

Federal Court



Cour fédérale

Date: 20041104

Docket: T-466-03

Ottawa, Ontario, this 4<sup>th</sup> day of November, 2004

Present: THE HONOURABLE MADAM JUSTICE SANDRA J. SIMPSON

BETWEEN:

WOODBINE ENTERTAINMENT GROUP

and

Applicant

HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION  
OF ONTARIO, ONTARIO HARNESS HORSE ASSOCIATION and  
CANADIAN PARI-MUTUEL AGENCY

Respondents

**ORDER**

UPON the following applications, which were consolidated by Order of  
Prothonotary Lafrenière dated May 26, 2003

1. An application by the Horsemen's Benevolent and Protective Association of Ontario ("HBPA") and the Ontario Harness Horse Association ("OHHA") (together the "Associations") for judicial review of a decision dated December 18, 2002 (the "Decision") made by the Canadian Pari-Mutuel Agency ("CPMA") in which it decided to issue a license to Woodbine Entertainment Group ("WEG") to conduct wagering on simulcast horse racing in 2003 (the "Merits Application") in which the Associations seek:

- (a) A writ of prohibition, prohibiting the Canadian Pari-Mutuel Agency from issuing to the Woodbine Entertainment Group any further permits and/or licenses pursuant to its regulations for simulcasting horse races in Ontario unless and until the Woodbine Entertainment Group provides evidence of an executed agreement between it and either or both of the Horsemen's Benevolent and Protective Association of Ontario and the Ontario Harness Horse Association, as the case may be;
  - (b) A writ of *certiorari* quashing and/or setting aside the decision of the Canadian Pari-Mutuel Agency to issue permits and/or licenses to the Woodbine Entertainment Group to conduct wagering on simulcast horse races during the period January 1 to December 31, 2003, in accordance with the Pari-Mutuel Betting Supervision Regulations;
  - (c) A declaration that the issuance of permits and/or licenses by the Canadian Pari-Mutuel Agency in the absence of an executed agreement between the Woodbine Entertainment Group and either or both of the Horsemen's Benevolent and Protective Association of Ontario and the Ontario Harness Horse Association, as the case may be, is a nullity;
2. An application by WEG for judicial review of the Decision and for declarations that certain sections of the *Pari-Mutuel Betting Supervision Regulations*, SOR/91-365 (the "Regulations") made pursuant to subsection 204(8) of the *Criminal Code of Canada*, R.S.

c. C-34, s. 1 are *ultra vires* of the Parliament of Canada (the "Constitutional Application"). In that regard it seeks:

- (a) A declaration that Sections 5(1)(i)(j)(k), 85(4)(f), 90(1)(d) and 94(f) of the Regulations are invalid and *ultra vires* the Parliament of Canada, and *ultra vires* the *Criminal Code*.
- (b) A declaration that the issuance of permits and/or licenses by the CPMA may be made in the absence of an agreement between WEG and either or both of the HBPA and the OHHA, as the case may be;

AND UPON hearing the submissions of counsel for all parties in Toronto on Monday, October 18, 2004 on the issues of the mootness of both applications and the Associations' lack of standing to bring the Merits Application;

AND UPON adjourning the hearing of these applications *sine die* to consider the issues of mootness and standing;

AND UPON determining, for the reasons issued this day, that both the Merits and Constitutional Applications are moot and that there is no public interest issue which justifies a hearing;

**AND UPON** concluding, therefore, that the question of the Associations' standing in the Merits Application need not be addressed.

**NOW THEREFORE THIS COURT ORDERS** that the Merits and the Constitutional Applications are both dismissed without prejudice to the parties' right to make submissions on costs if they cannot settle the issue. Submissions may be made in writing (if all parties agree) or by teleconference (again with agreement) or, if necessary, at a hearing in Toronto at a date to be set by the Registrar.

"Sandra J. Simpson"

JUDGE

Federal Court



CANADA

Cour fédérale

Date: 20041104

Docket: T-466-03

Citation: 2004 FC 1554

**BETWEEN:**

**WOODBINE ENTERTAINMENT GROUP**

**Applicant**

**and**

**HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION  
OF ONTARIO, ONTARIO HARNESS HORSE ASSOCIATION and  
CANADIAN PARI-MUTUEL AGENCY**

**Respondents**

**REASONS FOR ORDER**

**SIMPSON, J.**

***The Applications***

[1] In the first application, the Horsemen's Benevolent and Protective Association of Ontario ("HBPA") and the Ontario Harness Horse Association ("OHHA") (together the "Associations") seek judicial review of a decision dated December 18, 2002 (the "Decision") made by the Canadian Pari-Mutuel Agency ("CPMA") in which it issued a license to Woodbine Entertainment Group ("WEG") to conduct wagering on simulcast horse racing in calendar year 2003 (the "Merits Application").

