



COMMISSION HEARING

TORONTO, ONTARIO – JULY 27, 2011

**IN THE MATTER OF THE RACING COMMISSION ACT S.O. 2000, c.20;
AND IN THE MATTER OF THE APPEAL AND REQUEST FOR HEARING BY
THOROUGHBRED LICENSEES VICTOR FRASSON,
PATRICK HARRISON, JEFF BARNES AND BRIAN MORGAN**

Victor Frasson ("FRASSON"), Patrick Harrison ("HARRISON"), Jeff Barnes ("BARNES") and Brian Morgan ("MORGAN") are all thoroughbred licensees, and were all members of the Starting Gate Crew at Woodbine Racetrack.

On July 7, 2011, the Stewards required the entire Starting Gate Crew to re-attend for alcohol testing, including FRASSON, HARRISON, BARNES, and MORGAN. FRASSON, HARRISON, BARNES, and MORGAN all failed to provide breath samples, in violation of the Rules of Thoroughbred Racing, and were suspended as a result.

FRASSON, HARRISON, BARNES, and MORGAN subsequently submitted separate Applications for Reinstatement Hearing.

*On July 27, 2011, a Panel of the Ontario Racing Commission was convened consisting of Vice Chair James Donnelly to hear the matters and it was agreed by all parties that the matters would be heard together.

Angela Holland appeared as counsel for the Administration, Dan McMahon appeared as a "friend of the court", to assist the Applicants, and FRASSON, HARRISON, BARNES, and MORGAN all attended in person.

Upon hearing the testimony of Investigator Pam Bray, Assistant Clerk of the Scales Moises Guce, Assistant Manager of Racing Russ Fernandes and BARNES, upon reviewing the exhibits filed, upon hearing the submissions of counsel for the Administration and of Mr. McMahon, and upon reviewing the Written Submissions, the Panel ordered the following for each of FRASSON, HARRISON, BARNES, and MORGAN:

1. A fine of \$100.00;
2. Attendance upon a Substance Abuse Professional approved by the Program Administrator;
3. Agreement to consent to the release of ORC records to the Substance Abuse Professional for proper assessment;
4. Agreement to consent to the release of the Substance Abuse Professional's report to the ORC Alcohol Drug Program Administrator;
5. To participate fully in any recommendations of the Substance Abuse Professional which may include but are not limited to counseling, treatment programs or educational seminars; and



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6. Enter into a Post Violation Agreement that will set out licensing conditions for a period of twelve months.

Dated at Toronto this 25th day of August, 2011.

BY ORDER OF THE COMMISSION



John L. Blakney
Executive Director



REASONS FOR DECISION

1. This proceeding came forward as separate Applications for Reinstatement Hearings by Victor Frasson, Patrick Harrison, Jeff Barnes and Brian Morgan, Pursuant to Rule 38.08 (g) that “Hearing is for the sole purpose of determining the future status of the licensees....” All were members of the Starting Gate crew at Woodbine Racetrack.

2. The underlying circumstance was a single incident of failure to comply with a demand to provide breath samples for alcohol analysis Rule 38.08 (a), (d) and (g). It was common ground the four Applicants failed to provide breath samples.

3. Counsel Dan McMahon appeared with the Applicants advising that as a “friend of the court” (amicus curiae), he would assist in their defence. The Applicants elected to have their cases tried together. The Administration agreed. Provisions in the ORC Rules of Procedure and Section 9.1 SPPA enable that procedure. Accordingly, all cases were tried together. Mr. McMahon had full conduct of the proceeding for all Applicants.

4. Immediately it became apparent that the purpose of the Hearing was fundamentally different from that contemplated by Rule 38.08(g). Two issues were identified for disposition.

- Reasonable cause for the demand.
- Reasonable justification for the refusal.

