



COMMISSION HEARING

TORONTO, ONTARIO – DECEMBER 17, 2009

**IN THE MATTER OF THE RACING COMMISSION ACT S.O. 2000, c.20;  
AND IN THE MATTER IN THE APPEAL AND REQUEST FOR HEARING OF  
KERRY HOUSE AND SHIRLEY HOUSE**

On August 30, 2009, the Judges at Mohawk issued Standardbred Ruling Numbers SB 40123 and 40124 with a penalty of a \$17,343.50 fine to Kerry A. House ("KERRY") and Shirley J. House ("SHIRLEY") respectively for:

*Violation of ORC Rule 15.09(a)*

*Did violate the above rule by racing the horse All the Weapons outside of the Province of Ontario within 60 days of being claimed from Mohawk Racetrack on July 3, 2009.*

*Violations occurred at Charlottetown Driving Park in Race 12 on August 17, 2009, finishing first in a dead-heat, earning \$4,687 in purse money – and again at Charlottetown Driving Park in Race 13 on August 22, 2009, finishing first, earning \$30,000 in purse money.*

*Total purse earnings of \$34,687 x 50% = \$17,343.50*

On September 4, 2009, KERRY and SHIRLEY filed Notices of Appeal.

On September 10, the Executive Director issued Ruling Numbers S.B. 139/2009 and 144/2009 to SHIRLEY and KERRY respectively wherein they were each granted a stay of the Judges' decision pending the disposition of their appeals.

On December 15, 2009, a Panel of the ORC, comprised of Chair Rod Seiling, was convened to hear the appeal.

Jennifer Friedman appeared as counsel for the Administration. Frank Roth attended as counsel for KERRY and SHIRLEY.

Upon hearing the testimony of Associate Judge Rick Rier, reviewing the exhibits filed including an Agreed Statement of Facts, and upon considering the closing submissions, the Panel denied the appeal as follows:

- i) The penalty provision is clear for a violation of 15.09 (a), it is 10% of the claiming price or 100% of the purse for each race, whichever is greater.
- ii) The appeal is denied but the penalty is varied. Kerry House's fine is set at \$8,671.75. Shirley House's fine is set at the same amount, \$8,671.75.

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

DATED at Toronto this 18<sup>th</sup> day of December 2009.

BY ORDER OF THE COMMISSION

  
John Blakney  
Executive Director



## REASONS FOR DECISION

### Overview

1. Kerry and Shirley House appealed a decision of the Ontario Racing Commission (ORC) Judges wherein they were each fined \$17,343.50 for violating SB Rule No. 15.09 (a).

### Background

2. Legal counsel for the ORC and for the appellants, Jennifer Friedman and Frank Roth respectively, presented the Panel with an Agreed Statement of Facts. The hearing, therefore, dealt with penalty only.

3. The parties agreed that under the ORC Rules of procedure, S. 10.1, to combine the appeals of Kerry and Shirley House as one as they owned the horse in question, All the Weapons, equally.

4. The objective of SB Rule No. 15.09, when it was implemented, was to protect the Province of Ontario's horse racing stock from depletion by allowing individuals from claiming horses out of Ontario races and shipping them out of province to race at other tracks.

5. By claiming All the Weapons on July 3, 2009, at Mohawk Racetrack and then racing the horse in Charlottetown, PEI on August 17, 2009 and again on August 22, 2009 in the Gold Cup and Saucer Stakes Race, the Houses were clearly in violation of the rule. They raced the horse within the prohibited 60 days outside of the Province of Ontario.

6. The testimony of ORC Judge Rick Rier supported by the documentation contained in Exhibit 1, tabs 11 and 12 (Judges Webb & Hopkins notes) confirmed that the horse's trainer had been told twice about the consequences of racing the horse (fine of 10% of the claiming price or 100% of the purses, whichever is greater). Furthermore, that the Houses had been informed of this information prior to the horse racing.

7. The fact that the Judges discovered that the horse was racing at Charlottetown, PEI is out of the ordinary. Normally the Judges only discover a violation of the rule after the fact but in this case they found out in advance and took the initiative to warn the parties re the consequences of violating the rule.

8. Prior to December of 2002, the penalty for violating SB Rule No. 15.09 (a) was a penalty of 10% of the claiming price per start. According to Judge Rier it made no sense to allow a licensee to violate the rules and earn a profit as was the case related to the horse London Mews M. It is not necessary to relay the details of that incident as they are outlined in the Kevin Skilton, Les Ecuries Giroux and Jacques Caron Ruling, Com SB 032/2008 at para 13.

