CITATION: Shakes v. Ontario Racing Commission, 2013 ONSC 4229
DIVISIONAL COURT FILE NO.: 570/12
DATE: 20130820

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

SWINTON, HERMAN AND LEDERER JJ.

B E T W E E N:	
BRAD SHAKES	*David Barbaree*, for the Applicant
Applicant	
- and -	
ONTARIO RACING COMMISSION	*Brendan Van Niejenhuis and Frederick Schumann*, for the Respondent
Respondent	
	HEARD at Toronto: June 12, 2013

Swinton J.:

Overview

[1] The applicant, Brad Shakes, seeks judicial review of a decision of the Ontario Racing Commission ("the Commission") dated November 27, 2012, which dismissed his appeal from a decision of the judges at Georgian Downs finding he had violated a number of rules of Standardbred Racing because his horse tested positive for a banned substance.

[2] At issue in this application is the reasonableness of the Commission's rule imposing absolute liability on trainers for a positive drug test, as well as the reasonableness of the Commission's decision on liability and penalty in this case. For the reasons that follow, I would dismiss the application for judicial review.

Factual Background

[3] The applicant has been a licensed trainer since 2004. On December 6, 2011, one of the horses he trained, High Def Z Tam, won a race at Georgian Downs. Post-race, the horse tested positive for the Class II drug caffeine, the Class III drug theophylline and the Class IV drug theobromine. The judges at the track disqualified the horse and redistributed the purse money. They also found that the applicant had violated the *Rules of Standardbred Racing* ("the Rules") and imposed a fine of $5,000 and a 365 day suspension with 90 days stayed.

[4] The applicant appealed to the Commission, which conducted a hearing *de novo*. The Commission heard extensive evidence about the drug Sulfracate, which had been prescribed for the applicant's horse by a veterinarian in October 2011. The veterinarian specified a 24 hour withdrawal period for the drug pre-race. She also gave evidence at the hearing that had her instructions for the administration of the drug been followed, the supply would have been exhausted well before the date of last use.

[5] The veterinarian testified that there should have been no caffeine in the Sulfracate. However, a sample from the drug in the applicant's possession tested positive for caffeine.

[6] The applicant testified that he administered the drug more than 24 hours before race time. He had no knowledge how the caffeine got into the Sulfracate.

The Legal Framework

[7] The Commission is given broad powers to regulate horse racing under the *Racing Commission Act, 2000*, S.O. 2000, c. 20 ("the Act"). Its objects, set out in s. 5, are to govern, direct, control and regulate horse racing in all its forms. Section 6 requires the Commission to exercise its powers "in the public interest and in accordance with the principles of honesty and integrity, and social responsibility".

[8] Section 7 sets out a number of Commission powers, including the power "(a) to govern, direct, control and regulate horse racing in Ontario in any or all of its forms." Pursuant to s. 11(1) of the Act, the Commission can adopt rules for the conduct of horse racing.

[9] The Commission has exercised its rule making powers by adopting the *Rules of Standardbred Racing, 2008*. Rule 26.02 applies to trainers and grooms. Rule 26.02.01 sets out the obligations of trainers as follows:

> A trainer shall be responsible at all times for the condition of all horses trained by him/her. The trainer must safeguard from tampering each horse trained by him/her and must exercise all reasonable precautions in guarding, or causing any horse trained by him/her to be guarded, from the time of entry to race until the conclusion of the race. No trainer shall start a horse or permit a horse in his/her custody to be started if he/she knows, or, if by the exercise of a reasonable degree of care having regard to his/her duty to safeguard their horse from tampering, he/she might know or have cause to believe, the horse is not in a fit condition to

> race or has received any drug that could result in a positive drug test. Without restricting the generality of the foregoing, every trainer must guard, or cause to be guarded by the exercise of all reasonable standards of care and protection, each horse trained by him/her so as to prevent any person from obtaining access to the horse in such a manner as would permit any person not employed by or not connected with the owner or trainer from administering any drug or other substance resulting in a pre-race or post-race positive test. Every trainer must take all reasonable precautions to protect the horse and guard it against wrongful interference or substitution by anyone in connection with the taking of an official sample.

