



COMMISSION HEARING

TORONTO, ONTARIO – SEPTEMBER 16, 2010

**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
STANDARDBRED LICENSEE JAY POLIFRONI**

Standardbred licensee Jay Polifroni (“POLIFRONI”) appealed Ruling SB 41967, dated July 10, 2010, wherein he was suspended for 45 days, fined \$1,000 and put on probation for a period of two years for violating Rules 6.20(b), 6.20(c), 22.23.03(e), 22.3.05 and 26.02.01 of the Rules of Standardbred Racing, for maltreatment of the horse “Tricky Prospect”.

On September 16, 2010, a Panel of the Ontario Racing Commission (“ORC”) consisting of Chair Rod Seiling, Commissioner David Gorman and Commissioner Brenda Walker, was convened to hear the appeal.

Angela Holland appeared as counsel for the Administration, POLIFRONI attended the hearing, and James Evans appeared as counsel for POLIFRONI.

Upon hearing the testimony of Associate Judge Troy Rossignol, Phil Belanger, Isabelle Darveau, Pascal Berube, Jim Stewart, Dion McLean and POLIFRONI, upon reviewing the exhibits filed and upon hearing the submissions of counsel for the Administration and counsel for POLIFRONI, the Panel denied the appeal but varied the penalty. The penalty was varied as follows:

- i. The suspension is increased to 90 days, with 60 days stayed, accordingly POLIFRONI is suspended for 30 days (October 3, 2010 – November 2, 2010);
- ii. The fine is increased to \$1,500;
- iii. POLIFRONI must enrol in a recognized anger management program approved by the Judges at Sudbury Downs;
- iv. POLIFRONI will be on probation for two years (November 3, 2010 – November 3, 2012), subject to the normal terms and conditions. If during the probation period POLIFRONI violates any rule related to whipping a horse, or to the health and welfare of a horse, the stay will automatically expire.

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

Dated at Toronto this 28th day of September, 2010.

BY ORDER OF THE COMMISSION


John L. Blakney
Executive Director



REASONS FOR DECISION

Overview

1. Standardbred licensee, Jay Polifroni, appealed a decision of the Judges, SB No. 41967 (Ex. 1, tab 9) wherein he was suspended for 45 days, fined \$1,000 and put on probation for a period of two years for violating SB Rules Nos. 6.20 (b), 6.20 (c), 22.23.03 (e), 22.23.05 and 26.02.01.

Background

2. Legal Counsel for the Ontario Racing Commission (ORC) and the appellant, James Evans, agreed on August 25, 2010 to an adjournment of the hearing until September 16, 2010 in order to accommodate Mr. Evans due to the late engagement of his services by Mr. Polifroni.

3. At the commencement of the hearing, the Chair, Rod Seiling, inquired of Mr. Evans if he was aware of the Supreme Court of Canada Ruling, regarding standard of proof in as much as he noticed that Mr. Evans, in his factum, had referenced on page 5 the need for a stronger standard of proof than utilized by the judges and had referred to a number of precedent cases. He asked if Mr. Evans would agree that the Supreme Court of Canada ruling would trump any lower court ruling and then read the ruling, *F.H. v. McDougall* [2008] 3 S.C.R. 41 “I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the related evidence with care to determine whether it is more likely than not an alleged event occurred”. Mr. Evans did not agree and argued the need for a higher standard.

4. After the fourth race at Sudbury Downs on May 26, 2010, the appellant after going two additional rounds of the track immediately following the race took his horse, Tricky Prospect, to the back track.

5. On his way to the back track he was observed kicking his horse on his rear end by Phil Belanger. The appellant testified he kicked the horse as he was not able to use his whip. Mr. Belanger observed Mr. Polifroni having his whip in his right hand tucked into his side as is the normal position for it.

6. Pascal Berube, who gave his testimony via a translator, liked the horse and wanted to buy it from Mr. Polifroni because he heard that Mr. Polifroni had beat up the horse on the back track. While he did not identify where he had heard this during the Judges’ hearing, he testified that it was Joe Cote who had told him.

7. Tricky Prospect undisputedly, by the morning after the race, had a number of welts on his right rear and underbelly. The welts were such that they would not be the result of any use of the whip during the race or from any equipment. There was no dispute that these welts, that were between six to twelve inches in length and the size of a finger, swelled up to basketball size, were caused by a whip. Mr. Belanger and the ultimate new owner of the horse, Isabelle Darveau confirmed this fact.

8. Mr. Berube testified that he saw the welts on the horse when he picked him up from Mr. Polifroni. An audio replay of the Judges’ hearing verified the appellant’s claim that Mr. Berube stated at that hearing he only saw them when he took the horse back to his stall. The difference in Mr. Berube’s two versions is minimal as the time to go from Mr. Polifroni’s stalls in the barn to Mr. Berube’s would be around a minute at best. Mr. Berube claimed he showed Maxim Gouldreault the welts that same night but Mr. Gouldreault testified via phone that it was the next morning.