9. Suffice to say the ORC changed its policy dated December 2, 2002, to all ORC Standardbred Judges from ORC Supervisor of Standardbred Racing, Bill Fines. It read as follows: "Currently the practice has been to fine the owner of the horse 10% of the claiming price per start. In addition, we ask you to take into consideration the purse monies won by the horse when breaching this rule. The fine



should then reflect the greater of the two. Example: Horse was claimed for \$10,000 here in Ontario and makes one start within the time period out of province in Ohio. The 10% of the claiming price (\$10,000) is \$1,000, however, in this start he won purse money of \$3,000, the penalty would then be the greater of the two, which in this scenario would be the purse money (\$3,000)."

10. The Judges clearly followed this policy as outlined in their Ruling SB 40123 (Ex. 1, tabs 17 & 18) in arriving at the penalty following their hearing with the Houses at Mohawk on August 28, 2009, wherein each owner was fined \$17,343.50. When totaled together, the fines for both owners equal the purse earning for the horse in the qualifying race of \$4,687 and \$30,000 for the final.

11. Mr. Roth submitted that the rule was ambiguous to the extent 15.09 (a) does not refer to a fine. To support his position, he referenced SB Ruling No. 032/2008 (Skilton) where at para 15 Vice Chair Donnelly wrote, "That revised policy in place from December 2002 forward has been that the fine for each race in violation will be the greater of 10% of the claiming price or the purse money won by the horse in that race". There is an obvious misprint in this paragraph as at para 23 of the same ruling the fine imposed is that following the policy as laid in the December 2002.

12. Reference was also made to the Carroll Ruling, Com SB 001/2007 wherein Judge Gillies testified "the amount of the fine - it is ORC policy of 10% the claiming price or 10% of the purse, whichever is higher". Ms. Friedman submitted that Judge Gillies was in error as it related to the policy at that time and, no purse was involved and that the Skilton Decision cured that error.

13. Mr. Roth referenced a number of precedent cases regarding ambiguity and penalty, Exhibit 3, tabs 3 to 8. His argument was that where ambiguity or a contradiction exists, the appellant is to benefit from such, i.e., the lesser provision and that the legislation needs to authorize the right to levy fines such as those against the Houses.

14. Mr. Roth submitted that the Judges did not have the authority to levy the fine in that in the legislation no such power is conferred upon the Commission's officials. Furthermore, that the legislative intent needs to be clear which it is not, he argued, and that the penalty imposed was penal in nature. Under S. 11.3 of the Racing Commission Act, the wording and intent is quite clear, the Commission may delegate authority to both enforce the rules of racing and to fix and impose fines.

15. It was put before the Panel that the Houses did not profit from their violation of 15.09 (a). The unsubstantiated claim was made on the basis that \$12,000 in costs were accrued racing the horse in PEI coupled with the \$20,000 purchase price. Furthermore, whatever penalty the Houses were to end up paying, under Canada's tax code, that money was not an eligible tax deduction. The claims are irrelevant and conveniently include the value of the horse which more than likely represented an asset value increase as a result of his winning the race.

### **Issue**

16. Do Commission officials have the authority to enforce Commission rules? Is the Commission policy on penalty that supports SB Rule No. 15.09 clear? Did the Judges apply that policy appropriately as it relates to Kerry and Shirley House for their admitted violation of SB No. 15.09 (a)?



## Decision

17. After carefully listening to the testimony and reviewing the evidence and documents submitted, the appeal is denied but the penalty is varied. Kerry House's fine is set at \$8,671.75. Shirley House's fine is set at the same amount, \$8,671.75.

## Reasons for Decision

18. S. 11. (3) clearly establishes that Commission officials, operating on a delegated authority, have the "power to fix, impose and collect fines and other penalties for a contravention of a requirement of the Commission made under this Act." Supervisor of Standardbred Racing at that time, Bill Fines, was operating on such delegated authority, therefore it is reasonable to conclude the policy implemented by him in December 2002 is valid. No evidence was submitted suggesting that Rule 15.09 was not implemented appropriately by the Commission.

19. It is not unusual for the Commission to implement penalty provisions to enforce rules such as 15.09. As referenced by Ms. Friedman, the penalty provision for a violation of the pylon rule was implemented the same way.

