Ontario
Racing
Commission

RULING NUMBER COM SB 036/2011

COMMISSION HEARING TORONTO, ONTARIO – JANUARY 17, MARCH 28, 29, APRIL 28 MAY 24, 25, 27 & JUNE 3, 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 STANDARDBRED LICENSEES KEVIN WALLIS AND GENE PIROSKI

On September 2, 2010, the Director ordered an Immediate Suspension and issued a Notice of Proposed Order to revoke and suspend the licenses of ORC Licensee Kevin Wallis ("Wallis") for a period of twelve (12) years. On September 2, 2010, the Director further ordered an Immediate Suspension and issued a Notice of Proposed Order to revoke and suspend the licenses of ORC Licensee Gene T. Piroski ("Piroski") for a period of ten (10) years. Both Wallis and Piroski requested a Hearing pursuant to section 22 of the *Racing Commission Act, 2000*, S.O. 2000, c. 20. By consent of both Wallis and Piroski, and in accordance with s. 9.1 of the *Statutory Powers Procedure Act*, the Hearings pertaining to both Wallis and Piroski were heard together.

A Commission Panel consisting of Vice-Chair James Donnelly, Commissioner Brenda Walker, and Commissioner John W. Macdonald, Q.C., convened for the Hearing on January 17, March 28, 29, April 28, May 24, 25, 27 and June 3, 2011. Brendan van Niejenhuis and Fredrick Schumann acted as counsel for the Administration. James Cooke acted as counsel for Wallis. Hanieh Azimi acted as counsel for Piroski.

On hearing the evidence of Rick Murchison, D/Cst. Brian Arrand, Robert Coberley, Gilbert Ladouceur, D/Sgt Steve Schandlen, Judge Tom Miller, Kevin Wallis, Ken Hardy, Gene Piroski, Douglas Ackerman, Thomas Bain, and Nicholas Steward, and on reading and viewing the exhibits and considering the submissions of counsel, the Commission ordered that:

1. The Director's Orders of Immediate Suspension as against Wallis and Piroski, issued September 2, 2010, be terminated; and
2. The Director's Notices of Proposed Order, as against Wallis and Piroski, issued September 2, 2010, be terminated.

The Commission gave written reasons for its decision, a copy of which is attached to this Ruling.

DATED in Toronto this 30th day of August 2011.

BY ORDER OF THE COMMISSION _____

John Blakney
Executive Director

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REASONS FOR DECISION

INTRODUCTION

1. These deliberations bear on issues of primary significance, the integrity of racing, the licenses and careers of two lifetime horsemen. The Hearing proceeded January 17, March 28 and 29, April 28, May 24, 25, 27 and June 3. Written submissions were due June 13 by the Administration, June 20 by the Appellants and June 24 for Reply. For three weeks, deliberations were delayed by the June labour dispute at Canada Post. For one week they were delayed by the Hydro blackout following the Goderich tornado.

THE APPEAL

2. On September 2, 2010, the Director ordered the Immediate Suspension of ORC licenses held by Kevin Wallis (Wallis) and Gene T. Piroski (Piroski), and by Notices of Proposed Order sought a 12-year full suspension for Wallis and a 10-year full suspension for Piroski plus fines of $100,000 each. The Director's Suspensions and Notices of Suspension relate to racing activity in Ontario.

3. The overall investigation included alleged activities in Michigan racing. On July 2, 2010, Wallis and Piroski were suspended by the Michigan Racing Commission. On July 3, the ORC by way of reciprocal enforcement pursuant to Standardbred Rule of Racing 3.10 suspended their Ontario licenses. The stated reasons for the Director's Proposed Order were:

a) *there are reasonable grounds to believe that, while Wallis/Piroski carry out activities for which the licenses are required, they will not act in accordance with the law, or with integrity, honesty, or in the public interest, having regard to their past conduct;*

b) *there are reasonable grounds to believe that Wallis/Piroski are carrying on activities that are, or will be, in contravention of the Act, the Rules, or the terms of the licenses;*

c) *Wallis'/Piroski's conduct has placed the integrity of the horse racing industry in Ontario in question;*

d) *The public interest requires that Wallis'/Piroski's licenses be suspended.*

4. This is an appeal from the Director's Suspensions and Notices (Section 22 and 23 RCA 2000).

5. Wallis and Piroski requested and consented to their Hearings proceeding together. The suspensions are premised upon an allegation of participation in a race fixing conspiracy. Given that common element and the consent of the parties, as permitted by ORC Rules of Procedure and Section 9.1 (1) SPPA, the Hearings did proceed as one.

