



COMMISSION HEARING

TORONTO, ONTARIO – APRIL 9, 2009

**IN THE MATTER OF THE RACING COMMISSION ACT, S.O. 2000, c.20;**

**AND IN THE MATTER OF AN APPEAL AND REQUEST FOR  
HEARING OF DR. SHANE DURNIN**

On January 12, 2009, the Judges at Western Fair issued Standardbred Official Ruling SB 39051 to Dr. Shane Durnin ("Durnin") for "Violation of ORC Rules 1.09, 6.20(a), (b), (c), 10.02 and 10.03. Dr. Shane Durnin initially refused a search and did subsequently compromise that search on the grounds of Western Fair Raceway on November 21, 2008".

On January 13, 2009, Durnin appealed Standardbred Official Ruling SB 39051.

On January 20, 2009, the Executive Director of the Ontario Racing Commission ("ORC") issued Ruling Number SB 06/2009 wherein Durnin was granted a conditional stay of his penalties.

On April 9, 2009, a Panel of the ORC, comprised of Chair Rod Seiling, Vice Chair Hon. James M. Donnelly, and Commissioner Brenda Walker, was convened to hear the appeal.

Jennifer Friedman appeared as counsel for the Administration. Peter Behr appeared as counsel for Durnin.

Peter Behr filed a motion with the Panel at the beginning of the Hearing on the basis of an abuse of process wherein he sought the following relief:

- a) an order to quash the proceedings against Durnin;
- b) an order setting aside SB Ruling 39051; and
- c) an order against the Administration of the ORC in the amount of \$5,000.

The Panel denied the motion advanced on behalf of Durnin.

Following the motion, to narrow the issues, the parties arrived at an Agreed Statement of Facts.

Upon considering the Agreed Statement of Facts, hearing the testimony of Associate Judge Bill Maertens, ORC Investigator Troy Moffatt, Ian Fleming, and Durnin, reviewing the exhibits filed, and upon hearing the closing submissions, the Panel denied the appeal of Ruling Number SB 39051 as follows:

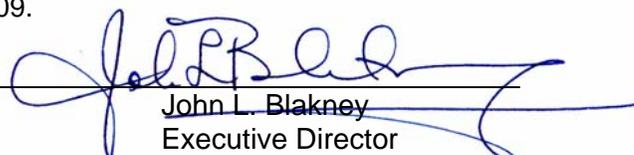
- i) Durnin contravened SB Rules 1.09, 6.20(a), (b) and (c), 10.02 and 10.03;
- ii) the \$5,000 fine and two years' probation are upheld; and
- iii) the suspension portion of Durnin's penalty is stayed on the condition that he abide by the Rules of Racing, failing which the stay will be automatically lifted.

Durnin's probation commences on the date of this Ruling for a period of two years, namely April 22, 2009 through April 22, 2011 inclusive.

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

DATED at Toronto this 22<sup>nd</sup> day of April 2009.

BY ORDER OF THE COMMISSION

  
John L. Blakney  
Executive Director



## REASONS FOR DECISION

### Overview:

1. Standardbred licensee, Dr. Shane Durnin, appealed a ruling of the Judges, SB No.39051, dated January 12, 2009, wherein he was fined a sum of \$5,000 and suspended for a period of ninety days with two years probation for a violation of SB Rules Nos. 1.09, 6.20 (a), (b), (c), 10.02 and 10.03. Dr. Durnin was granted a stay, with conditions, by the Executive Director of the Ontario Racing Commission (ORC) on January 20, 2009, until a de novo hearing could be held. That hearing took place on April 9, 2009.

### Background

2. Legal Counsel for the appellant, Peter Behr, filed a motion with the Panel seeking an order to quash the proceedings against Dr. Durnin, an order setting aside SB Ruling No. 39051 and an order against the Administration of the ORC in the amount of \$5,000. The basis of Mr. Behr's motion was that with the Administration providing the Panel its factum and book of documents in advance of the proceedings it represented an abuse of process and the appearance of fairness was lost with the advance dissemination. Mr. Behr, during his arguments, declined a possible offering for a new Panel that had not seen the material to hear the case claiming his client needed the matter resolved now.

3. The Panel, in rendering its decision, found it unnecessary to hear opposing arguments from the ORC's legal counsel, Jennifer Friedman. It ruled that none of the material presented had been admitted as evidence, the Panel understood its obligation to decide the case on the evidence and that it will do so, therefore the motion was dismissed.

