



COMMISSION HEARING

TORONTO, ONTARIO – JUNE 22, 2009

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

**AND IN THE MATTER OF THE APPEALS AND REQUESTS FOR
HEARINGS OF SEAN SULLIVAN**

On December 31, 2008, the Judges at Rideau Carleton Raceway (the “Judges”) selected the horse, Rosester (tattoo # 8CM929), which was competing in the 5th race that day, to provide blood samples for Total Carbon Dioxide (“TCO₂”) analysis. At all material times, Sean Sullivan (“Sullivan”) was the trainer and owner of Rosester.

On January 8, 2009, the Judges received a certificate of positive TCO₂ analysis, a laboratory report and the TCO₂ confirmatory testing document. The analysis indicated that the samples from Rosester contained an excess level of TCO₂ in the amount of 39.7 millimoles per litre of blood.

On January 8, 2009, the Judges issued Standardbred Official Ruling SB 38483 to Rosester for a violation of ORC Rules 11.10.01 and 20.01.01 with a penalty of “ineligible to race for a period of 90 clear days from January 8, 2009 to April 9, 2009 inclusive”.

On January 11, 2009, the Judges issued Standardbred Official Ruling SB 38486 to Sullivan for violating ORC Rules 22.38(a), 26.02.01 and 26.02.03(d) for a Class III positive test. Rules 9.13, 18.08.01, 6.14 and 26.08 were also enumerated in the Ruling. The penalty for the positive TCO₂ test was a \$1500 fine and a 60-day full suspension (January 16 to March 16, 2009 inclusive) in accordance with Policy Directive No. 1-2008. The Judges also issued Standardbred Official Ruling SB 38485 wherein terms were imposed upon Sullivan’s licence for a two-year period (January 16, 2009 to January 15, 2011) pursuant to ORC Policy Directive No. 3-2008.

On January 11, 2009, Sullivan filed a Notice of Appeal.

On January 27, 2009, the (Acting) Executive Director issued Ruling Numbers SB 5/2009 and 7/2009 wherein Sullivan and Rosester were granted conditional stays of their penalties.

On May 3, 2009, the Judges selected the horse, K Dog (tattoo # 9AR86), which was competing in the 12th race that day, to provide blood samples for TCO₂ analysis. At all material times, Sullivan was the trainer of the horse, K Dog.

On May 7, 2009, the Judges received a certificate of positive TCO₂ analysis, a laboratory report and the TCO₂ confirmatory testing document. The analysis indicated that the samples from K Dog contained an excess level of TCO₂ in the amount of 38 millimoles per litre of blood.

On May 7, 2009, the Judges issued Standardbred Official Ruling SB 39880 to K Dog for a violation of ORC Rule 11.10.01 with a penalty of “ineligible to race for a period of 90 days (May 7, 2009 to August 4, 2009 inclusive).”

On May 14, 2009, the Judges issued Standardbred Official Ruling SB 39893 to Sullivan for violating ORC Rules 22.38(a), 26.02.01 and 26.02.03(d) for a Class III positive test. Rules 9.13,



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18.08.01, 6.14 and 26.08 were also enumerated in the Ruling. The penalty for the positive TCO₂ test was a \$5000 fine and a 270 day full suspension (May 15, 2009 through February 8, 2010 inclusive) pursuant to ORC Policy Directive No. 1-2008. In addition, the Judges issued Standardbred Official Ruling SB39892 wherein terms were imposed upon the reinstatement of Sullivan's licence for a two-year probation period (February 9, 2010 to February 8, 2012 inclusive) in accordance with ORC Policy Directive No. 3-2008.

On May 19, 2009, Sullivan filed a Notice of Appeal.

On June 22, 2009, a Panel of the ORC, comprised of Chair Rod Seiling, Commissioner David Gorman and Commissioner Brenda Walker, was convened to hear the appeal.

Jennifer Friedman appeared as counsel for the Administration. Gerry White attended as counsel on behalf of Sullivan.