20. The penalty provision is clear for a violation of 15.09 (a), it is 10% of the claiming price or 100% of the purse for each race, whichever is greater. It is not confiscatory as suggested by Mr. Roth but follows up on what is a reasonable principle that no person should be allowed to profit from a breach of the rules.

21. The facts are clear that both appellants were made aware of the rule prior to the breach of the rule. Notwithstanding that ignorance of the rules is not an acceptable defence, SB No. 1.04. Furthermore, no contradictory evidence was submitted that the normal communication vehicles utilized by the Commission when the change was effected in December of 2002 were not employed. Based on previous evidence submitted at other hearings, those methods such as paddock meetings, postings in race offices, etc., have proven successful in communicating to the industry, policy initiatives by the ORC.

22. There is no ambiguity as it relates to the penalty for a violation of SB Rule No. 15.09 (a). Vice Chair Donnelly correctly applied the penalty in Skilton. That application, on a balance of probabilities, clearly negates the misprint/error contained at para 15 of that Decision. On a similar basis, given that the Skilton Decision of December 23, 2008, was rendered some 23 months after the Carroll Decision, the misstatement of the policy by Judge Gillies was cured.

23. The Judges correctly applied the penalty as per the policy for a breach of SB 15.09 (a). When Kerry and Shirley House's fines are added together, they equal the amount won by the horse in both races, \$34,687. That amount is greater than the 10% of the claiming price which would have been \$2,000.

24. A policy of not allowing a licensee to profit from a violation of the rules is, on a balance of probabilities, an appropriate deterrent. Common sense dictates that any other approach could activate devious minds as to ways to profit at the expense of the system and all those law abiding licensees.

25. The purposes and principles of sentencing are laid out at S. 718 of the Criminal Code of Canada. It reads "The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives,



to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives: a. to denounce unlawful conduct, b. to deter the offender and other persons from committing offences, c. to separate offenders from society, d. to assist in rehabilitating offenders, e. to provide reparations from harm done to victims or the community, and f. to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and the community. It is reasonable to conclude that the penalty provision accompanying SB Rule No. 15.09 (a) meets this standard.

26. The Code also states at S 718.1, "A sentence must be proportionate to the gravity of the offence and the degree of the responsibility of the offender". The appellants by way of the Agreed Statement of Facts bear the responsibility for the breach of the rule. Vice Chair Donnelly, on the appropriateness of the penalty wrote in the Skilton Decision at para 41, "In passing it is noted that the current policy is stern but apparently effective. The infrequency of violations may fairly bear the inference that the policy underlying Rule 15.09 (a) is widely although not universally known. As such, placing violators in a position to lose purse, travel and other racing expenses plus nomination fees where applicable, the policy provides a formidable disincentive for breach of rule. What reason to tweak or tamper?" The Panel concurs.

27. Claims by the appellant that they did not profit from the rule violation and cannot deduct fines from their income tax returns are irrelevant. The fact is, if left to the appellant's suggestion for a fine of 10% of the claiming price or 10% of the purse, it would effectively be a "jackpot" win for their Maritime excursion. Clearly this would negate the intent of the policy.

28. Aggravating the violation is that the facts clearly show the Houses were made aware of the situation including the penalty provisions by the ORC Judges before the races through their trainer, Mr. Oliver. Not once but twice the Judges went out of their way to provide the warning and consequences. Neither Kerry nor Shirley House testified to refute this fact nor was Mr. Oliver called to give his evidence. Their actions were willful, to say the least.

29. Mitigating factors are the good record of both licensees, Mr. House's industry involvement at Elmira Raceway, and the fact the horse returned to race in Ontario immediately after the race. On this basis the fines for each appellant have been reduced. Licensees should not view this reduction as a signal of a policy change related to the penalty policy for SB Rule No. 15.09 (a) but rather the appellants benefiting from a combination of mitigating factors in their favour.

30. It is time for the organizers of the Gold Cup and Saucer to look at making their race some type of late closing event or some stake race designation. This in itself would solve the problem.

31. The Panel suggests that the Administration of the ORC review the role of trainer Oliver as it relates to the rule breach. Based on the testimony of Judge Rier and the accompanying notes from the other Judges, he obviously played a central role in the affair.

DATED this 18<sup>th</sup> day of December 2009.

Rod Seiling  
Chair