4. Legal counsel for both the Administration and the appellant, after a brief recess, were able to reach an agreed statement of facts. They are as follows:

- On November 21, 2008 ORC investigator, Troy Moffatt was at Western Fair Raceway.
- Mr. Moffatt observed Dr. Durnin in the Western Fair paddock.
- Mr. Moffatt saw a vehicle with license plate number BEES501 parked outside the paddock door within the fenced enclosure.
- Mr. Moffatt was wary of what he observed.
- Mr. Moffatt then approached the vehicle and based on what he saw inside it, concluded it was a mobile veterinary clinic.
- At about 10:43 a.m. that same day he saw Dr. Durnin at the rear of that vehicle taking items out of it.
- Mr. Moffatt observed Dr. Durnin in the paddock with an out of competition horse in stall 6, race 8
- Mr. Moffatt, on returning to the parking area, observed the vehicle had been moved to outside the enclosure to another parking area.
- At about 12:00 noon Mr. Moffatt then observed the vehicle back parked inside the paddock's fenced enclosure.
- Mr. Moffatt, on returning to the paddock, saw the horse in cross ties in front of stall 6.
- On approaching the area, Mr. Moffatt found a used syringe in the garbage located closest to stall 6.
- Mr. Moffatt approached Dr. Durnin advising him of his conduct, that it was suspicious given his vehicle (clinic) and the time spent with the horse.



- Mr. Moffatt asked Dr. Durnin for permission to search his vehicle
- The request was refused on the basis there were personal items in the vehicle and that it was not on the backstretch.
- Mr. Moffatt and Dr. Durnin walked out of the paddock together wherein Mr. Moffatt noticed the vehicle was now parked outside the fenced enclosure.
- Mr. Moffatt did not see Dr. Durnin move the vehicle.
- Mr. Moffatt advised Dr. Durnin that notwithstanding the new location of the vehicle it was still on the grounds of an association and that ORC search powers still apply.
- Dr. Durnin still refused to the search request.
- Troy Moffatt advised Dr. Durnin that as an ORC investigator he was entitled to search his vehicle because it was on the Western Fair grounds and that as an ORC licensee and an ORC veterinarian he is regarded as consenting to the search as per ORC rules.
- At about 1:16 p.m. that same day Mr. Moffatt made a final request to search the vehicle.
- The request was denied.
- Mr. Moffatt drove his vehicle over to Dr. Durnin's to take pictures of it.
- Mr. Moffatt then saw a truck, license number 1757FB and trailer, license number A6869F pull beside Dr. Durnin's vehicle.
- Mr. Moffatt observed Dr. Durnin remove a large plastic cooler and duffel bag from the vehicle and hand the items through the passenger window of the truck/trailer.
- Mr. Moffatt, after the departure of the truck/trailer read the applicable rules to Dr. Durnin.
- Dr. Durnin then consented to the search which Mr. Moffatt conducted.
- At times there is insufficient room inside the fenced paddock enclosure for all the vehicles and the overflow regularly park just outside the gated enclosure.
- The area still constitutes the grounds of Western Fair.

5. Dr. Durnin came to Western Fair Raceway on November 21, 2008 to help his friend, Patrick McIlhargy, determine whether to purchase the horse in question. Mr. McIlhargy, who was not called as a witness, brought the horse in his truck and trailer, the same one identified by Mr. Moffatt as the recipient of items passed to him through the driver's window of his truck by Dr. Durnin outside the fenced enclosure just before agreement was given for the search of the Durnin vehicle.

6. On arrival, the appellant parked his vehicle inside the enclosed paddock area (#1 on Ex. 2a). Dr. Durnin, as per his testimony, is familiar with most of the rules of racing which included the consent to a search request from an ORC official as per SB Rule No. 10.03. It was Dr. Durnin's assertion that consent had no currency once his vehicle was outside the fenced enclosure. Mr. McIlhargy moved the vehicle from inside the enclosed area to another parking area just outside the fence (#2 on Ex. 2a). This was the first of two in and out movements from the enclosed area of Durnin's vehicle, each time done by Mr. McIlhargy in accordance with the appellant's concurrence. According to Western Fair Race Manager, Ian Fleming, this area is regularly divided (by Western Fair security) to ensure that it can accommodate the overflow of horse people racing at the track as well as arena patrons.

