

GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL
GOVERNMENT LAW ONLINE

**WOODBINE ISN'T MR. ROBINSON'S
NEIGHBORHOOD**

MARCH 2004



80 New Scotland Avenue
Albany, NY 12208
www.als.edu

GOVERNMENT LAW ONLINE publications are available at www.governmentlaw.org

WOODBINE ISN'T MR. ROBINSON'S NEIGHBORHOOD

**Bennett Liebman, Esq.
Coordinator/Staff Attorney
Racing and Gaming Law Program**

MARCH 2004

These materials are copyright by Albany Law School (ALS) on behalf of its Government Law Center or ALS licensors and may not be reproduced in whole or in part in or on any media or used for any purpose without the express, prior written permission of Albany Law School or the licensor. Neither Albany Law School, the Government Law Center or any licensor is engaged in providing legal advice by making these materials available and the materials should, therefore, not be taken as providing legal advice.

All readers or users of these materials are further advised that the statutes, regulations and case law discussed or referred to in these materials are subject to and can change at any time and that these materials may not, in any event, be applicable to a specific situation under consideration. The information provided in these materials is for informational purposes only and is not intended to be, nor should it be considered to be, a substitute for legal advice rendered by a competent licensed attorney or other qualified professional. If you have any questions regarding the application of any information provided in these materials to a particular situation, you should consult a qualified attorney or seek advice from the government entity or agency responsible for administering the law applicable to the particular situation in question.

Woodbine Isn't Mr. Robinson's Neighborhood

In horse racing, it is quite often too easy to be dismissive of actions by racetracks, horsemen's organizations, and racing commissions, and courts. In the case of Bill Robinson, a leading harness trainer who has been denied access to Woodbine Entertainment's [WEG's] two tracks (Woodbine and Windsor) however, there actually is a reason to be dismissive. There is a clear catalyst for the legal struggles involved in the proceedings. The decision of the Court of Appeal for Ontario in Ontario Harness Horse Association v. Ontario Racing Commission 62 O.R. (3d) 44 (2002) leave to appeal refused by (2003), 313 N.R. 195n (S.C.C.) has created a legal minefield in Ontario over the rights of racetracks to exclude licensees. The bombs in the minefield have exploded at the Ontario Racing Commission [ORC] in the Robinson case.

The Background

Bill Robinson is Canada's championship harness trainer of 2003. His horses in 2003 earned more than any other trainer in North America, and this was the fourth time that Robinson earned Canadian harness trainer of the year laurels. He has trained such top pacers as Art Major, Western Dreamer, Mach Three, Precious Bunny, Presidential Ball, Pacific Rocket, Cams Card Shark, Million Dollar Cam, and Riyadh. He has been a dominant trainer in harness racing for two decades.

With his success has come controversy. There have been a series of questions involving Mr. Robinson's fitness to continue as a trainer. He has had eleven drug positives as a trainer. The Ontario Racing Commission described them as follows: 'Mr. Robinson has had a number of positive equine drug tests over the years. He recalled nine or ten of these of which 'seven were minor and three major'. Mr. Robinson's various positive equine drug tests, according to him, were the result of 'mistakes' by his help, 'mistakes' with the products being used, or 'mistakes' by the veterinarians, but 'always a mistake' or 'carelessness'.'¹

Robinson is currently in court, contesting "a four-year-old case involving a horse called Artistic, which was found with ephedrine in his system, a Class II drug. The classifications range from Class 1, the most serious, to Class V, the least serious. The ORC had originally given Robinson a \$25,000 fine and a two-year suspension in that case, then modified it to a \$50,000 fine and a 10-month suspension."²

¹ Ontario Racing Commission, RULING NUMBER COM SB 007/2004, THE MATTER OF THE ONTARIO RACING COMMISSION ACT, 2000, S.O. 2000, c.20 AND IN THE MATTER OF WILLIAM ROBINSON AND WOODBINE ENTERTAINMENT GROUP Page 9. The decision of the Racing Commission is at http://www.standardbredcanada.ca/misc/orc_weg_robinson.pdf.

² Beverley Smith, "Woodbine Can Banish Robinson, ORC Says," Toronto Globe and Mail, February 25, 2004, Page S-5. Robinson's argument is that given the number of horses he has run over the years, his total of drug positives is not excessive.

These positives were capped on November 8, 2003 when his horse Flight Plan received a positive for a total carbon dioxide test at Mohawk Raceway.³ The Ontario Racing Commission's judges imposed a five-year suspension and \$100,000 fine on Robinson. Robinson has appealed from this penalty, and his appeal is pending before the ORC.

The Governing Case Law

Soon after the positive, Woodbine citing its rights under the Trespass to Property Act, stopped accepting entries from Robinson's horses. In prior times, that might have been the end of the matter. Woodbine, as an owner of property, could have banned Robinson from its racetrack properties with impunity. That, however, is no longer the case under Ontario Harness Horse Association v. Ontario Racing Commission.