6. The Panel is mindful of the obligation to make separate adjudications premised on the evidence relevant to each of Wallis and Piroski.

7. Witnesses, excepting Investigator Arrand, were excluded by Order. Document books were marked for identification with the evidentiary status of their contents remaining to be determined in the course of the Hearing. As result of that determination, certain elements of the document books were removed and were not admitted in evidence.

THE ALLEGATION

8. The Administration contends that Wallis, Piroski and others conspired and acted with Sam Summa (Summa) to affect the result of certain races as follows:

- Summa paid Wallis, Piroski and other drivers to hold back their horses during races.
- Wallis and Piroski drove their horses at Windsor Raceway to produce the forecast result that the particular horse would not finish in the mutuel payoffs.
- Summa premised his mutuel wagering on that information.

9. The Administration position is that the scope of the conspiracy is unknown in terms of number and identity of races and of participants. The Administration investigation focused on a number of races from 2008 – 2010. Nine races were examined in evidence. The Administration contends that analysis of these races and conduct related thereto considered in the context of the entire evidence demonstrates firstly the conspiracy and secondly participation therein by Wallis and by Piroski.

10. Reliable information that a horse would finish out of the mutuel payoffs would give Summa a significant advantage.

- By way of illustration, with a seven horse field, knowing that Wallis and Piroski would not finish “in the mutuel money”, Summa could bet a five horse Triactor box on the remaining horses and he was guaranteed a winning ticket. The cost for a $1.00 box, 5 horses could be first, leaving 4 to be second and three to be third (5 x 4 x 3) is $60.00. That advantage applied to various forms of exotic (multiple horses) wagering; Exactors, Triactors, Superfectas, Win Four’s and so on.

- The information that a horse would not do well can be forecast with almost 100% certainty. Not so with information that the horse would race well - too many variables. Accordingly, information that the horse will not figure in the mutuel payments has far more value in framing multiple horse wagers.

11. If the horses held back were short-priced or wagering "favourites", the payout on the winning mutuel tickets without those favourites would be increased. Thereby Summa would have a twofold advantage: foreknowledge that certain horses could be eliminated and increased payouts if those horses were short priced.

- Mutuel odds could be manipulated as follows thereby conferring a third advantage as demonstrated by Race 7, Windsor Raceway, October 11, 2009:

  43 minutes prior to the "stop betting signal", someone (who could not be identified from the tote records) bet $100 to win (horse 6) driving the mutuel price down to 1-5 (bet $2 to win 40 cents) thus inhibiting other bettors from backing that horse to win, (not worth the price) but encouraging them to include the six-horse (as a crowd favourite) in their Exactors and Triactors thereby increasing the payoff on a winning mutuel ticket excluding the six-horse. At one minute and 40 seconds prior to the stop betting signal, the bettor cancelled that $100 ticket. The closing price on the six-horse was 2 to 1.

- That mutuel manipulation mechanism was known and used by Summa. Gilbert Ladouceur, a mutuel clerk at Windsor Raceway since the 1960s, knew Summa from his activities at the Windsor track. He described how Summa would, several races in advance, bet $200 to win on a horse at Hazel Park or Northville and just prior to race time would cancel the ticket. According to Ladouceur, Summa did not use his Player's Card for this type of bet.

- Through Summa's use of a "Player's Card" (which identifies the bettor for the purpose of earning premiums or benefits as the accumulating amount bet increases) and through his use of wagering vouchers, his wagers could be identified through the track computer system as to date, race, amount, horse and type of wager.

12. Windsor Raceway conferred special status on Summa apparently in deference to the amount of his wagers. Unlike other patrons, he was provided with a private room equipped with 3 TV monitors and 2 telephones. The room had a grandstand view of the track. The amounts of Summa's wagers do not appear to have led to any level of track monitoring.

THE RESPONSE

13. Wallis and Piroski deny any involvement in race fixing. Each knew Summa through his frequent attendance at the track. The assertion by each is that upon request he would on occasion indicate to Summa that he liked or did not like a certain horse to do well in a certain race. Beyond this, they deny any involvement in Summa's wagering activity. Each denies receipt of any money from or behalf of Summa or participation by holding a horse back during races.