Upon considering the Agreed Statement of Facts, hearing the testimony of ORC Investigator Charles Beirnes, Senior ORC Judge Pat Webb, Senior ORC Judge Tom Miller, Richard Tso, Dr. Robert McKenzie, and Dr. Mike Weber, reviewing the evidence filed, and upon hearing the closing submissions, the Panel denied both appeals as follows:

1. The Panel, after carefully reviewing the testimony and reading the submissions and documents submitted, denied Mr. Sullivan's first appeal as it related to the TCO₂ positive test for the horse, Rosester, in its December 31, 2008 race at Rideau Carleton Raceway.
2. With respect to the second appeal - the second positive TCO₂ test - the Panel finds, based on the evidence, that Mr. Sullivan also violated SB. Rules 6.20 and 1.09.
3. The penalties imposed by the Judges for his two TCO₂ positive tests remain as assessed.

In aggregate, Sullivan shall pay a \$6500 fine (i.e. \$1500 for the first TCO₂ positive test and \$5000 for the second TCO₂ positive test) and complete a full suspension of 330 days (i.e. 60 days for the first TCO₂ positive test and 270 days for the second TCO₂ positive test). Since Sullivan's second suspension was not stayed, he has already served 49 days. Therefore, his suspension will continue for 281 days to April 9, 2010. Upon reinstatement of Sullivan's licence on April 10, 2010, he will be on probation for a period of two years (April 10, 2010 through April 9, 2012 inclusive). The terms of Sullivan's probation are as follows:

1. The Licensee shall keep the peace and be of good behaviour;
2. The Licensee shall allow Commission investigators access to his/her stabling area at any time to conduct unannounced random searches for illegal or non-therapeutic medications or drugs;
3. The Licensee shall allow Commission investigators to seize any illegal or non-therapeutic medications or drugs found at his/her stabling area; and



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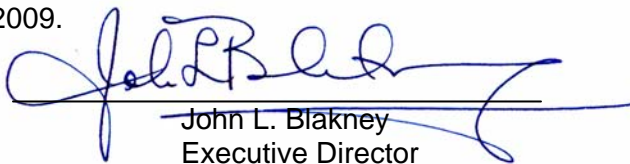
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4. The Licensee shall be subject to the Commission's Out of Competition Program.
5. The Licensee may be subject to a Notice of Proposed Order in addition to any penalty imposed by the ORC Judges or Stewards for any breach of the terms of their licence.

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

DATED at Toronto this 2nd day of July, 2009.

BY ORDER OF THE COMMISSION


John L. Blakney
Executive Director



REASONS FOR DECISION

Overview

1. Standardbred licensee, Sean Sullivan, was the trainer of the horses Rosester and K Dog when they raced at Rideau Carleton Raceway (RC) on December 31, 2008 and May 3, 2009 respectively. Both horses, following tests taken in accordance to the rules of standardbred racing, were found to have a Class 3 drug rule violation, specifically TCO₂ levels above the legal limit of 37 mmol/l. The reported TCO₂ level for Rosester was 39.7 mmol/l (Ex.1, tab 6) and for K Dog, 38 mmol/l (Ex. 1, tab 5 of appeal #2). Mr. Sullivan, following a hearing before the Ontario Racing Commission Judges (ORC) on January 11, 2009, was suspended and fined for the rule violation related to the positive test on Rosester. He was granted a stay until his appeal could be heard when the second TCO₂ positive on K Dog occurred less than five months after the first TCO₂ positive test.

Background

2. Gerry White, legal counsel for the appellant, objected to having both appeals heard on the same day, notwithstanding that his client had requested that both appeals be heard at the same time. That request had been made before Mr. Sullivan had engaged Mr. White to represent him. Mr. White had not registered his objection in advance of the commencement of the hearing. In support of his position, he stated that if the appeal on the first violation of December 31, 2008, was not successful he would not argue the merits of the May 3, 2009 violation, only the penalty imposed by the Judges. Jennifer Friedman, legal counsel for the ORC, referenced that the Commission's Rules of Procedure, Sections 10.1 and 10.4 allowed both appeals to be joined together.

3. The Panel ruled that it would hear both appeals but that they would deal with the December 31, 2008 rule violation first followed by the May 3, 2009 violation with the understanding that the latter appeal would be related to penalty only if the first appeal was unsuccessful.