[2] The Associations have asked for the following relief:

- (a) A writ of prohibition, prohibiting the Canadian Pari-Mutuel Agency from issuing to the Woodbine Entertainment Group any further permits and/or licenses pursuant to its regulations for simulcasting horse races in Ontario unless and until the Woodbine Entertainment Group provides evidence of an executed agreement between it and either or both of the Horsemen's Benevolent and Protective Association of Ontario and the Ontario Harness Horse Association, as the case may be;
- (b) A writ of *certiorari* quashing and/or setting aside the decision of the Canadian Pari-Mutuel Agency to issue permits and/or licenses to the Woodbine Entertainment Group to conduct wagering on simulcast horse races during the period January 1 to December 31, 2003, in accordance with the Pari-Mutuel Betting Supervision Regulations;
- (c) A declaration that the issuance of permits and/or licenses by the Canadian Pari-Mutuel Agency in the absence of an executed agreement between the Woodbine Entertainment Group and either or both of the Horsemen's Benevolent and Protective Association of Ontario and the Ontario harness Horse Association, as the case may be, is a nullity.

[3] The second application is made by WEG. It seeks judicial review of the Decision and declarations that certain sections of the *Pari-Mutuel Betting Supervision Regulations*, SOR/91-

365 (the "Betting Regulations") made pursuant to subsection 204(8) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 are *ultra vires* of the Parliament of Canada (the "Constitutional Application"). In particular it asks for:

- (a) A declaration that Sections 5(1)(i)(j)(k), 85(4)(f), 90(1)(d) and 94(f) of the Betting Regulations are invalid and *ultra vires* the Parliament of Canada, and *ultra vires* the *Criminal Code*.
- (b) A declaration that the issuance of permits and/or licenses by the CPMA may be made in the absence of an agreement between WEG and either or both of the HBPA and the OHHA, as the case may be.

### ***The Parties***

[4] The HBPA represents approximately three thousand horsemen (including owners, trainers, jockeys and grooms) who are members of the thoroughbred racing industry.

Thoroughbred horses race in flat track and steeplechase events.

[5] The OHHA represents approximately six thousand horsemen who are members of the standardbred racing industry. These horses are pacers and trotters. Accordingly, drivers rather than jockeys are represented with other horsemen.

[6] Stanley Sadinsky Q.C., Chair of the Ontario Racing Commission, described the Associations in his ruling number COM SB 22/2002 dated November 8, 2002. At page 4, he said:

In order for a horseman to enter a horse to race, it is not necessary that he or she be a member of any horsemen's association. A horsemen's association in Ontario is not a union that has an exclusive right to bargain on behalf of all horsemen in Ontario. It is simply a trade association. Membership is voluntary and highly desirable because the association may offer benefits to its members. It can also negotiate overall revenue splits with individual racetracks and other terms that are favourable to horsemen.

[7] WEG (formerly the Ontario Jockey Club) operates horse racing tracks and wagering facilities. It is described as an "association" in subsection 204(11) of the *Criminal Code* but that term will not be used in these reasons to avoid confusion with the Associations.

[8] The CPMA is a Special Operating Agency which functions as a national regulatory unit in the Federal Department of Agriculture and Agri-Food. It enforces the Betting Regulations. In paragraph 8 of his affidavit of March 17, 2003, Mr. Thane Bell, Associate Executive Director of the CPMA, described the purpose of the Betting Regulations in the following terms:

The purpose of the *Regulations* is to provide effective and efficient pari-mutuel betting supervision in order to protect the betting public against fraudulent practices, thereby helping to maintain a viable racing industry.

[9] Counsel for the CPMA acknowledged that it has no regulatory authority over horseracing and that it is a provincial matter. The CPMA's regulatory role is focussed on wagering and only involves racing to the extent necessary to ensure fairness. In that context, it conducts video surveillance of races, supervises photo finishes and tests horses for illegal drugs.



***The Criminal Code and the Betting Regulations***

[10] Sections 201 and 202 of the *Criminal Code* outlaw wagering. However, paragraph 204(c)(ii) provides an exemption for bets made through a pari-mutuel system if there is compliance with the Betting Regulations. Subsection 204(8) gives the Minister of Agriculture and Agri-Food the power to regulate pari-mutuel systems of betting.

[11] The Betting Regulations require race track owners such as WEG to apply for permits, authorizations and approvals ("Licenses") to conduct various kinds of wagering. In this regard, see subsections 5(1), 85(4) and 94(b) and paragraph 90(1)(d) of the Betting Regulations.

[12] In sum, these sections require WEG to accompany its applications for Licenses with evidence of an executed agreement with the horsemen under contract to it for the period of the proposed Licenses. From the CPMA's perspective, such agreements need only provide that the horsemen and WEG have agreed about the racing schedule (the "Schedule") and the sharing of revenues from wagering (the "Split"). These agreements will be described as the "Pre-License Agreements".

[13] In practice, in Ontario, Schedules are set by the Ontario Racing Commission. However, since the Betting Regulations came into force in 1991, the Associations have negotiated and executed the Pre-License Agreements on behalf of the horsemen. Typically, the Pre-License Agreements dealt with a host of other matters related to the use of the track. However, only the Schedule and the Split were of concern to the CPMA.