[10] Rule 26.02.02 then creates an offence:

> Any trainer who fails to protect or cause any horse trained by him to be protected and a positive drug test thereby results or who otherwise violates this rule shall be guilty of an offence.

[11] The major issue in the present application for judicial review is the validity of Rule 26.02.03, which imposes absolute liability on trainers in specified situations. It states in part,

> Notwithstanding 26.02.01, the Commission and all delegated officials shall consider the following to be absolute liability offences:
>
> ...
>
> (c) any trainer whose horse(s) tests positive resulting from testing in accordance with or under the Pari-Mutuel Betting Supervision Regulations ...

The Commission's Decision

[12] Although Rule 26.02.03(c) imposes absolute liability for a positive test for caffeine, the Commission considered the applicant's argument that he had used due diligence. The Commission noted that due diligence would be a defense if the rules imposed strict liability, and it was also relevant to penalty.

[13] The Commission rejected the applicant's defence of due diligence. It expressed concern that no evidence was given about the horse's care in the week of December 3, the week prior to the race, when the applicant was out of the country. There was no evidence from the applicant or his staff about security arrangements or day to day care and management of the horse. As well, there was no evidence suggesting any third party tampering or intervention. The Commission concluded (at para. 27):

> In light of the failure of evidence relating to the training and care protocol and in light of the failure to comply with veterinarian instruction, no due diligence defence has been demonstrated on a balance of probability. There must be a

finding of breach of the trainer responsibility rule regardless of whether the proper standard is absolute or strict liability.

[14] The Commission then turned to the argument that the absolute liability rule was invalid, explaining that the rule was necessary to address the problem of performance enhancing substances in horse racing. I will discuss the Commission's analysis of that issue in more detail later in these reasons.

The Issues on the Application for Judicial Review

[15] The applicant raises two issues: first, the Commission did not have the statutory authority to adopt the absolute liability Rule 26.02.03; second, and in the alternative, if it did have that authority, its decision that the defence of due diligence was not made out was unreasonable. At the hearing of this application, counsel also took issue with the reasonableness of the penalty, although that was not raised as an issue in his factum.

The Standard of Review

[16] The applicant argues that the standard of review is correctness, both with respect to the question of whether the Commission has the power to adopt the absolute liability rule and with respect to the finding there was no due diligence. He argues that the question of the Commission's power is one of jurisdiction, while the due diligence defence raises an issue of law that is of general importance (*Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190 at paras. 55 and 59).

[17] The Commission argues that the standard of review is reasonableness for both questions. I agree.

[18] The Supreme Court has stated that there is a presumption that review will be on a reasonableness standard when an administrative tribunal is applying its home statute (*Alberta (Information & Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61 at para. 34).

[19] When the Commission adopted the absolute liability rule, it was not determining a "true question of jurisdiction". Rather it was applying its own statutory mandate to make rules for the conduct of horse racing under s. 11 of the Act and exercising its power to regulate horse racing in accordance with ss. 6 and 7 of the Act.

[20] The Divisional Court has determined in other cases that the standard of review is reasonableness when the Commission is interpreting and applying its home statute (*Ontario Harness Horse Association v. Ontario Racing* Commission, 2012 ONSC 821 (Div. Ct.) at para. 46 (*"OHHA No. 1"*) and *Ontario Harness Horse Association v. Ontario Racing Commission*, 2012 ONSC 2198 (Div. Ct.) at paras. 12-13 (*"OHHA No. 2"*)).

[21] Therefore, the standard of review with respect to the validity of the absolute liability rule, as well as the determination of liability for breach of the rules and the proper penalty, is

reasonableness. That said, the Commission was required to adopt the correct legal principles when applying the absolute liability rule. However, the application of those principles to the facts before it requires deference from this Court, as the Commission was assessing the evidence it heard and making a decision that drew on its expertise in the industry of horse racing.

