



COMMISSION HEARING

TORONTO, ONTARIO – SEPTEMBER 13, 2012

**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
STANDARD BRED LICENSEE JASON ROBERTSON**

Jason Robertson ("ROBERTSON") appealed against the Director's Notice of Proposed Order to Refuse to Issue a Licence ("NOP").

On September 13, 2012, a Panel of the Ontario Racing Commission ("ORC") consisting of Chair Rod Seiling, Commissioner John Macdonald, and Commissioner Pam Frostad was convened to hear this matter.

ROBERTSON was in attendance, and was represented by his legal counsel, Edmond Paquette and Terry Waltenbury. Jennifer Friedman appeared as counsel for the Administration of the ORC.

Upon hearing the testimony of Oleh Kupraty, Rasa Malinauskas, Dr. P.J. Rocheleau, Dr. Bruce Duncan (qualified as an expert witness) and ROBERTSON, considering the exhibits filed, and upon reviewing the written submissions, the Panel denies ROBERTSON'S appeal as follows:

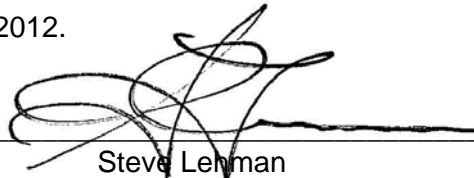
1. There were reasonable grounds to believe that while ROBERTSON carries out activities for which a licence is required, he will not act in accordance with the law or with integrity, honesty or in the public interest having regard for his past conduct.
2. ROBERTSON was carrying on activities that were in contravention of the rules and terms of his licence which was under suspension.
3. His conduct placed the integrity of the horse racing industry in Ontario in question.
4. The public interest requires that his licence remains suspended.

ROBERTSON is eligible to re-apply for a licence in two years.

A transcript of the Panel's Oral Decision is attached to this Ruling.

DATED at Toronto this 4th day of October 2012.

BY ORDER OF THE COMMISSION



Steve Lenman
Acting Executive Director



REASONS FOR DECISION

Overview

1. Jason Robertson filed an appeal on January 31, 2012, (Ex. 1, tab 19) in accordance with the Rules of Racing in relation to the Notice of Proposed Order (NOP) dated January 19, 2012, wherein the Ontario Racing Commission (ORC) refused to grant him a licence (Ex.1, Tab 18). He had been on full suspension for a period of fourteen months which said suspension expired on May 19, 2011. A de novo hearing was held on September 13, 2012, to hear the matter.

Background

2. Legal Counsel for the ORC, Jennifer Friedman and for the appellant, Edmond Paquette and Terry Waltenbury, provided the Panel a brief agreed statement of facts.

3. Included in the statement was that on January 19, 2010, the Executive Director of the ORC issued an immediate suspension for the appellant for violating SB Rule No. 26.02.01 (failing to ensure reasonable care and protection for horses under his care).

4. Following an appeal filed by the appellant related to his suspension, a Panel of the ORC following a hearing held on January 27, 2010, ordered the following:

- i Full suspension for a period of fourteen months less time already served with the suspension to be completed on May 19, 2011;
- ii Robertson agrees and consents that ORC investigators shall be permitted access to his property known as "Robertson Stable" located at 152 Bonin Street, Chelmsford, Ontario for a period of three years (up to & including 1/19/13) for the purpose of conducting searches and seizures as may be required;
- iii At the conclusion of the suspension on May 19, 2011, Robertson may make an application for licensing and the Executive Director, in accordance with the Racing Commission Act, may impose any terms and conditions deemed appropriate but a minimum, the terms and conditions shall include a period of probation for a period of two years;
- iv A fine of \$6,500.

5. On September 11, 2010, six months prior to the expiry of the appellant's suspension, the ORC conducted a search of the Robertson Stable in accordance with the terms and conditions of his suspension (para 4 iii). This search differed from the September 2010 search which was conducted by the ORC after obtaining a search warrant. According to ORC investigator, Oleh Kupraty, who was present for both searches, the basis for the first search was derogatory confidential information related to the death of two horses.