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4. An agreed statement of fact was presented to the Panel. It reads as follows:

- Sean M. Sullivan ("Sullivan") is licensed with the Ontario Racing Commission ("ORC") as a Driver/Trainer/Owner (licence # (214H90). At all material times Sullivan was the trainer and owner of the horse Rosester (tattoo # 8CM92).
- On December 31, 2008, the Judges at Rideau Carleton Raceway selected Rosester, who was competing in the 5th race that day, to provide blood samples for Total Carbon Dioxide ("TCO₂") analysis.
- On December 31, 2008, TCO₂ test collector Pamela Palmer obtained two equine blood samples from Rosester with test card assignment #1001250, which samples were obtained in the presence of Sullivan. The samples were sealed and transferred into a locked cooler.
- Arrangements were made for the samples bearing test card #1001250 to be picked up on January 1, 2009, and to be shipped to the approved TCO₂ laboratory, Racing Forensics Inc. for testing on January 2, 2009. However, the courier company used by Racing Forensics Inc. made an error in regards to the pick-up date given the holiday and did not pick up the samples until January 2, 2009. On January 3, 2009, Racing Forensics received the samples.
- On January 3, 2009, at approximately 1:30 p.m. the samples were tested, with confirmatory analysis performed at 3:56 p.m. that day.
- On January 8, 2009, the Judges at Rideau Carleton Raceway received a certificate of positive TCO₂ analysis, a laboratory report and the TCO₂ confirmatory test document. The analysis indicated that the samples contained an excess level of TCO₂, namely a level of 39.7 millimoles per litre of blood.
- On January 8, 2009, further to the receipt of the confirmation of a positive test, the Judges at Rideau Carleton Raceway issued Standardbred Official Ruling SB 38483 to the horse, Rosester, for a violation of ORC Rules 11.10.01 and 20.01.01 with a penalty of "ineligible to race for a period of 90 clear days from Jan. 8/09 to April 9/09 inclusive."
- On January 11, 2009, the Judges at Rideau Carleton Raceway held a hearing with Sullivan in connection with the positive TCO₂ test from December 31, 2008.
- On January 11, 2009, the Judges at Rideau Carleton Raceway issued Standardbred Official Ruling SB 38486 to Sullivan for violating ORC Rules 22.38 (a), 26.02.01 and 26.02 03 (d) for a class 3 positive test. Rules 9.13, 18.08.01, 614 and 26.08 were also enumerated in the Ruling. The penalty for the positive TCO₂ test was a \$1500 fine and a 60-day full suspension (January 16 to March 16, 2009 inclusive) pursuant to Policy Directive No. 1-2008. In addition, the Judges issued Standardbred Official Ruling SB 38485 wherein terms were imposed upon Sullivan's license for a two-year period (January 16, 2009 to January 15, 2011) in accordance with ORC Policy Directive No. 3-2008.
- On January 11, 2009, Sullivan filed a Notice of Appeal.
- On January 27, 2009, the (Acting) Executive Director issued Ruling Numbers SB 5/2009 and 7/2009 wherein Sullivan and Rosester were granted conditional stays of their penalties.
- On May 6, 2009, a Notice of hearing was issued to advise that a Panel of the ORC would be convening on June 22, 2009, for the purposes of hearing the appeal.



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5. Under SB Rule No. 22.38.05 (6) the approved TCO₂ laboratory is responsible for “analysing samples within 48 hours of collection and reporting all results to the Ontario Racing Commission (ORC) and the Canadian Pari-Mutuel Agency (CPMA). Due to the delay in the courier pickup of the samples, the testing of Rosester’s blood samples did not occur until about 71 hours after collection.

6. Mr. White did not dispute the fact that Rosester, trained and owned by the appellant, was in violation of the Rules of Standardbred Racing by having a TCO₂ reading in its blood of 39.7 mmol/l of TCO₂ when the horse raced at Rideau Carleton Raceway on December 31, 2008. He argued that the Administration should be held to the rules just as licensees are, and that by not having the blood sample of Rosester tested within the prescribed 48-hour time period, it had not complied with its own rules. On that basis, the appeal should be allowed.

7. With respect to the delay in the sample pickup, Richard Tso, Vice-President for Racing Forensics Inc., testified that due to the holidays, the courier contracted to make the pickup erred. His testimony confirmed that given by ORC investigator, Charles Beirnes, who was assigned the case by Commission officials and reported a similar finding (Ex. 1, tab 11).