Motions on behalf of the Applicants proceeded as follows:

- For production of unredacted copies of disclosure documents. Dismissed on grounds of irrelevancy.
- For identification of the confidential informant. Dismissed on grounds of absolute privilege.
- For exclusion of hearsay evidence. Dismissed on grounds of S15 SPPA.
- For non-suit. Dismissed for reasons herein.
- A motion relating to the availability of evidence by Chris Wilson of Alcohol Countermeasures Systems (currently in Europe but said to be available by Telephone) was resolved by Agreed Statement of Fact.
- An issue over the content of a taped interview by Investigator Pamela Bray was resolved by Agreed Statement of Fact.

5. The Administration called evidence by ORC Investigator, Pamela Bray, WEG Assistant Clerk of the Scales, Moises Guce and ORC Assistant Manager of Racing, Russ Fernandes. A Document Book and Supplementary Document Book were filed in evidence. Jeff Barnes was the only witness called by the Applicants. Character references were filed. Written submissions were directed to be completed by August 9.

The Narrative

6. The Applicants are licensed by the Ontario Racing Commission as Associate Officials. On July 7th, 2011 they were members of the starting gate crew at Woodbine Racetrack. At 1.35 p.m., a telephone complaint was received by ORC Assistant Manager of Racing, Russ



Fernandes, that members of the crew might not pass a breathalyser test for alcohol while they were engaged in the current course of their duties. The complaint was from a source known to Fernandes and regarded by him as reliable. Fernandes referred the matter to the Stewards by telephone call at 2:19 p.m. suggesting that the starting gate crew be retested. All had been tested before the start of that race card. Retesting during the course of the races was not unusual.

7. The Stewards called Moises Guce, Assistant Clerk of the Scales, who was on duty in the absence of the Clerk. Mr. Guce was informed that the entire starting gate crew was required to attend for retesting following the third race. The crew attended as directed and retesting began.

8. During the test of the fourth person Richard McMahon the testing unit emitted a code of 999. The Applicant Frasson stated that the machine was broken and that he would not provide a sample. Guce reported to the Stewards and on their instructions changed the batteries in the unit. McMahon submitted another breath sample. The reading was zero. None of the four Applicants provided samples. Guce tested the remaining crew members, none of whom tested positive.

9. Guce reported the failure of the four Frasson, Harrison, Barnes and Morgan, to provide samples. Steward Lindberg then contacted the Starter, Ian Ross, who was directed, as supervisor of the crew to inform the four that they were required to provide samples for testing otherwise they would not be permitted to work. Ross instructed the four men accordingly.

10. Upon continued refusal, all were relieved of their duties and suspended. Subsequently they were dismissed from their employment at WEG. Barnes, Morgan and Harrison also lost part time employment as a Groom, exercise rider and a practitioner of horse dentistry respectively. By suspension, they were prohibited from entering the ORC licensed track premises.

11. The hand-written notes of Steward Neil McCoag in the Document Book filed in evidence are in part:

“Pat Harrison, Brian Morgan, Jeff Barnes and Victor Frasson left without blowing. They thought machine had malfunctioned. Richard (McMahon) blew a 999 and then a .000. Ian Ross called. They don’t want to blow because they felt machine was malfunctioning. Told those individuals had to blow; that the machine was working, battery was changed and it was fully operational.

Ian called – Those 4 refused to blow; advised that they couldn’t work. Checked all the rest (0)....; (immediately suspended).”

12. A letter from Christopher Wilson of Alcohol Countermeasures Systems dated July 14, 2011, filed in the Book of Documents provides:

“The unit was last calibrated July 6, 2011 and noted that the unit was working within its specified parameters post and prior to the incident in question. The anomaly of 999 is noted as a low battery error. The Alert J5 unit does not have a low battery warning only an indicator – hence the unit will proceed with testing protocol even in a low battery situation.”



13. The breathalyser unit having no voice capacity speaks in numerical code. The designation for low batteries is the code number 999. In response to that signal, the batteries having been changed, the instrument was ready for operation.