6. Over a period of some four years, the ORC received about twenty-six confidential reports related to the appellant with fourteen being listed in Exhibit 5, tab 1, pages nine and ten. The information received from informants was deemed reliable based on the Commission's rating system. Three of the listed confidential information bullets pertained to matters allegedly occurring after Robertson was suspended. The April 28, 2010 information was that Robertson killed a horse twelve years ago using Clorox,



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Robertson had taken over Fred Rogers' business (selling drugs). Robertson has his own blood machine (and is charging for its use), that he sells pre-race for \$300 and that when he returns from the west he has lots of cash. The second bullet of the same date included that Robertson was racing as a participant and that he was selling pre-race for \$300 and charging \$25 for his blood machine. The third information bullet dated August 31, 2011, alleged that Robertson was conducting his own "vet" work and would not allow a local "vet" on his property.

7. Robertson was a client of Fred Rogers. On April 11, 2006, he was fined \$1,000 and placed on probation for one year for "Misconduct Prejudicial to the Best Interests of Racing" as substances he had purchased were controlled by the Food and Drug Act and Controlled Substances Act (Ex. 1, tab 11). During Robertson's probation, Pat Hudon, during an interview with ORC investigators dealing with the Rogers/DeFlorio matters, told them that he had given Robertson one and one quarter boxes of Aranesp. Robertson denied the allegation but admitted to being in DeFlorio's home with a friend (Hudon) who made purchases. (Ex. 1, tab 1) Aranesp (EPO) is an illegal drug that affects performance and can threaten the health of the horse.

8. The appellant denied all the allegations. He did confirm that he owned a blood machine but that it was for his own personal use and that his daughter was now using it. Dr. Bruce Duncan, Chief Veterinarian for the ORC who testified as an expert witness, confirmed that there was no rule prohibiting a person owning a blood machine but added that it takes a lot of training to use it. Robertson, at one time, owned three shock wave machines. According to him they were part of a business venture for his wife wherein she planned to lease them out referencing Dr. Vansegbrook as one lessee. Under the Rules of Racing, only a licensed veterinarian can use them. Robertson, in admitting to his lengthy racing violation record, did deny his violation for cryosurgery.

9. The search turned up a banker's box located in the basement crawl space of the house containing zip lock bags containing a granular mix and blue pills. Subsequent analysis conducted for the ORC confirmed the blue pills to be Levothyroxine (thyroxine). This is a controlled drug under the Food and Drug Act. Only a veterinarian can prescribe the drug and only after examining the horse and conducting a blood test. Robertson never had a horse examined nor had an accompanying blood test for any of the prescriptions he acquired for the drug. This is a violation of SB Rule No. 6.46.01. Robertson claimed that he was unaware of the rule. Licensees are expected to know the rules; ignorance of them is not an acceptable defense (SB Rule No. 1.04).

10. Robertson told ORC investigator, Oleh Kupraty, in a May 17, 2011 interview (Ex. 5, tab 1, p 2, para 8) about the discovery of the pills that they were from some two to three years ago and had been prescribed by Dr. Donna Vansegbrook. According to him the veterinarian had examined a horse off-site for him but he did not recall any blood tests related to that examination on any of his horses. Robertson believed the pills were a heart stimulant.

11. In his testimony, Robertson told the Panel that the pills were acquired when he was stabled in New York, that a Dr. Seth Fisherman had provided the prescription and that they were purchased from Equestology (Ex. 5, tab 6 invoice). He used the pills as a part of his pre race program for under-performing horses feeding them the packaged mixture including the thyroxine pills two days before the race. Fisherman provided the script without any examination of any horse. According to him the box ended up in the basement when they moved back from New York. Dr. Duncan expressed a concern that some licensees were using thyroxine as a pre-race treatment with the objective to affect performance.

12. The search also turned up a bottle of the thyroxine pills located in a back stable on a shelf. No evidence was led as to be able to determine ownership.



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13. Dr. Vansegbrook prescribed Levothyroxine to Robertson without any examination of any horse and without conducting a blood test as required by the rules for both the ORC and the CVO. Vansegbrook had only examined one horse for Robertson over the years and according to the appellant, would provide prescriptions for him after phone calls between the two individuals. Vansegbrook's actions were wrong and according to Dr. Duncan, an alert was sent out to the industry when he became aware of what had transpired. The billing records for both Jason Robertson and his wife, Chantelle Robertson, from Dr. Vansegbrook from May 30, 2006 to May 15, 2007 and May 15, 2007 to December 28, 2009 support the fore-mentioned practice.

14. Levothyroxine or thyroxine is one and the same drug. Dr. Bruce Duncan, Chief Veterinarian for the ORC confirmed that use of the drug is intended to help horses with an underperforming thyroid. According to him, he has concerns that some individuals are using it as a pre-race to enhance performance.