BACKGROUND

14. In 2002 the Canadian Pari-Mutuel Agency (CPMA) officer at Windsor Raceway, Gordon Murray, noted what he regarded as suspicious mutuel payouts. In that follow-up, Summa's activity at Windsor came to CPMA attention in 2003. ORC Judges were alerted but other investigative activities were given priority and no proceedings ensued. In 2006, Murray again drew attention to suspicious mutuel payouts at Windsor. Again other investigative issues had priority and this matter was stood down.

15. Robert Coberly, a Michigan State Racing Steward testified that in March 2009, anonymous tips triggered a Michigan investigation into race fixing. Races were checked for betting irregularities. Certain drivers were noted to be in those races, often driving favourites. Piroski was not part of the Michigan investigation.

16. The investigation was substantial, involving the Michigan State Police, the Michigan Racing Commission, the Ontario Provincial Police, the Ontario Racing Commission and to some measure, the FBI.

17. Thousands of telephone calls were checked. There were thirty days surveillance of different parties. Hundreds of races were reviewed; mutuel records were checked. Search warrants were executed in Michigan at the Summa and McIlmurray residences (ORC personnel were in attendance); no physical evidence was seized through execution of the warrants. 27 persons were interviewed at Windsor.

18. Summa's mutuel records prior to some point in 2009 had been purged by the Tote company in the ordinary course of business. Activity on Summa's Player's Card (number 3169) was tracked from October 2009 to March 2010.

19. Summa was noted to have bet heavily on exotics in the suspect races with a pattern of excluding certain of those drivers from his wagers. Telephone records for about 30 drivers were obtained. Telephone activity around race dates between those drivers and Sam Summa was identified. At the annual Michigan/Ontario Racing Commission meeting, this information which was shared with Ontario re-energized the issue of race fixing at Windsor.

20. Rick Murchison (Murchison), National Team Leader of the CPMA Pari-Mutuel Unit, was consulted by investigators. His specialty is assessment of wagering patterns as indicative of race fixing. His analysis is based solely on wagering.

21. Murchison described a preliminary "flag" which signals further investigation. He termed that flag as a "ladder" system. An example - the winning horse pays $12 to win, the second horse

pays $4 to place. The "ladder" system forecasts a mutuel payout on the Exactor of $48 (4x12). If there is more than a 50% variance, (an Exactor payout of less than $24 or more than $72), then further checking is deemed advisable. The ladder system may also be used to test the Triactor payout. If the third horse paid $3 to show, the ladder forecast would be $144 (12x4x3). Murchison explained that in small wagering pools, the ladder system is less reliable (akin to an inadequate sample in polling public opinion).

22. The ladder test was not tendered as science. No claim was made that it meets the "Daubert" standard bearing of the reliability of scientific technique (*tested – peer review – rate of error – general acceptance in the scientific community* 1993 U.S. Supreme Court). It was simply a far from precise means of identifying seemingly disproportionate and thereby suspicious mutuel prices on exotic bets. The ladder system is of limited reliability. In demonstration of this, Piroski's counsel obtained from the Standardbred Canada website, and filed in evidence, mutuel payouts for Flamboro, February 8, 10, 11, 18, 19 and Rideau Carleton, February 17 all in 2011. For example, at Flamboro February 10, 2010, on an 11 race card, nine of the Exactors and eight of the Triactors did not meet the ladder standard described by Murchison. At Windsor on February 8, 2010, on a 12 race card, four of the Exactors and six of the Triactors failed to meet that standard.

23. Murchison conducted an exhaustive review of mutuel payouts. Windsor records were available for about 1,000 races over a 110-day race season. In the 2009/10 season, Summa bet 185 races for a total of about $50,000. On 15 of those races he bet over $1,000 and $25,000 of his total of $50,000. Over 13 racing days Summa bet 15 races. On 6 of those days he had the highest Triactor payout of the day. Checking mutuel records generated about 300 pages per race. 150 races were selected. Based on the "ladder" system, this was reduced to 47. Ultimately nine races were introduced in evidence. Eight of those races were analyzed in terms of firstly wagering patterns, and secondly conduct of the race. The 9th race was referenced with no wagering analysis. That race seems to have been included because it is the only race date on which there was telephone contact between the phones of Piroski and Summa. There was no such race date telephone contact between Summa and Wallis.