8. Testimony by Mr. Tso and supported by Robert McKenzie, Manager of Laboratory Services for Racing Forensics Inc., indicated that there were no issues as they would relate to the chain of custody for the sample from its time of collection to arrival at the laboratory. Mr. Beirnes’ report indicated the same facts. Mr. Tso demonstrated how the samples are sealed, secured and kept at the required temperature. Mr. McKenzie stated that the person at the lab, on receiving the samples, checks to ensure that they are cool. There was no indication on the lab report that there was an issue regarding the temperature. Uncontradicted evidence was tabled (Ex. 1, tab 28) referencing research in Australia that indicated that when stored at 4 degrees centigrade, samples could be successfully shipped between Australian laboratories with the results obtained at the various labs being comparable through at least 96 hours. Dr. Michael Weber, Manager, Veterinary Services for the CPMA, testified that the Racing Medication Task Force Coalition (RMTFC) in the United States has completed scientific studies that recommended a new model TCO₂ rule that extended the testing time up to 120 hours.

9. Undisputed testimony was given that demonstrated the delay in testing was not prejudicial to the appellant and if there was any advantage, it went to him, as the level of TCO₂ in a sample is found by way of scientific studies to decrease over time as opposed to increasing. Mr. McKenzie testified that the accuracy of the test results for Rosester’s blood sample would have been the same had they been read at 24 hours or 96 hours.

10. Dr. Weber testified that the CPMA conducted a study regarding the stability of blood samples for TCO₂ testing about 1999/2000. That study concluded that there was no change in the mean values over a period from 24 hours to 96 hours for TCO₂ concentrations, Ex. 1, tab 24). He agreed that the ideal time frame for reading the tests is 48 hours and that provincial authorities (racing commissions) had adopted this time frame but he recognized that delays sometimes do occur. Mr. Tso admitted that his laboratory, which has the contract with CPMA, has experienced delays in up to 2% of its samples but that number has decreased to less than 1%. It was Mr. McKenzie’s view that the 48-hour reference in the rules was arbitrary and that he



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did not understand how it came to be incorporated in the rules given that the science shows the accuracy of the test results up to at least 96 hours.

11. Racing Forensics Inc. sent to the ORC Judges at Rideau Carleton Raceway the confirmatory test result from the blood sample of Rosester from its December 31, 2008 race at that track. SB Rule No 22.38 states that when the TCO₂ test result for a non-lasix horse exceeds 37 mmol/l the Judges shall order the relief authorized pursuant to Rule 22.38.06. That rule states that the Judges shall assess penalties in accordance with Policy Directive; Guidelines - Penalties for Equine Drug, TCO₂ and Non-Therapeutic Drug Offences.

12. Pat Webb, Senior ORC Judge, confirmed that the Judges decided to proceed with Mr. Sullivan's hearing on January 11, 2009, despite the tests on Rosester's blood sample were conducted past the 48-hour time frame referenced in the rules. Mr. Sullivan was advised of this fact at the start of the hearing and given the option of delaying it so he could seek legal advice or assistance from another person. He opted to proceed with the knowledge that he could appeal the decision by the Judges. No excuse for the positive test was offered other than the horse was not feeling that well and after the race was examined by the veterinarian at the track. As a result of that examination, the horse was reportedly to be recommended to be put on the lasix program. Mr. Sullivan did testify to confirm this fact.

13. Following the hearing, the Judges issued two rulings, SB Ruling No. 38486 (Ex.1, tab 19) and SB Ruling No. 38485 (Ex.1, tab 20) both dated January 11, 2009. With respect to the former, that ruling ordered a fine of \$1,500 and a suspension of 60 days for violating ORC Rules Nos. 22.38 (a), 26.02.01 and 26.02.03 (d). The rest of the ruling deals with the redistribution of the purse (SB 9.13), the purse money, driver/trainer fees to be returned for redistribution (SB 18.08.01) and all horses owned wholly or in part are suspended, horses not owned wholly or in part may not be released to another trainer without prior approval by the Judges (SB 6.14 & 26.08). The latter ruling added terms to the appellant's licence for a two-year period referencing ORC Policy Directive No. 3 - 2008 (Ex 2).