15. On May 25, 2011 the appellant applied to the ORC for an owner/trainer's licence as per Section 17 of the Racing Commission Act (Act). Subsequently, the ORC commenced a due diligence investigation on Robertson in accordance with Section 18 of the Act.

16. On July 28, 2011, ORC Investigator, Rasa Malinauskas, interviewed Robertson at his stable. Robertson told her that there are no veterinarians available to treat horses at his stable notwithstanding his attempts to secure such services. He specifically referred to his efforts to secure service from a veterinarian (Dr. Rocheleau) from Espanola, telling her that he would not respond. He would not allow Dr. Suprenant on his property, had filed a complaint with the OVC about her plus he was commencing a lawsuit against her. Robertson subsequently testified that he did not ban her from his property but rather that she advised his clients that she would not attend their horses at the Robertson Stable.

17. Dr. Rocheleau first called Dr. Duncan to relay concerns he had related to issues at the Robertson Stable. Those concerns originated from his seeing them. The concerns included that drugs were readily available at Robertson's and that vet work was being done there, including blood work, shock wave and cryosurgery. Rocheleau told him he had been told that it was in Robertson's best interest not to have a vet available as he was doing the work himself. Dr. Duncan indicated he would alert the OPP investigators and contact the CVO and he advised Rocheleau to contact the CVO.

18. Dr. Duncan was present for the Malinauskas interview with Dr. Rocheleau, who operated from the Espanola Animal Hospital. At that interview, Dr. Rocheleau indicated that he had met with Robertson and laid out the basis on which he would provide vet services to his stable (contract, examinations). He never heard back from Robertson. Robertson, in his testimony, referenced a chance meeting at Tim Hortons. Robertson approached Rocheleau on the basis that he was following up on an unreturned phone call. According to Robertson, Rocheleau made no offer. However, Rocheleau claimed that he did make an offer and never heard back (Ex.5. tab 3, p 34). Dr. Rocheleau, who testified via telephone, did not have his interview report with him and seemed to not be totally sure of the timing of some events. On cross examination, Rocheleau confirmed that at the meeting at Tim Hortons he told Robertson, "I am a vet, not a drug dealer and that I was willing to treat his horsesI set the rules, including my policy signed." "He never called me back." It is worth noting that shortly after their meeting, Rocheleau started providing service at the stable which now includes Robertson's daughter's horses.

19. Robertson earns approximately \$20,000 per month from stall rental at his stable. He estimated his net income at about \$100,000 annually. He does not own any horses but his daughter, Brittany, who is twenty-one, does own and race horses from her father's stable.



20. Robertson claimed that he was unaware that he was not to use thyroxine on a horse unless it had been prescribed for that horse after it had been examined by a vet in combination with a blood test on the horse. While he claimed this ignorance he was aware that it could cause health issues with prolonged use. He forgot to dispose of the pills on his return from New York. According to Dr. Duncan, “good” trainers dispose of medications when they are finished using them. He is now willing to commit to knowing the rules better albeit he had been in the industry for some nineteen years.

Issue

21. Should Jason Robertson have the privilege of being granted a licence by the ORC?

Decision

22. After carefully listening to the testimony and reviewing the exhibits and documents, the Panel denies the appeal. Robertson can reapply for a licence in 24 months. He will have to satisfy the Director at that time that he is worthy of the privilege of a licence.

Reasons for Decision

23. The Racing Commission Act puts the onus on the ORC “to govern, control and direct” and to protect “the public interest”. Accordingly, this Panel, in making decisions, must be guided as to what is in the public interest and the public interest should and must prevail as outlined in Anthony A. MacDonald, [2008] O.R.C.D. No. 1, Ruling Number COM SB 002/2008, para 25. As detailed in these reasons, there are a number of cogent and compelling reasons why Mr. Robertson is not worthy to be privileged to have an ORC licence. Any one of those in isolation would be sufficient.

24. When assessing the public interest versus the appellant's interest, one must examine the mitigating and aggravating factors. In this case, the appellant's commitment to better know the rules is far outweighed by the gravity of his violation compounded by his past record in this area and lack of veracity. In this instance, the public interest must prevail.

25. It is important to remember that the appellant was on suspension. He violated the terms of the agreement of May 19, 2010 when he was found to be in possession of Levothyroxine. With that fact established it stands to reason there can be no abuse of process as submitted by the appellant. He and he alone, is responsible for his conduct and the resulting outcomes.