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9. Mr. Berube stated that he did not say anything about the welts to Mr. Polifroni because he did not want to cause a scene and that he forgot to tell the Judges. Dion MacLean, who testified via telephone, helped Mr. Polifroni unhook the horse on his return from the track. He unhooked the race bike on the right side of the horse and did not see any welts but he admitted that Mr. Berube was the best person to be able to confirm if there were any welts on the horse given he examined him before agreeing to the purchase.

10. Jim Stewart was on the back track that night jogging his horse in an attempt to keep the horse calm. He was not happy to have Mr. Polifroni come up from behind and pass him as it excited his horse. He left the track shortly thereafter and due to darkness did not see anything, i.e. whether Mr. Polifroni had a whip or were there welts on the horse.

11. According to Mr. Polifroni, he took the horse to the back track because in previous races it had helped to calm the horse following the race. He testified that he has an anger problem but it is limited to yelling and only lasts a few minutes. Mr. Belanger gave undisputed testimony that Mr. Polifroni is well known for his temper and that he has seen him on numerous occasions both kick and whip a horse. Mr. Stewart stated that the appellant is known to get hot once in a while. Mr. MacLean said he was not aware of anything reputation wise.

12. He claimed not to have whipped Tricky Prospect and that the welts did not result from the time the horse was in his care. He claimed he could not remember if he had any post race whip violations. His record, Exhibit 5, indicated that he had a number of post race whip related incidents and received a ten-day suspension for hitting a horse in the head after a race on November 4, 2009.

13. The Judges learned of the incident seventeen days after the incident. It came to light as part of their investigation concerning the ownership and possible rule violation concerning Tricky Prospect as Mr. Polifroni scratched the horse from its next race after he sold it on the basis of him being sick. There were never any pictures taken of the welts nor did anyone see the horse being whipped.

14. Judge Troy Rossignol, who testified on behalf of Judge Larry Hughes who was hospitalized for an appendectomy, confirmed that the Judges were unanimous that Mr. Polifroni was responsible for the welts on the horse. He referred to the act as appalling. He cited credibility as the key factor citing contradictions from the appellant such as saying he threw his whip away on one occasion then saying he lost it on another, stating he sold the horse after he scratched on Friday and referencing the horse as it was dirty when others who knew the horse disagreed.

Issue

15. Did the Judges at Sudbury Downs carefully review the testimony and evidence in the alleged welting of Tricky Prospect in determining to assess Jay Polifroni responsible?

Decision

16. After carefully listening to the testimony and reviewing the evidence and submissions made, the Panel denies the appeal but varies the penalty. Mr. Polifroni's suspension is increased to 90 days with 60 days stayed. His fine is increased to \$1,500; he must enrol in a recognised anger management program approved by the Judges at Sudbury Downs and he is put on probation for a period of two years subject to the normal terms and conditions. If during this time frame he violates



any rule relative to whipping a horse or related to the health and welfare of a horse, the stay will automatically expire.

Reasons for Decision

17. On a balance of probabilities, it is reasonable to conclude that the appellant is responsible for the welts on Tricky Prospect. The appropriate standard of review is reasonableness as articulated in *Dunsmuir v. New Brunswick* [2008] S.C.J. No. 9. It reads, "Reasonableness is a differentiated standard animated by the principle that underlies the development of two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within a range of acceptable solutions."

18. Mitigating factors for the appellant are that no one saw the whipping of the horse and it was not reported for 17 days. Counterbalancing are the following overwhelming aggravating factors. Mr. Berube's desire to buy the horse to save it from the appellant, he would not then turn around and whip it therefore it is credible to accept his testimony that the horse had the welts when he purchased it. Mr. MacLean, the appellant's own witness confirmed that Mr. Berube would be the best person to determine if the horse had welts. Mr. Belanger testified that he has seen the appellant both kick and whip a horse. The appellant admitted that he has a temper problem. Kicking Tricky Prospect on his way to the back track indicates the state of mind of the appellant at the time and given his past history of whip use post racing it makes it reasonable that he did cause the welts while on the back track.

19. Judge Rossignol testified such action is appalling. The Panel agrees.

20. The ORC has a responsibility to protect the health and welfare of the horse. It takes this responsibility very seriously. Ms. Holland could not find any similar precedents to the credit of all licensees. The added penalty is required to act as a deterrent and warning to both Mr. Polifroni and every other licensee about the serious consequences of such action. There is also a public interest aspect to this appeal. Racing will only survive and the futures of the thousands

in the sport are dependent on public support. The public expects and demands that horse racing treat its equine stars in a fashion that helps to ensure their health and welfare.

DATED this 28th day of September 2010.

Rod Seiling
Chair