7. Dr. Durnin's knowledge also included rules related to the paddock when qualifying races are occurring as to what is permitted within that area. Reference was made to SB Rule No. 32.07, which makes the paddock a secure area two hours before the races and one hour after the races. The rule states no medication of horse is allowed, either parenteral or orally, during this time. The appellant, in acknowledging awareness of this rule was not confident he was in full compliance with it time wise.



8. Dr. Durnin admitted to examining and treating the horse in the paddock around the time of the qualifying races. His actions were not pertinent to the hearing except as grounds for the search demanded by investigator Moffatt notwithstanding he froze the horse's splint inside the paddock. In a similar vein, whether the horse in question was an in or out of competition animal was not at issue. Moffatt's interest commenced when he saw Dr. Durnin entering the paddock carrying a bridle and it increased with his discovery of the used syringe in a garbage container near the horse in question. It continued to increase when he observed Dr. Durnin taking things out from the back of his vehicle which was now parked back inside the enclosed area near the paddock (#3 on, Ex. 2a). Mr. Moffatt again asked Dr. Durnin for permission to search explaining his right based on the rules but was told the vehicle was not now on racetrack property (#4 on Ex. 2a) so he did not have to comply. This marked the second in and out movement of the subject vehicle, again done by Mr. McIlhargy. Mr. Moffatt then informed Dr. Durnin he would go to his vehicle to get a Rule Book and show him where the rules gave him the right to search, SB Rule No. 10.02, (within the grounds of any association).

9. The refusals (three) to search his vehicle only served to heighten the level of suspicion culminating in his witnessing of the passage of the cooler and duffel bag through the passenger window of the truck to Mr. McIlhargy, and its immediate departure from the grounds of the racetrack. It was after this occurrence that Dr. Durnin agreed to the search. That search did not reveal anything suspicious.

10. The duffel bag in question, which Dr. Durnin took into the paddock was said to contain his helmet, driving suit et al. Mr. McIlhargy regularly borrowed them as he did not own any of this required gear to go on the Western Fair track with the horse. The cooler was said to belong to Mr. McIlhargy and he was just returning it as it had been left in his vehicle a few days earlier.

11. According to ORC Judge, William Maertens, it would not be in the best interests of racing if the powers of search did not extend to the entire area of Western Fair, that they would not be able to function if trucks/trailers parked outside the compound were not subject to the search provision. The lot is owned by Western Fair and forms part of its property (Ex. 1, tab 5).

12. He referenced Windsor Raceway (Ryan Reynolds ORC SB Rule 98/2000) stating that being outside the fenced area still constituted being on the association grounds as the area is maintained by the track. Investigator Moffatt substantiated the same assertion stating the rules regarding ORC search authority applied to outside the fenced paddock enclosure. In support, he referenced that the track maintained the area in question regarding snow ploughing, lighting and security patrol. The appellant's Exhibit 1, tab 6 contained photos of the parking area in question. The pictures (# 10 & 11) showed the lot was ploughed, and light towers. The aforementioned is the responsibility of Western Fair. Another photo (# 13) of the subject area showed a Western Fair security vehicle in it. Photo # 19 of that exhibit was of signage at Flamboro Downs wherein one of the two signs at the stable gate indicated a person would not be subject to search if they did not enter the backstretch. Mr. Moffatt explained the reference was for Flamboro Downs security and did not apply to ORC search powers.

13. Judge Maertens testified that SB Rule 10.02 gives jurisdiction to all the Western Fair grounds, that distance is not an issue. SB Rule 7.17 is not applicable as it refers to a prohibition of track personnel being granted search powers at a licensee's property, i.e. home, training centre.



### Issue

14. Did ORC investigator, Troy Moffatt, have reasonable cause to request a search of the appellant's vehicle per SB Rule Nos. 10.02 and 10.03? Did Dr. Durnin violate the rules as charged by the Judges in their ruling, SB 39051? Does the power of search for ORC personnel extend to the grounds of a licensed association beyond the fenced paddock enclosure? Was the penalty assessed by the Judges appropriate given the circumstances?

### Decision

15. After carefully considering the testimony and reviewing the evidence and submissions, the Panel denies the appeal of the appellant, Dr. Shane Durnin. On a balance of probabilities, the evidence is clear, cogent and compelling that he violated SB Rules Nos. 1.09, 6.20 (a), (b) and (c), 10.02 and 10.03 as per the ruling of the Judges, SB 39051.

16. However, the Panel for mitigating reasons related to Dr. Durnin's unfortunate decision-making on November 21, 2008, stays the suspension portion of his penalty and he is put on probation for a period of two years on condition that he abide by the Rules of Racing. If at any time during the time period Dr. Durnin is found to be in violation of the rules of racing, the stay will be automatically lifted.