Whether the absolute liability rule is reasonable

[22] The applicant argues that the Commission had no authority to adopt the absolute liability rule. He relies on the decision of the Supreme Court of Canada in *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299, where the Court was dealing with the availability of a due diligence offence in the prosecution of public welfare offences. Dickson J. adopted a presumption that public welfare offences are offences of strict liability. When an offence is one of strict liability, the prosecution must establish the *actus reus* beyond a reasonable doubt. The accused can then avoid liability by proving, on a balance of probabilities, that he or she took all reasonable care to avoid liability (p. 17 Quicklaw version).

[23] With an absolute liability offence, an accused cannot escape conviction by showing he was free of fault or exercised due diligence. Invoking "the principle that punishment should in general not be inflicted on those without fault", Dickson J. held that courts will not find an offence to be one of absolute liability unless the legislature makes it clear that guilt should be found on proof of the proscribed act. In determining whether an offence is one of absolute liability, a court must consider the language used in the Act, the overall regulatory scheme, the subject matter of the legislation, and the significance of the penalty.

[24] In the present case, the Commission made it clear in Rule 26.02.03 that the specified offences are ones of absolute liability. The first question, then, in this application for judicial review is whether the Commission had the power to adopt such a rule. If so, the second question is whether the rule is a reasonable one.

[25] The applicant relied on cases in which the defence of due diligence has been applied in administrative proceedings imposing a penalty and argued that, by analogy, the Commission does not have the authority to adopt an absolute liability offence. In *Consolidated Canadian Contractors Inc. v. Canada*, [1998] F.C.J. No. 1394 (F.C.A.), the Federal Court of Appeal implied a defence of due diligence in s. 280 of the *Excise Tax Act* where a person would otherwise face an automatic penalty for failing to remit the correct amount of goods and services tax. Similarly, the New Brunswick Court of Appeal held that a defence of due diligence was available in administrative proceedings under the provincial *Liquor Control Act* (at para. 27).

[26] The cases on which the applicant relies are not directly applicable. In those cases, the courts were engaged in an exercise of statutory interpretation, applying the presumption of strict liability from *Sault Ste. Marie* and interpreting the applicable statute to determine whether that presumption was rebutted. They were not dealing with the scope of an administrative tribunal's authority to make rules.

[27] Moreover, the Divisional Court in Ontario has taken a different approach, holding that the presumption in *Sault Ste. Marie* is not applicable in the administrative law context. In

Gordon Capital Corporation v. Ontario Securities Commission (1991), 1 Admin. L.R. (2d) 199, the Court upheld a decision of the Ontario Securities Commission which rejected a defence of due diligence in a regulatory proceeding where conditions were placed on the licence of an investment dealer and a short suspension from trading ordered. The Court described the *Sault Ste. Marie* analysis as "irrelevant" to the regulatory proceeding (at paras. 34-35).

[28] What is significant in this case is the broad mandate given to the Commission to regulate horse racing, including the power to make rules and to punish their contravention. In effect, the applicant is arguing that the Legislature must expressly confer the power to adopt an absolute liability offence before the Commission can do so. He cites no authority for this proposition.

[29] In my view, the applicant is inappropriately trying to take the principle that there should be no liability without fault and have this Court adopt it as a restriction on the rule making power conferred in s. 11 of the Act. I note that the Federal Court of Appeal expressly rejected a similar argument in *Consolidated Canadian Contractors*, above at paras. 33-35, and instead considered the language of the Act, the penalty and the impact on the efficacy of the regime in determining whether a particular penalty was one of strict or absolute liability.