In the Ontario Harness Horse Association [OHHA] case, the racetrack Sudbury Downs excluded ten members of the OHHA, the horsemen's association representing harness horsemen in Ontario, from participating in races at Sudbury Downs. OHHA appealed to the Ontario Racing Commission asking the Commission to hold hearings on the exclusions. The Commission refused to hold a hearing citing the familiar proposition "that the owner of the facility is entitled to exercise its private property rights"⁴

The decision of the Racing Commission not to intervene in the Sudbury dispute was upheld by the Divisional Court. On appeal, however, the Court of Appeal for Ontario reversed the decision. The court in an unanimous decision by Mr. Justice Morden found that its key decision on the issue of exclusions, Kimball v. Windsor Raceway Holdings Ltd. 10.O.R. (2d) 428 (1973), only barred the excluded plaintiff licensee from suing the defendant racetrack. It did not restrict the excluded licensee from seeking redress from the ORC to have the ORC take appropriate action against the racetrack. Based on this logic, the Court overruled those decisions which had held that the Racing Commission did not have jurisdiction over the exclusion of licensees.⁵

Instead, the Court found that the ORC had the responsibility to hold a hearing affecting the excluded licensees. Reviewing the Racing Commission Act, 2000, the Court found that the racetrack's private property rights were not a barrier to the Commission's jurisdiction. The Commission had the power to govern and regulate horse racing in Ontario,⁶ and the exclusion of licensed owners was within the administrative powers of the Commission.⁷

³ This is a blood gas test used as a way to prevent horses from receiving milkshakes before races. Milkshakes involve solutions of baking soda which can be administered directly through a tube into a horse's stomach.

⁴ 62 O.R. (3d) at 47.

⁵ Ontario Jockey Club v. Ontario Racing Commission, unreported, February 3, 1995 (Ont. Div. Ct.); Wray and Ontario Racing Commission (Re) (1982), 138 D.L.R. (3d) 307 (Ont. H.C.J.),

⁶ Id. at 57.

⁷ Id. at 58-59.

In terms of how the ORC was to make its decision, the Court gave little clue. The ORC was to follow the public interest⁸ which stood for “the good of horse racing generally.”⁹ The court indicated that one factor relevant to the public interest level was the effect of the exclusion on the competitive level of the racing at the track.¹⁰ The court further stated, “Whether or not the Commission takes any action after holding a hearing will turn of course entirely on the facts which it finds and then on the exercise of the broad discretion which it undoubtedly has.”¹¹ Justice Morden followed this statement with the assertion, “It is not necessary or helpful to consider at any length the action which the Commission could take following a hearing. It is sufficient to say that I am satisfied that it would be wrong to conclude that it could not take any action.”¹²

The Court further indicated that a decision had to be made by the Commission but not the staff, and it suggested that possible remedies could include the revocation of Sudbury Downs’ license, imposing terms or conditions on the license of Sudbury Downs, or the denial of race dates for Sudbury Downs.¹³

No matter how you look at the OHHA decision, it provides remarkably little guidance to the ORC in determining how to exercise its newly found jurisdiction. Can it decline to hear an exclusion case? On what grounds does it determine whether to hold a hearing? On what basis can the Commission overturn the decision of the racetrack to exclude a licensee? Who has the burden of proof in this case? What is the remedy should the Commission decide to order that the licensee be allowed to compete at the racetrack? How do the public interest and the discretion of the ORC factor into any determination? By providing almost no standards, the court virtually guaranteed that the next battle between excluded horsemen and the excluding racetrack would be a mess, and the collision between the Woodbine and Bill Robinson was not a mere mess. It was a train wreck.

Due to the absence of any standards established by the OHHA case, there appeared to be virtually no agreement between any of the parties on how the Robinson case was to be handled. Robinson and the horsemen took the position that OHHA mandated that a racetrack could not exclude a licensed horsemen from participating in racing.¹⁴ Any attempt of Woodbine to block a licensee from racing would be “vigilante justice.” Woodbine took the position that there was “no reason this hearing should be taking place and the sole reason we are here is out of respect for the institution of the

⁸ *Id.* at 59.

⁹ *Id.*

¹⁰ *Id.* This may be a most unfortunate assessment as it would seem to give major horsemen such as Bill Robinson greater rights than horsemen with lesser quality horses. The determination of whether a racetrack can exclude a licensee ought not to depend on the prominence of the licensee or the quality of a licensee’s horses.

¹¹ *Id.* at 61.

¹² *Id.* at 62.

¹³ *Id.*

¹⁴ Beverley Smith, “Robinson Continues to Divide Racing Community,” *Toronto Globe and Mail*, March 3, 2004.