26. Thyroxine can be utilized to treat horses under the Rules of Racing. Before acquisition of the drug via a prescription, a veterinary doctor must examine the horse and take a blood test of the horse. The appellant acquired the drug without ever having a horse examined or blood tested by a veterinarian thereby violating SB Rule No. 6.46.01.

27. Jason Robertson was on suspension when he was in violation of SB Rule No. 6.46.01. Notwithstanding his claim of ignorance of the rules, which under SB Rule No. 1.04 is not an accepted defense, it is reasonable to both expect and demand that every licensee know and operate within those rules. Furthermore, it is reasonable to believe that a person with nineteen years “in the business” had a “good” understanding of the rules and if he truly did not, given the number of medication violations he has incurred, would have taken the appropriate steps to know the rules as is expected of every licensee. Furthermore, with the onus on Robertson to know what the rules were regarding the administration of drugs, the appellant had the opportunity by way of the CPMA to make those inquiries as the Panel is aware is the common practice with other licensees.



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28. The appellant's co-operation with ORC Investigators regarding the discovery, seizure and identification of the blue pills should not and cannot negate the fact of the rule violation. Similarly, what may have been acceptable practices in the past or even current practices now by some licensees does not give the appellant a "free pass" now and somehow make him eligible for a licence.

29. Robertson's practices as a trainer fail to make the grade. For example, "good trainers" do not keep old medication around, they dispose of it when there is no further need as Dr. Duncan noted. Robertson did not dispose of the thyroxine but kept the drug. The individual packaging of the drug combined with the fact he did not dispose of it raises the question of what he was doing with it given he had no horses. Furthermore, based on well accepted past practices, trainers normally dispense prescribed medications from the respective manufacturer's containers as needed for each dosage.

30. Trainers are required to keep their equine medications in a locked box. Robertson kept his in a room in the house when he had horses and then "stored" them in his basement on his return from New York.

31. Integrity is the cornerstone and bedrock for the future survival of horse racing in Ontario. It has always been thus but with the ongoing uncertainty as to the future of racing as it relates to changes in government policy, this fact has never been truer. As was stated in Flamboro Downs Holdings and Belmont Hotel, SB 129/1995, July 14, 1995, horse racing must be conducted and seen to be conducted with the utmost integrity. The future of this industry depends on maintaining the public's confidence that it is being operated totally "above board". The Panel concurs.

32. In the matter of the Racing Commission Act, 2000, c. 20 and in the matter of the Appeal and Request for Hearing of Standardbred Licensee Kenneth William Hornick [2010] O.R.C.D. No. 10, paras 23 and 26, the importance of the war on illegal and non-therapeutic medications is further highlighted. #23 - "The use of illegal, non-therapeutic medications has no place in horse racing. This Commission is committed to eradicating their use by the small few who would seek to gain an unfair advantage. For that reason, this Commission has established and published a substantive penalty regimen that is designed to act as a deterrent." This penalty falls within the established policy. #26 "...The Court has been supportive of the ORC in its need to have a penalty regimen that can support and protect the sport's integrity." See Brian Scott v. Ontario Racing Commission, Divisional Court File No. 07-DV-001344 wherein it reads at para 47 in dealing with the reasonableness of the penalty: "The Commission is under a duty to exercise its power to impose a suspension and penalty under ss. 19-22 of the Act in a manner that is in the public interest, and this calls for the Commission to apply its expertise in regulating horse racing. Regulatory sanctions imposed in the public interest are preventative in nature and prospective in application. A public interest order properly may take into account deterrence. In my view, the ORC carefully considered what has become a scourge within the horse racing industry. Performance enhancing drugs threaten the integrity of the entire industry. In my view, the ORC properly took into account that there was a significant need for general deterrence in a case such as this given the level of drug abuse in the industry." Penalties to Mr. Robertson in the past clearly have not had the desired result. Making him eligible for licensing at this time would not be in the public interest or in the best interests of racing.

33. The appellant's own counsel introduced his past record. It clearly indicates that he has a checkered past at best, both in horse racing and in the real world. Horse racing, in today's context of fierce competition for the gaming and entertainment dollar, cannot afford to have such an individual be licensed if it is to have any hope of a sustainable future for the thousands and thousands of hard working individuals who depend on racing for their livelihood and that of their families. He has some twenty-one ORC infractions, mostly related to illegal medications and this latest infraction just adds to the concerns about his practices with illegal medications. He has other derogatory incidents with the police as well.