14. The ORC alcohol and drug policy (Policy Directive No. 1 – 2011 effective March 31, 2011) defines “**designated racing officials**” and “**safety sensitive positions**”. Thoroughbred Rule 38.07 implements that ORC Policy Directive. The Rule and Policy Directive were in force on July 7, 2011. Thereby, the former breath demand rules were superseded (Rules 15.24, 15.25). All designated licensees (designated racing officials) are subject to testing based on reasonable cause Rule 38.07(a). All designated licensees are subject to testing “at any time they are actively engaged in racing”, Rule 38.07 (d). “Starting Gate Personnel” is specifically designated as a “safety sensitive position”.

15. By the combined operation of Rules 38.01 and 38.07(d), “Starting Gate Personnel” are subject to testing “at any time while they are engaged in their racing duties.” There is no “reasonable cause” precondition. By becoming licensed, the licensee acknowledges under the Thoroughbred Rules that he/she will accept, observe and enforce the Rules. Thereby the licensee acknowledges and accepts the obligation under the rules to provide breath samples.

16. The “reasonable cause” demand is founded on Charter considerations of Unreasonable Search. The “at any time” demand is founded upon imminent and grievous safety concerns.

17. The “reasonable cause” issue warrants comment. The Rule contemplates something less than the “reasonable and probable “test” in criminal law proceedings. Following the telephone communication there was no follow-up investigation to verify the message conveyed to Fernandes. Counterbalancing considerations are:

- The source was known to Fernandes, apparently well and favourably, to the extent that even though he assessed the “reasonable grounds” as “razor thin”, he accepted the information as sufficiently credible and reliable to warrant action.
- “Reasonableness” is governed by the existing circumstances. This was not a case for leisurely response such as surveillance of midnight traffic at a reported bootlegging establishment. There were time constraints with the scheduled race card. There were significant safety issues. No qualified ORC breath technician was on duty at that track. The availability of the gate crew varied with the race. The finished line is fixed. The starting gate position is variable depending upon the length of the race. Fernandes made a decision based on his assessment of the imminence and severity of the risk, the disruption of a simulcast racing event and the proximity of the starting gate for the various races. Upon those considerations, he directed the testing take place after the third race, a mile and three sixteenth event when the crew would be closest to the Jock’s Room test area. Circumstances such as this may transcend “reasonable suspicion” and constitute “reasonable grounds”. However, that determination is not necessary.

18. In his notes, Fernandes twice referred to the relevant Rules as 38.07 (a) and (d). By incorporating subsection (d), it appears that he was mindful of “any time” testing.



19. To suggest that by directing his comments to the “reasonable cause” obligation, Fernandes extinguished the “at any time” obligation for “safety sensitive personnel” would lead to an untenable result. Under the Rules, the starting gate crew was obligated to provide samples upon demand at any time while engaged in their racing duties. They were so engaged when the demand was made. Fernandes had neither power to quash that obligation nor to grant relief from it.

20. The “safety sensitive” obligation is so important that it must be construed as free-standing entirely independent from the Reasonable Cause obligation. A demand was made. Their obligation was triggered by Rule 38.07 (d).

The “reasonable excuse” defence

21. The Applicants have no skill, training, or experience with operation of the breath testing unit. They were long- serving WEG employees. As an element of daily routine, they provided breath samples for testing.

22. Subsequent to the 999 reading, they were advised that the machine was in proper working order and that they were obliged to provide samples. The Applicants were provided with ample opportunity to comply with a proper demand by a qualified person. They had been made aware of the consequences of refusal. They had reasonable opportunity to consider their response. They maintained their refusal, offering erroneous grounds of malfunction. The burden of proof of reasonable excuse is upon the Applicants. The standard of proof is upon a balance of probability. The Applicants have failed to discharge that burden. The Applicants were in willful breach of the Rule. The consequences of refusal are their responsibility.

Penalty

23. **Rule 38.07 (g)** Failure to Submit a sample is a violation with consequences identified in Rule 38.08 (d). A first offence results in suspension from performing the licensed duties followed by referral to the Commission.