[30] The existing jurisprudence on the scope of the Commission's powers emphasizes the breadth of its regulatory power over horse racing. The Court of Appeal in *Ontario Harness Horse Association v. Ontario Racing Commission*, 2002 CanLII 41981 ("*Sudbury Downs*") held that the Commission has the power to interfere with private rights, including property rights, so long as it does so incidental to the regulation of horse racing. The Court reached this conclusion, based on the broad powers in the Act to govern and regulate horse racing, despite the common law presumption that legislation, when ambiguous, should be interpreted in a manner that does not interfere with private rights (at paras. 48 and 56). More recently, the Divisional Court has held that the broad regulatory power allows the Commission to interfere with contractual rights (*OHAA No. 1* at para. 82).

[31] In my view, those broadly worded powers in the Act are also sufficient to allow the Commission to adopt a rule specifying that certain offences are ones of absolute liability, provided the rule is rationally supported and in the public interest (*OHAA No. 2*, above at para. 16).

[32] That brings me to the question of the reasonableness of the rule. The Commission gave a number of reasons why the absolute liability rule was necessary. It noted that a licence to race is a privilege. Accordingly, those who seek a licence are required to agree to obey the Rules.

[33] The Commission emphasized that the use of performance enhancing drugs in horse racing strikes at the integrity of racing and undermines public confidence, with a negative effect on track attendance and wagering. The Commission discussed the difficulties of enforcement and concluded that a strict liability regime was not effective on a systemic level, and doping cases had been on the increase. The Commission observed that it is easy for a trainer or owner to testify that he or she took reasonable steps to safeguard the medication in question, and it is very difficult to prove in a particular case that the individual is lying.

[34] The Commission was of the opinion that a due diligence test would protect too many people who deliberately administer performance enhancing substances to their horses. While the approach may be harsh in an individual case, the Commission noted that due diligence is taken into account when assessing the appropriate penalty.

[35] In my view, the absolute liability rule, while harsh, is reasonably justified in the public interest to protect horse racing for the reasons set out in the Commission's decision. As the Court of Appeal noted in *Sudbury Downs* at para. 49, the Commission, when acting in the public interest, considers the interest of horse racing generally.

[36] The Commission took into account the negative impact of drug use on the racing industry, the difficulties of preventing drug abuse through a strict liability regime, and the need for prevention of such abuse. It also took into account the interests of trainers by its consideration of due diligence at the penalty stage – for example, by limiting the penalty for those who establish due diligence to a fine, described as "non-oppressive" in amount, and no suspension. Therefore, I would not give effect to the applicant's argument that the rule was not authorized by the Act.

Was the application of the due diligence defence reasonable?

[37] Strictly speaking, I need not deal with this issue, having found that the rule imposing absolute liability is valid. However, in the interests of completeness, I will deal with this argument briefly.

[38] The Commission considered the applicant's due diligence argument both in respect of liability and penalty, and found that the applicant had not shown that he took all reasonable steps to avoid the administration of caffeine to his horse.

[39] The applicant bore the onus to prove due diligence. He testified, but did not call anyone else who had worked with the horse, even though the applicant had been away for the week prior to the race. The Commission was not satisfied that there were actual safeguards in place to prevent misuse of medication, concluding, "There is a significant gap relating to discharge of the trainer responsibility obligation in the critical week before the positive test" (Reasons, para. 25).

[40] Deference is owed to this conclusion, as the Commission heard the evidence and the panel members have expertise in the area of horse racing. Their conclusion on the inapplicability of the due diligence defence was reasonable. As well, deference is to be accorded to their determination of the appropriate penalty.

Conclusion

[41] Accordingly, the application for judicial review is dismissed.

[42] Costs to the Commission are fixed at $10,000.00 all inclusive, an amount agreed upon by the parties. While the applicant's counsel suggested that no costs should be awarded, given the

impact on the applicant as he starts a period of suspension, I see no reason why costs should not follow the event.

Swinton J.

Herman J.

Lederer J.

Released: AUG 2 0 2013

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REASONS FOR JUDGMENT

Swinton J.

Released: August 20, 2013