14. An oral decision was rendered denying the appellant's appeal with written reasons to follow. The Panel then dealt with the TCO₂ positive test for the horse, K Dog, in its race at Rideau Carleton Raceway on May 3, 2009, with a reading of 38 mmol/l. Mr. White did not argue the merits. He spoke to penalty only as he promised and asked for leniency, not suggesting the Judges erred by affixing his penalty in the mid range of the suggested penalty guidelines (Ex. 2), but asking the Panel to consider a penalty at the lower end of the range. Ms. Friedman countered that there was no need to modify the penalty given that it was within the guidelines and that this was a second offence within 4 to 5 months and the appellant only had 5 starts within that time frame.

Issue

15. For the first appeal, should Mr. Sullivan's appeal be upheld on the basis that the blood sample of his horse, Rosester, was not tested within the 48-hour time frame according to SB Rule No. 22.38.05 (6)? For the second appeal, would it be appropriate, given the circumstances, for the Panel to reduce his penalty?



Decision

16. The Panel, after carefully reviewing the testimony and evidence and reading the submissions and documents submitted, as referenced above, denied Mr. Sullivan's first appeal as it related to the TCO₂ positive test for the horse, Rosester, in its December 31, 2008 race at Rideau Carleton. With respect to the second appeal, the appellant did not argue the merits as it relates to the second positive TCO₂ test on May 3, 2009 race on the horse, K Dog, at Rideau Carleton. The Panel finds, based on the evidence, that Mr Sullivan also violated SB Rule No. 6.20 and 1.09. The penalties imposed by the Judges for his two TCO₂ positive tests remain as assessed.

Reasons for Decision

17. Mr. Sullivan was in violation of SB Rule No. 22.38 when his horse, Rosester, had a TCO₂ level of 39.7 mmol/l when it raced at Rideau Carleton in the 5th race on December 31, 2008. There were no challenges as to the validity of the test or to the chain of custody, testing procedures, etc. The only objection was that the actual testing of the blood sample did not occur within the 48 hours as per SB Rule 22.38.05 (6). The Panel accepts the unchallenged testimony of Dr. Michael Weber, Manager of Veterinary Services for the CPMA, Richard McKenzie, Laboratory Manager for Racing Forensics Inc. and Richard Tso, Vice President of the same company, that the accuracy of the reading of the sample taken at about 71 hours post collection was still valid and that if there would be any prejudice as it related to the time delay, it would have been in favour of the appellant. Scientific research in the form of Exhibit 3, The Detection and Performance Effects of Sodium Bicarbonate Administration in the Racehorse supported their evidence.

18. The Panel accepts the evidence that the accuracy of the readings for the TCO₂ tests are good for up to at least 96 hours and that the 48-hour rule insertion was arbitrary with the intent to lessen any chance of false negative results being called. On a balance of probabilities, one has to accept that the rule makers would be aware, as Dr. Weber testified, that delays in transportation of samples will occur. Furthermore, with such knowledge in hand, it is reasonable to expect that they would not write an absolute liability rule wherein delays were not accounted for, thus allowing a licensee committing a serious Class III breach of the rules to be allowed a free pass.

19. Based on past precedents, re Morrissey Armstrong and Ontario Racing Commission [1960] support this view. The Commission has at its disposal, a wide scope of administrative powers. In this regard, the Court said. "One only has to look at the powers granted to the Commission to grasp and understand the wide scope of administrative powers granted to it, all with the manifest intention that the Commission should regulate horse racing as it affects those who participate in it and the public who patronize it, and that as a public sport it shall not be adversely affected by those who participate in it or any odium cast upon it." Section 6 of the Racing Commission Act, 2000, authorizes the Commission to exercise its powers in the public interest based on the principles of honesty, integrity and social responsibility.