Commission . . . I'm not sure that there is jurisdiction in this case . . . This will be back to a court of appeal pretty quickly if needed."¹⁵

Even the Ontario Racing Commission staff seemed unsure of the standards to be applied in an exclusion case. Jean Major, the executive director of the ORC commented, "WEG is completely within its rights to bar an individual from their property. They did not consult with us or ask us. They can exercise their rights to do what they did, as any other track could. However, a track can not refuse entry outright for no reason," said Major, adding that "the commission does have a possible role in reviewing such decisions if the matter involves horse racing. A person can request that the commission review that decision."¹⁶

The Racing Commission Decision

With these differing perspectives, the Robinson case came to the Ontario Racing Commission. After initially determining that the Commission had jurisdiction, the panel of the ORC determined that it had to balance the rights of Woodbine against the rights of the licensee. That balance could not be undertaken without a full evidentiary hearing on the matter.

Based on this jurisdictional statement, the panel heard four days of testimony and eventually issued an unanimous decision in support of Woodbine. While perhaps not as confusing as the OHHA decision, the ORC decision in the Robinson case hardly clarifies the matter. In fact, it likely only sets the stage for future fights.

In this case, Robinson argued that as long as he was licensed, under the OHHA decision, he was required to be admitted by Woodbine.¹⁷ Woodbine argued a series of contentions: First, it argued that its private property rights were not bound by the OHHA decision, and secondly that "both the public interest and WEG's business interest mandate this panel "not modify" WEG's private property rights by directing that Mr. Robinson's racing privileges be restored."¹⁸ The staff of the Racing Commission also argued against Mr. Robinson, suggesting that the ORC should not be turned into a trespass court and that there was no "public interest" involved in the Robinson case.¹⁹

The ORC panel seemed to try to steer a middle path between the parties. It rejected Robinson's notion that the OHHA decision eliminated the ability of Woodbine to exclude licensees. It similarly rejected Woodbine's suggestion that the ORC lacked jurisdiction over the case. Similarly, in stating the facts of the case, the ORC panel accepted much of the evidence of the parties. It found that Robinson "has demonstrated a

¹⁵ David Willmot quoted at "Robinson Hearing Complete," February 15, 2004
<http://www.standardbredcanada.ca/news/iss0204/hearingcomplete0215.html>

¹⁶ "Bill Robinson Update," posted by Anthony Corban, Harnesslink
<http://www.harnesslink.com/www/Article.cgi?ID=7436>

¹⁷ RULING NUMBER COM SB 007/2004 at Note 1, Page 7.

¹⁸ Id.

¹⁹ Id.

record of great success and skill over many years”²⁰ and that the quality of his racing stock required him to race at the Woodbine- operated tracks in Ontario.

On Woodbine’s side, the panel found that “the evidence indicates that the Trespass Act remedy and its occasional use and availability is an essential tool in the pursuit of the business interests of WEG.”²¹ The panel also found “as a fact that WEG’s Trespass Notice delivered to Mr. Robinson was not motivated by any personal animosity or bad faith on its part.”²² WEG excluded Robinson because of Robinson’s prior drug record, his November 8th total carbon dioxide positive, and feedback from customers and other horsemen about Robinson’s record. Woodbine noted that if Robinson’s appeal of his total carbon dioxide positive was successful, it would readmit Robinson.²³

Based on these facts, the ORC panel determined that its decision would be guided by three factors. The factors would be: (1) an issue that is primarily horse racing, (2) the good of horse racing generally, and (3) the public interest. Based on these factors, the Commission decided for Woodbine. It first determined, citing a prior ORC decision, that the burden was on Robinson to modify the exclusion. Robinson, according to the panel “presented a reasoned and rational case in this regard.”²⁴ It was only deficient in Robinson’s inability to disclose how he might prevent future drug positives.

On the other hand, Woodbine’s position was “sound and reasonable based on their business interests, their business goals, the economic interests that they are currently protecting and seek to protect, and a consideration of the well-being of racing in general. We find that the foundation and basis of the vast majority of WEG’s position is both unimpeachable and laudable.”²⁵

Based on this finding, the panel found that the best interests of racing were served by not modifying Woodbine’s exclusion order. Nonetheless, as if to make sure that Woodbine did not get a whole loaf, and while the issue was not part of the case, the panel proceeded to criticize Woodbine’s refusal to accept the entry of a horse owned by Katrina Shmitz, Robinson’s common-law wife.²⁶ The panel found that the exclusion of a horse owned by Shmitz that had not been part of the Robinson stable was “over-reaching and excessive.”²⁷ The panel was glad that Woodbine had apparently rectified the Shmitz situation by letting her race her horses.

Assessment of the Commission Decision

²⁰ Id. at 9.

²¹ Id. at 11.

²² Id.