[14] The practice of the CPMA was to issue Licenses for a calendar year and, for that reason, the Pre-License Agreements were traditionally negotiated and signed in the late fall. WEG then made its License applications before the end of the year to avoid any gaps in its approvals.

[15] However, as the end of 2002 approached, events did not unfold in the traditional manner. By mid-December, it became clear that the negotiations between WEG and the Associations were not going to result in a Pre-License Agreement in time for WEG to submit its License application before the end of 2002.

[16] Faced with this situation, WEG presented the individual horsemen, who wanted access to its track, with agreements which governed their right to such access. These agreements were also a traditional part of industry practice and were signed in the fall of each year by individual horsemen. However, in late 2002, the usual form of these agreements was changed to incorporate the Schedule for 2003 and the Split (the "Access Agreements").

[17] WEG submitted one hundred and fifty Access Agreements to the CPMA as the Pre-License Agreements necessary to support its License application for 2003. The CPMA decided that, because the Access Agreements were executed by horsemen and because they dealt with the Schedule and the Split, they met the requirements of the Betting Regulations. Accordingly, WEG was issued its License for 2003.

[18] Meanwhile, the Associations extended their 2002 Pre-License Agreements with WEG and successfully negotiated new agreements early in 2003 (the "Contracts"). They have a five-year term and provide that the Associations shall be the exclusive bargaining agents for the horsemen until the year 2009. They also provide that the Split will be 50/50 based on gross revenue (as distinct from the net revenue provision which had been included in the Access Agreements). At the end of 2003, when WEG applied for its License for 2004, it relied on the Contracts as its Pre-License Agreements to demonstrate to the CPMA that an accord had been reached about the Schedule and the Split.

### *The Dispute*

[19] Both applications in this case stem from a dispute between WEG and the Associations about whether the Associations are the exclusive bargaining agents for the horsemen for the purpose of negotiating the Pre-License Agreements which must form part of WEG's applications for wagering Licenses.

***Mootness***

[20] There is no issue that, by reason of the Contracts, the dispute at issue on the facts of this case in the Merits Application is moot in the sense that it has been settled. The Contracts provide that the Associations are the exclusive bargaining agents for the horsemen until 2009.

[21] However, the Associations say that the issue of whether they have exclusive bargaining rights for the horsemen is still "alive" in the sense that it may arise in their dealings with other track owners and with WEG in the future. They also submit that there is a public interest in having this case decided. That, it is said, arises because the CPMA accepted the Access Agreements and issued WEG a License based on those agreements without regard for the fact that prior Pre-License Agreements had always been signed by the Associations. For this reason, it is argued that CPMA breached a duty to act fairly when it issued the License based on the Access Agreements. The Associations note that they negotiated a better Split for the horsemen (based on gross revenues) than the one WEG had included in the Access Agreements (based on net revenues).

[22] With regard to the Constitutional Application, WEG acknowledges that, if the Merits Application is moot and is not heard, the Constitutional Application is also moot and need not be considered.

***Conclusions***

[23] There is no longer a *lis* or a live issue between the parties. I do not accept the Associations' submissions that the issue remains "alive" because it might arise elsewhere between the Associations and other parties. My conclusion is that a live issue means a *lis* - an active dispute between the parties before the Court. As the relief sought in the Merits Application makes plain, a *lis* is no longer present. The Contracts settled the Pre-License Agreement for 2003 and the issue of exclusive bargaining rights until 2009.

[24] The public interest argument is not persuasive. There is nothing in the Betting Regulations which suggests that, in the course of regulating wagering at racetracks across Canada, the CPMA is required to investigate and reject Pre-License Agreements which comply with the Betting Regulations simply because the signing party changes from a horsemen's association to individual horsemen. It may well be that the Associations negotiate better agreements than the horsemen can obtain individually, but the question of representation by the Associations is a private issue for the horsemen to resolve. It is not an issue for the CPMA or for the public.

[25] For these reasons it is not necessary to consider the issue of standing in the Merits Application and both the Merits Application and the Constitutional Application will be dismissed because they are moot and there is no public interest which justifies a hearing.

"Sandra J. Simpson"

JUDGE

Ottawa, Ontario  
November 4, 2004

**FEDERAL COURT OF CANADA**  
**Names of Counsel and Solicitors of Record**

DOCKET: T-466-03

STYLE OF CAUSE: WOODBINE ENTERTAINMENT GROUP  
and  
HORSEMEN'S BENEVOLENT AND PROTECTIVE  
ASSOCIATION OF ONTARIO, ONTARIO HARNESS HORSE  
ASSOCIATION, and CANADIAN PARI-MUTUEL AGENCY

DATE OF HEARING: October 18, 2004

PLACE OF HEARING: Toronto, Ontario.

REASONS FOR JUDGMENT BY: Honourable Madam Justice Simpson

DATE OF REASONS: November 4, 2004

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Respondents

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