24. The penalty for positive breathalyser tests varies with the severity of the breach. No symptoms of consumption of alcohol by any of the Applicants appear in evidence. They have endured significant economic hardship by virtue of their decision. No record of prior misconduct is alleged. They have been long-serving employees. Favourable character references were filed. All of which operates in mitigation. As a result the penalty will equate to the minimum penalty for a positive test result. Licensees ought not to benefit by a refusal. Refusal frustrates the ORC drug alcohol rehabilitation program.

25. In compliance with the ORC drug/alcohol rehabilitation policy which seeks to enable return to safe working conditions, the disposition will be as follows:

- A fine of \$100.00,
- attendance upon a Substance Abuse Professional approved by the Program Administrator,
- agreement to consent to the release of ORC records to the Substance Abuse Professional for proper assessment,



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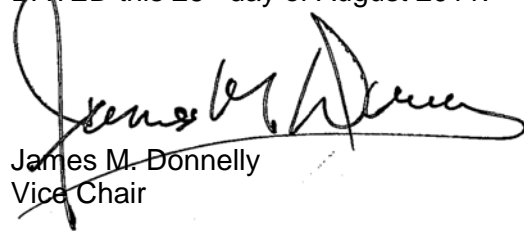
- agreement to consent to the release of the Substance Abuse Professional's report to the ORC Alcohol Drug Program Administrator,
- to participate fully in any recommendations of the Substance Abuse Professional which may include but are not limited to counselling, treatment programs or educational seminars,
- enter into a Post Violation Agreement that will set out the licensing conditions for a period of twelve months.

26. A copy of this Ruling will be provided to the Applicants with an Alcohol Violation Information package.

27. In passing the following observations are made:

- Objection was made about failure to wait fifteen minutes between the breath samples provided by Richard McMahon. This defence was conjured up after the fact. It was not the basis of any objection by the Applicants. The purpose of the fifteen minute wait is to allow the machine to clear and failure to wait fifteen minutes has no significance when the second test produces a zero reading. On the evidence, there may well have been 15 minutes between the two samples. In that interval the problem was reported to the Judges and remedial steps taken.
- There is nothing in the breathalyser manual about the 999 test indicating that the batteries should be changed. This seems to have been unknown to all parties concerned. The point is there was no defect in the operation of the machine other than its power source.

DATED this 26th day of August 2011.



James M. Donnelly
Vice Chair

Attachment



Exhibit

a) **Designated Racing Officials** for purposes of this policy refers to all employees and other individuals who have responsibility for decision making and the safe operations of all events at ORC licensed facilities. The following positions are included:

Standardbred: judges, paddock judge,

Thoroughbred: stewards, paddock judge, clerk of the scales, assistant clerk of the scales, placing judge, horse ambulance driver, and course marshal,

Quarter Horse: stewards, paddock judge, clerk of the scales, assistant clerk of the scales, horse ambulance driver, and course marshal.

(2) "Safety Sensitive Position" is defined in Appendix "A (c)"

c) **Safety-Sensitive Position (SSP)** is a position in which individuals have a key and direct role in the handling of horses such that performance impacted by alcohol or other drug use could result in:

i) An incident affecting the health or safety of employees, licensees, patrons, horses, or the public, or

ii) An inadequate response or failure to respond to an emergency or operational situation.

This category includes any and all individuals required to temporarily relieve in a safety-sensitive position. The following positions are included:

Standardbred: driver, trainer, groom, starting gate personnel, horse identifier, test inspectors, TCO₂ technicians, track maintenance personnel, commission and official veterinarian, outrider and blacksmith. (underlining added)

Thoroughbred: apprentice jockey, exercise person, jockey, pony person, starting gate personnel, horse identifier, test inspectors, TCO₂ technicians, commission and official veterinarian, jockey valet, trainer, groom, hot walker, and blacksmith.

Quarter Horse: ambulance personnel, apprentice jockey, exercise person, jockey, pony person, starting gate personnel, horse identifier, test inspectors, TCO₂ technicians, track maintenance personnel, commission and official veterinarian, jockey valet, trainer, groom, hot walker, and blacksmith.