger testified the bedding was necessary for the horses to empty themselves and they should not have to be in a dirt floor stall with urine, etc., and possibly roll in it as horses are wont to do. It was their opinion this was not healthy. Both Judges, Mr. Maertens and Mr. Fraleigh, supported this view that on a health and welfare perspective for both the horse and participants the ship in stalls needed to be bedded. They also added that allowing the practice of not bedding the stalls could give racing a negative image with the public.



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5. It was the contention of the appellant that Sudbury has not bedded its ship in stalls for the thirty-five years of its existence and forcing it now, was an incursion by the ORC into the contractual affairs of the track. Sudbury did recognize the ability of the ORC to govern and regulate the track from a strictly legal perspective but termed the outcome of the Order an overreach by the Judges.

6. The track argued, via its brief on page four, that “SB 40923 mandates a deviation from Sudbury Downs’ ORC accepted past practice respective bedding and imports unmanageable and unnecessary influence over our ship in assignment procedures”. No evidence was tendered as to how this negative influence worked re bedding. The arguments put forward were related to stall assignment. In fact, there was testimony from the NHA representatives, supported by the Judges, that there were no issues re stall assignment of any account. According to the Judges, part two of the order was added on the basis of wording in the track’s June 20, 2009 overnight sheet (Ex. 3) that indicated that horses could be separated re stall assignment. Sudbury Downs countered that the wording was an honest attempt by the track to deal with identified issues including safety due to number of horses in an area as raised during the discussions on the matters.

7. The NHA representatives indicated that the horse people were prepared to pay for the bedding. They had one condition, they wanted assurance in consistency of stall assignment to the same horse people noting that if a person did not have enough horses entered to race the remaining stalls could be assigned to someone else. The track would not agree on the basis it prohibited it from possibly renting that stall to another horse person. The track’s preferred solution was to have the horse people rent the stalls from the track.

8. Sudbury acknowledged that the relationship with both the ORC and its horse people had deteriorated and claimed not to understand why this has occurred. Mr. LeDrew, the track’s General Manager, confirmed that the track has had a policy for thirty-five years not to provide bedding for its ship in stalls and that the NHA had not raised the matter during contract negotiations. Both Judge Maertens and Fraleigh disputed this statement based on their prior personal experience as horse people. It was suggested that both individuals may have raced at Sudbury for an Ontario Sires Stakes race or a special race when Sudbury does provide bedding for those horses shipping into the track.

9 Judge Fraleigh testified that he received many complaints from horse people re the lack of bedding in the ship in stalls. He asked the NHA to write a letter so the Judges could act (Ex. 1, tab 3) dated May 28, 2009. On June 3, 2009 as per the Judges Report, the Judges convened a meeting with Mr. MacIsaac (Ex 1, tab 5) that dealt with lack of bedding in the ship barn as one agenda item. One week later, June 10, 2009, a follow up meeting was held to see what the track would propose to solve the identified issues (Ex. 1, tab 7). It was determined that Mr. Maertens would follow up. On June 15, 2009, the Judges wrote to the ORC’s Deputy Director, Rob McKinney, stating that there was merit to the horse people’s concerns re lack of bedding. The Judges went on to say that they found the conditions an unacceptable standard as it resulted in both horses and people frequently standing in urine and faeces that turned the dirt into mud. That report on page three stated that Mr. Le Drew dismissed the proposition that the horse people supply their own bedding. It was positioned and not denied that the easiest solution from the track’s perspective was for horse people to just rent stalls from the track. The Judges indicated a desire to work with the track to resolve the issue. The Judges made their



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order as a last resort. In their minds, there was a serious health and welfare issue that needed to be addressed and they were not prepared to wait any longer, given the unlikely possibility of the parties to resolve it themselves.

10. Mr. MacIsaac introduced a survey he conducted (Ex. 2, tab 19) of Ontario tracks he purported supported his position that it was not standard policy of tracks to provide bedding for ship in stalls. He would not reveal what tracks were contacted but the Panel noted that of the eight tracks listed, three confirmed they provide bedding. Judges Maertens and Fraleigh disputed Mr. MacIsaac's assertions, claiming that while there is no ORC policy, it is an unwritten policy for all tracks to provide free bedding for all ship stalls. Both NHA witnesses testified that bedding was provided at other tracks that they had raced at. Mr. MacIsaac contended that the ORC was holding Sudbury Downs to a higher standard than it does for other tracks by the issuance of the Order.

Issue

11. Did the Judges act within their delegated authority when they issued SB Ruling No. 40923? Should ship in stalls be provided with adequate bedding and should they be adequately maintained?

Decision

12. After carefully listening to the testimony and reviewing the evidence and submissions, the Panel orders that Sudbury Downs provide bedding and maintenance for the ship in stalls until its current contract with the Northern Horsemen's Association expires. The matter of cost on a go forward basis is to be resolved between the parties. If they cannot come to an agreement, the Administration of the ORC is to make that determination. With respect to part two, the assignment of stalls, the Panel upholds the appellant's appeal. This portion of the decision is conditional on the track's ongoing commitment to assign the stalls as per its present willingness to offer convenience to horse people. Part three of the order is therefore nullified.