20. The courts have recognized that this Commission can and is expected to utilize the special knowledge it collectively possesses. The Panel is aware that the only reason one would administer bicarbonate of soda to a horse which is to race is to gain an unfair advantage. Previous testimony before this Commission (Kelly Lester, Robert Zubkoff v Ontario Racing Commission, Nos. 135/08 & 136/08) concluded that such administration could threaten the health of that horse. That information adds weight against Mr. Sullivan. He cannot be allowed to escape unpunished and therefore for the good of racing and to protect the health and welfare of the horse, this Panel should not accept that the TCO₂ test of blood samples must occur within the referenced 48 hour time period or else be invalidated. In WEG v Hamather [2009] the Court recognized the powers of this Commission to act for “the good of horse racing.” Section 19 of the Racing Commission Act imposes a duty on a licensee to act in the public interest. Mr. Sullivan surely failed this test.

21 The Panel agrees with Ms. Friedman that the Lynn case, [2007] O.R.C.D. No. 2, Ruling Number COM SB 002/2007 supports the Panel’s decision. There the issue was the time a sample was taken in relation to the time specified in the rules. As in this case, the appellant was not prejudiced and any benefit flowed to him/her. Chair Tanaka writes in para. 10, “We have to interpret the rules in order to give effect to the purpose and intent of the Act.” Para 11, “We have to interpret the rules in the context of this very practical issue of the conduct of the races,” and again in para. 12, “The 20-minute time frame and the potential for a greater period of time means that a horseman whose horse may be in violation at race time might get off.” As in the Lynn case, we have with Mr. Sullivan a clear violation of the rules, there is no therapeutic value in administering bicarbonate of soda to a horse which is “in to race” and therefore Mr. Sullivan could also have been charged with violating SB Rule No. 6.20.

22. Trainers, under the rules of racing, are held responsible for the care, custody and control of their horses that they train. Trainer responsibility is the underpinning, the foundation for the business and the sport of horse racing. Without it, the health and welfare of the horse would be placed in serious jeopardy by the unscrupulous few who would seek to gain an unfair advantage and at the same time possibly putting at risk the health and welfare of the horse. The public would soon lose faith in horse racing and with that, their support, which is essential if horse racing is to have a future. Mr. Sullivan was the trainer of record for Rosester. Under SB Rule No. 26.02.03 (d), it is an absolute liability offence for any trainer whose horse’s level of TCO₂ equals or exceeds the levels set out in Rule 22.38 (a), therefore he was in violation of this rule and the Judges were correct in identifying this rule violation as well as SB Rule No. 26.02.01.

23. Mr. Sullivan is also judged to be in violation of SB 6.20. It reads as follows:

A participant shall be guilty of the rules:

- a. for any misconduct which is injurious to racing although unspecified in the rules
- b. for any misconduct prejudicial to the best interests of racing
- c. for committing or attempting to commit any other act injurious to racing

24. The only known way for a horse to have elevated TCO₂ levels that Mr. Sullivan’s two horses had was for them to have been administered bicarbonate of soda. This administration commonly referred to as “milkshaking” has had an accepted negative effect on the industry not



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to mention the health of the horses involved. This Commission continues to do what it can to discourage this illegal practice.

25. Should there be any doubt as to the powers within the rules for this decision as it relates to Mr. Sullivan's first appeal, he is guilty by way of SB Rule No. 1.09. It reads as follows:

If any case occurs which is not or which is alleged not to be provided for in the rules, it shall be determined by the Judges or the Commission as the case may be, in such manner as they think is in the best interest of racing. Provided however, the Commission in its absolute discretion may waive the breach of any rules, which waiver or breach the Commission does not consider prejudicial to the best interests of racing.

26. With respect to the second appeal, Mr. White did not argue the merits of the rule violations but asked for leniency for his client as it related to the penalty. The Judges had already given Mr. Sullivan the benefit by assessing his penalty in the mid range as per the guidelines, Policy Directive No. 1-2008 (Ex. 2) for a second offence. Given that he violated the same rule in less than 5 months while on probation and paying for the stipulated TCO₂ testing of all his starters while enjoying the benefits of his stay, and that he only started 5 times during that time period, Mr. Sullivan is fortunate that his penalty was not more severe. This was not a case where there was a miscalculation in dosage of a legally prescribed medication but a deliberate attempt to administer an illegal non-therapeutic substance to a horse in an attempt to affect the outcome of a race, and in the process, possibly endanger the health of the horse. The penalty must be such to serve as a deterrent to such action and serve as a notice to others of the price to pay for acting as such.

DATED this 2nd day of July 2009.

Rod Seiling
Chair