²³ Id. at 10.

²⁴ Id. at 12.

²⁵ Id.

²⁶ Rob Longley, “Woodbine Ban of Horseman Upheld,” Toronto Sun, February 25, 2004 P. 75; Beverley Smith, “Woodbine Can Banish Robinson, ORC Says,” See Note 2, supra.

²⁷ Ruling at Note 1, supra at p. 12.

The sad fact is that very little of this decision is satisfying. It may be that the Court of Appeal decision in the OHHA case is so inherently confusing that nobody can make much sense of it. Certainly, the ORC panel clearly could not make much sense of it. It was able to deal with the extreme position of Robinson that the racetrack had power to exclude and the extreme position of Woodbine that under the OHHA decision it had retained an unfettered right to exclude. But it was clearly at a loss to determine what factors the OHHA decision forced it to apply. Instead, the ORC panel set out a three factor test involving horse racing, the good of horse racing generally and the public interest. The panel, however, made no effort to define any of the three factors. Nor did the panel even make an effort to weigh any of these factors as it applied to the facts of the case. It simply concluded that Woodbine's interests were sound and reasonable, and Woodbine's expulsion should not be modified.

The Commission's discussion of the burden of proof issue also is less than compelling. It placed the burden on Robinson to show by clear and cogent evidence that modification of Woodbine's exclusion order was needed. The panel simply cited a prior Commission case where the burden of proof was placed on the excluded party, but it gave no reasons why the burden was on the excluded party. Nor did it explain the burden issue. Does the excluded party only have the burden of going forward? Again, if that is the case, wouldn't Robinson's presentation of a "reasoned and rational case" be sufficient to meet the burden of going forward? If the burden of proof is on Robinson, why doesn't the panel weigh Robinson's case against Woodbine's case and conclude that the burden of proof was not met. Also what is meant by "clear and cogent" evidence? Does that mean that the burden on the excluded party is greater than presenting a fair preponderance of the evidence? Again, we don't know.

The problem with the decision in Robinson is the same as the problem with the OHHA decision. There simply is no guide to future conduct for either the racetracks or the horsemen. What is an issue dealing "primarily with horse racing?" Nobody has any reasonable expectation as to how the next case will be decided. If a racetrack excludes a licensee who is active in the horsemen's group, is that an issue affecting horse racing? What if the licensee says that the track is a dump or that the track surface is unsafe and gets expelled by the racetrack? What if a horseman at Flamboro Downs (a Magna Entertainment racetrack) is expelled for actively campaigning against Belinda Stronach, the politically active daughter of the chairman of Magna Entertainment? The ORC panel gives us no clue as to what issues are primarily horse racing. Nor is it of much help on the other issues. Is there any difference between the "public interest" and the "good of horse racing generally," and what do these terms mean?

The matter is not helped at all by the panel's dicta on Woodbine's improper exclusion of Katrina Shmitz. If the burden of proof is on the excluded party to modify the exclusion, how can you find an exclusion to be improper when nobody is even contesting it? And how do you make the finding on Ms. Shmitz without some finding that the ban on her involves horse racing? Beyond that, why is the exclusion of Ms Shmitz so

excessive? Penalties on licensees by commissions and stewards often extend to members of their households. Stewards often devise procedures that assure that members of one household don't compete against each other. What is so excessive about extending a ban on a licensee to include a ban on that licensee's spouse? For instance, if Bill Robinson owned a horse and transferred ownership of that horse to Katrina Shmitz, why wouldn't Woodbine be within its rights to decline to take entries from Ms. Shmitz? Similarly what if Ms. Shmitz became a trainer and took over training of Bill Robinson's horses? Wouldn't it be rational for Woodbine to extend its ban on Bill Robinson-trained horses to horses trained by Katrina Shmitz? It almost seems that the panel's criticism of Woodbine's decision criticizing Woodbine on Katrina Shmitz is a makeup call for its decision against Bill Robinson

To a certain degree, it is almost unfair to criticize the ORC for its decision in the Robinson case. It has been dealt a very poor hand by the OHHA decision. The ORC is likely attempting to steer a middle course between the horsemen's belief that no racetrack exclusion is valid and Woodbine's belief that all exclusions are valid. Given the fact that the ORC has penalized Bill Robinson severely for a series of drug positives, it is hard to envision a scenario under which the ORC would block an exclusion of Mr. Robinson. If Woodbine couldn't exclude Bill Robinson, what licensee could the racetrack possibly be entitled to exclude? Yet by not explaining or evaluating the factors that went into its decision on Bill Robinson and tossing in the admonition against Woodbine on Katrina Shmitz, the ORC has likely exacerbated the situation on exclusions in Ontario. As confusing as the OHHA decision might be, the ORC made almost no attempt to clarify it. As a result, nobody now knows the laws on exclusions in Ontario.