### Reasons for Decision

17. ORC investigator Moffatt, with his nine plus years of experience, had reasonable cause to request Dr. Durnin's consent to search his vehicle.. Had Dr. Durnin not disposed of the used syringe in the garbage, an act he admitted to and an action a veterinarian knows he/she should not do, the whole affair probably would not have proceeded any further. Mr. Moffatt testified it was this act that caused him to make the original request to search. The curious movement of the vehicle by someone other than the appellant would only raise a reasonable person's suspicions. Additionally, SB Rule No. 32.07, of which Mr. Moffatt was aware, made the paddock a secure area as the qualifying races were in progress or had just finished. Dr. Durnin admitted he was not sure he was in compliance of this rule time wise. The rule prohibited any such administration and thus another red flag for Mr. Moffatt regarding his suspicions.

18. The appellant's vehicle was subject to search once it entered the paddock area, whether it was in the fenced enclosure or just outside it in the overflow lot. SB Rule No. 10.02 clearly gave ORC investigators the power of search. Mr. Moffatt had the delegated authority of the Director and that authority, as per the rule, extended to any part of the grounds of the association (Western Fair) and any vehicles within those areas. The Panel agrees with Judge Maertens, ORC officials would have a very difficult if not impossible task in enforcing the rules of racing if it were not so. The basis for acceptance of this opinion is the Austin case, p 25. *Austin v Ontario Racing Commission*, [2007] O.J. No. 3249. *Reynolds (re) the Racing Commission Act*, R.S.O. 1990 c. R. 2 in the matter of the appeal of SB licensee Ryan Reynolds [2000] O.R.C.D. No. 12 Series No. SB 98/2000 p. 19 reads "...In his investigation Stone established that the raceway was responsible for maintenance of this lot and that the grounds start at the public roadways leading onto the property as evidenced the site plan". Mr. Behr cited tab 3 in his factum, *Ozubko v. Manitoba Horse racing Commission* [1986] M.J. No. 500 where the court found the appellants could possess anything outside the gates of the racetrack. The Panel notes the rules of racing in Manitoba differ from Ontario.



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19 SB Rule No. 10.03 is clear that all ORC licensees grant search and seizure provisions by virtue of their having the privilege of an ORC license. Dr. Durnin, therefore, was subject to the search request as an ORC licensee and his refusal was a violation. SB Rule No. 1.04 provides that ignorance of the rules is not a valid defence therefore his claim that the vehicle was not subject to search as it was outside the enclosure has no valid basis. He also, as a licensed veterinary doctor, has an added responsibility as he is accorded privileges not afforded to other licensees, and he failed in this regard.

20. Accepting that Dr. Durnin agreed to the search request is wrong. He denied Mr. Moffatt's oral requests three times and only agreed once he had the opportunity to remove items from his vehicle that the investigator did not have the opportunity to examine. Aspects of his evidence were difficult to accept regarding his reasons not to allow the search, he could have asked Mr. Moffatt to remove the personal papers and he could have assisted Mr. Moffatt with the movement of any valuable equipment if he was concerned about the possibility of a valuable item being damaged. If Dr. Durnin brought the duffel bag and contents to the truck in order to deliver them to McIlhargy as claimed and having brought the bag into the paddock why did he not give it to McIlhargy who was in his company for about three hours?

21. Why did Durnin:

- Return bag and contents to his truck?
- Have McIlhargy move Durnin's truck from inside the paddock area to the overflow parking area which Durnin believed to be search free?
- Why did Durnin delay the transfer to McIlhargy until it could be made in the claimed search free area?

22. If Durnin's version is correct, it could have been readily verified by testimony from McIlhargy. McIlhargy did not testify. Absent explanation, this failure to testify could give rise to an adverse inference.

23. In assessing the penalty against Dr. Durnin, the Judges acted properly in utilizing whatever precedent cases were available to them including the McLean case. Times have changed as they relate to the severity of penalties being imposed for rule violations that deal with the integrity of the sport. This Panel would naturally expect Judges to take this into consideration.

24. For greater certainty, the Panel suggests the Administration of the ORC instruct Flamboro Downs to clarify the sign at its stable gate. Flamboro Downs search authority is limited as per the sign, ORC powers of search are not limited and the sign should convey these important differences.

DATED this 22<sup>nd</sup> day of April 2009.

Rod Seiling  
Chair