Reasons for Decision

13. Two of the three operating principles of the Ontario Racing Commission are to protect the health and welfare of the horse and to protect the safety of participants. Allowing unsanitary practices, no matter how long they may have existed or that they may delve into areas considered by some as contractual, would constitute a dereliction of that responsibility. The public interest required action.

14. Basic animal husbandry requires that all horses should be provided adequate bedding whenever they are present at a licensed racetrack in Ontario, either to race in a pari-mutuel event or in a qualifying race to facilitate their bodily functions post shipping. This means that ship in stalls should be adequately bedded and maintained. This would also help to ensure a healthy working environment for horse people. The Panel suggests that it is why, according to Judges Maertens and Fraleigh's testimony, that other tracks provide this necessity. Sudbury's bedding survey carries little if any weight given that Mr. MacIsaac chose not to reveal what tracks he was referencing combined with the testimony of the Judges and the track's admission that the stalls should be bedded.



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15. The Panel agrees with all the witnesses; there is no issue on the need to provide bedding for the ship in stalls, it is a reasonable expectation. Therefore, the only issue regarding the bedding requiring resolution was who was going to pay.

16. In this matter, Sudbury Downs was not being held to a higher standard than other licensees by the Judges. The Panel accepts the testimony of the Judges that Sudbury Downs was being required to conform to a basic animal husbandry practice as it relates to providing bedding for the ship in stalls. For greater certainty, it is reasonable to expect there is a need to have the ship in stalls bedded and maintained for both health and welfare reasons and for the good of racing.

17. Sudbury Downs had the opportunity to accept the horse people's offer to pay for the bedding and rejected it. Given that Sudbury Downs is the only alternative and their agreement on need, it is reasonable to expect they should pay.

18. The Judges acted reasonably given the circumstances they faced. The Court has spoken as it relates to the Commission's standard of reasonableness in *Woodbine Entertainment Group v. Robert Hamather, Lloyd Nicholson, Gary Smith, Geoffrey Mound and Ontario Racing Commission*. In para 30 it wrote "*Reasonableness is a differential standard animated by the principle that underlies the development of the two previous standards of reasonableness: Certain questions come before administrative tribunals do not lend themselves to one specific, particular result. Instead they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within a range of acceptable solutions.*"

19. The Panel recommends that the Commission should establish a minimum standard as it relates to adequately bedding and maintaining ship in stalls. As referenced previously, it is a basic animal husbandry requirement.

20. Sudbury did not dispute the Judges' authority to make the order. Under the Racing Commission Act, 2000, Section 7 states, that the Commission has the power "*to govern, control and regulate race tracks*". In Section 6 of the Act, it mandates the Commission exercise its powers in the public interest. The Ontario Court of Appeal, in the *Ontario Harness Horse Association v. the Ontario Racing Commission*, 62 O.R. (3) 44 [2002] O.J. No. 3409, Docket No. C36305 confirmed this fact. The Court went to say on page 2 that "*Section 19(a), as part of the licensing provisions, imposes the duty on any licensee, which included the respondent owner, 'to act in the public interest'*". The "public interest" in this context meant that not only the interest of the respondent owner had to be taken into account, but also the interests of other participants in the industry and the good of horse racing generally". The Court reiterated this in para 48 of the same decision. The wide scope of powers of the Commission were reconfirmed in the Supreme Court of Canada decision, *Wm. F. Morrissey Ltd. v. Ontario Racing Commission*, [1960] S.C.R. 104 and the Ontario Supreme Court - Court of Appeal [1958] O.J. No. 55 12 D. L. R. (2d) 772.

21. The Judges acted reasonably given the circumstances at the track in issuing their order. Despite the acknowledged need to have the stalls bedded and their attempts to have the parties resolve the matter, it was clear that had they not acted, the absence of bedding for ship in stalls at the track would have stretched into thirty-six years and counting.



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22. This Commission has an established policy of not intervening in contractual issues. The appellant argued that the Judges had infringed in a contractual matter between itself and the NHA. Notwithstanding the Commission's policy, it does have the authority to intervene on the basis of the public interest. This authority was recognized by the Ontario Superior Court of Justice, Divisional Court in the case of Woodbine Entertainment Group and Robert Hamather, Lloyd Nicholson, Gary Smith, Geoffrey Mound and Ontario Racing Commission, Court file No. 381/08 dated 20090114. In para 27, the court wrote *"Notwithstanding the contractual term, the ORC has jurisdiction pursuant to s. 7 of the racing Commission Act to review a track's private actions in accordance with the principles of Sudbury Downs. The ORC must recognise the public interest, including all participants in the industry, including owners and race tracks, and the good of horse racing generally."* Section 19 of the Racing Commission Act imposes the duty on a licensee such as WEG to act in the public interest. Therefore the appellant's claim bears no weight as to the overreaching of the judges in making their order. The Judges, as per their testimony, acted in the public interest, the health and welfare of both the horses and participants.

23. Testimony confirmed that there were no issues re, stall assignment post issuance of the order. It is understandable why the Judges made the Order regarding assignment given the wording on the June 20, 2009 Sudbury Downs overnight sheet. That condition does not and has not applied since the issuance of the Order.

DATED this 19th day of August 2009.

Rod Seiling
Chair