34. The numerous derogatory reports related to him are from confidential informants. Those sources, according to ORC investigators, have proven to be reliable and while those reports have not led to a confirmed violation, they do, in their totality, give one a reasonable view as to licence suitability. With respect to reasonableness, the ORC has long abided by the standard as articulated in *Dunsmuir v New Brunswick*, [2008] S.C.J. No. 9. That view has been supported by the Courts in such cases as *Friedman v the Ontario Racing Commission* [2008] C.J. No. 1706 at para 16 and *Gray v Ontario Racing Commission*, [2008] O.J. No. 1235 at para 3.

35. Dr. Rocheleau called Dr. Duncan some time before the investigation of Robertson commenced. He raised concerns about issues at Robertson's that he had seen and what he had heard. They included that with Robertson doing vet work, that they did not want a vet and the availability of drugs. The Panel notes these concerns are closely aligned with some of the confidential information.

36. Truthfulness is a characteristic all licensees are expected to uphold. The evidence demonstrates Robertson has not been truthful. Robertson claimed that there were no vets available; however, he told Investigator Malinauskas (Ex. 5, Tab 2, p26) that he would not allow Dr. Suprenant on the grounds of his stable while telling the Panel that it was Dr. Suprenant who refused to attend. Dr. Rocheleau told Investigator Malinauskas (Ex.5, tab 3, p 34), in an interview where Dr. Duncan was present that at a meeting with Robertson at a Tim Horton's that he was willing to treat his horses but that he was "not a drug dealer." Robertson never got back to him. Robertson admitted to the meeting but claimed that he never heard back from Dr. Rocheleau about providing service. Dr. Rocheleau, shortly thereafter, did start providing service at Robertson's for clients stabled there. Robertson, in explaining his sources for obtaining the drug, Drs. Vansegbrook and Fisherman, neglected to mention Fred Rogers. Given his suspension from using Rogers, it is hard to understand his memory lapse.

37. Dr. Rocheleau had some difficulty recollecting time lines but when a statement from his interview by Ms. Friedman was read, he clearly supported the evidence provided by Malinauskas and is consistent with that provided by Dr. Duncan. That evidence reasonably confirms that Dr. Rocheleau did offer to provide veterinary service contrary to the appellant's claim.

38. The Panel, in its decision making, is guided by the Brian Scott and Todd Gray decision, Ruling No. COM SB 021/2007 at para 83 wherein it reads, "principles for determination of this penalty are extracted from S 718 c.c.:

- ⤴ The fundamental objective is to protect the industry
- ⤴ Denunciation clear and unmistakable
- ⤴ To deter like-minded individuals
- ⤴ To separate offenders from the industry
- ⤴ To provide reparation for the vast numbers of victims by restoring viability and truly protecting integrity
- ⤴ Rehabilitation"

39. The decision addresses all of the aforementioned six points; it protects the industry as the ORC is mandated, it denounces the action as unworthy of licensing, it sends a signal to others as to the consequences, it keeps the offender out of the industry, it protects integrity thereby supporting viability



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and it allows for rehabilitation within a reasonable time frame. While economic hardship is irrelevant in this matter, in and of itself, is not a ticket for a licence. In fact, economic hardship, by its very nature will and should act as deterrence. In this case, evidence was led that indicates the appellant will not suffer economic hardship as a result of this decision.

40. Turning to the Director's Notice of Proposed Order, the Panel finds:

- ⤴ There were reasonable grounds to believe that while Jason Robertson carried out activities for which a licence is required, he will not act in accordance with the law or with integrity, honesty or in the public interest having regard for his past conduct.
- ⤴ Jason Robertson was carrying on activities that were in contravention of the rules and terms of his licence which was under suspension.
- ⤴ His conduct placed the integrity of the horse racing industry in Ontario in question.
- ⤴ The public interest requires that his licence remains suspended.

41. The ORC is committed to a policy of rehabilitation. Based on past experience in these matters, for rehabilitation to have a chance, the individual needs to acknowledge and want to change from his or her misguided ways. Those basic requirements are missing at this time and it is hoped that two years from the date of this decision, when he will be eligible to reapply for an ORC licence, he will know the rules of racing and truly want to abide by them. With respect to time, it is important to note that this panel supports the concept that the passage of time alone is not sufficient repayment, Chabot [1998] O.R.C.D. No. 4 Series No. SB 296/1997.

DATED this 4th day of October 2012.

Rod Seiling
Chair