COMPONENTS OF THE ADMINISTRATION CASE

24. Support for the Administration's contention is claimed to be provided by.

- Summa's wagering patterns in excluding Wallis and Piroski from his exotic wagers.
- Racing Judge Tom Miller's opinion of discernible lack of effort by Wallis and Piroski premised upon his analysis of the nine race tapes.
- Michigan-based race driver Art McIlmurray's accusations involving Wallis and Piroski in race fixing activity.
- Wallis' denial claimed by the Administration to show evidence of having been rehearsed.
- Wallis' utterances in a recorded telephone conversation with Art McIlmurray.
- Piroski's references to the possibility of providing further information to investigators.

25. Of the nine races reviewed in evidence, three involved Wallis and Piroski:

October 4, 2009	Race 10
October 11, 2009	Race 10
October 27, 2009	Race 5

Two involved Wallis only:

October 11, 2009	Race 7
October 18, 2009	Race 10

Four involved Piroski only:

January 13, 2009	Race 5
November 15, 2009	Race 7
February 28, 2010	Race 7
March 2, 2010	Race 6

THE RACE EVIDENCE

26. In assessing the relationship between the closing odds and the final placement of a horse in a race, resorting to any race program discloses that something approaching 60% of favourites are beaten. As observed by the witness Ackerman, cheap horses race inconsistently. These horses judging by the race classifications could be described as “cheap”.

27. Senior racing Judge Tom Miller reviewed in excess of 120 races at Windsor of which over 50 were identified for further investigation. He was involved in the selection of the race tapes filed on this Hearing.

28. The thrust of Miller’s evidence was that in each of the tapes where Wallis or Piroski finished “off the board”, there was sustained observable lack of effort displayed by each of Wallis and Piroski. In each race he suggested specific examples. His accusations of deliberate lack of effort were denied by Wallis and by Piroski.

29. Douglas Ackerman, a lifelong horseman with a background of considerable success, viewed the race tapes on behalf of counsel for Piroski. He was provided with Judge Miller’s analysis of each race and the race lines. Mr. Ackerman testified by telephone.

30. Ken Hardy, age 62, a lifetime horseman who had driven in 12,000 – 15,000 races with about 2,800 wins, currently President of OHHA, viewed the race tapes on behalf of Wallis’ counsel. Mr. Hardy prefaced his comments by explaining that he was appearing in his private capacity not as President of OHHA. He commented that the tapes were of poor quality (night racing). Hardy offered his opinion that Wallis had a talent for urging horses in a non-demonstrative manner. He had a sit-still style, not whipping, not jumping around in the race bike.

31. Reviewing the race tapes by Ackerman and Hardy yielded opinions which by virtue of their sources, merited serious consideration. No support for Miller's criticisms was generated. His opinion was seriously challenged.

October 4, 2009, Race 10

32. Wallis drove the five horse - the second favourite at odds of 1.80 to1.00 - finished fifth. McIlmurray drove the third favourite – finished last.

33. Piroski's horse went off at 119 to 1 from the least favourable or outside post, the nine hole. In Piroski's opinion, the only valid strategy was to go to the back end, hope for fast quarters and beat tired horses coming home. He did manage to beat horses 7, 8 and 2 by saving his horse and pacing his last quarter in 28.4.

34. Miller testified that neither Wallis nor Piroski demonstrated any discernible effort.

35. In Ackerman's opinion, Piroski did well to finish 6th and probably should have been last.

36. Hardy regarded this as a poor drive by Wallis. In his view, Wallis should have left the gate with this horse. Wallis testified that this turned out to be a bad drive. The decision whether to leave or not is instantaneous and irreversible. The decision is made in the heat of the moment as the dynamics of the race start to unfold.

37. No inference of impropriety by Piroski is to be drawn from Summa's omission of Piroski's 119 – 1 shot. The horse was 119 -1 because bettors were leaving it out due to its obvious class and form.

38. Summa made 25 wagers at a cost of $1,339.00 and cashed $4,710.95 for a net win of $3,371.95. He bet 5% of the Exactor pool and won 25% of the winning pool. He bet 10% of the Triactor pool, winning 46%. Wallis, Piroski and McIlmurray, all under investigation, were excluded from his bets.

39. Sixteen minutes prior to post time, a $100 WIN bet was placed on McIlmurray's horse by an unknown person and was cancelled 7 seconds before Summa's last recorded wager. Thereby a temporary and false favourite would be indicated. The timing and pattern of this conduct constitute persuasive evidence that Summa made the $100 wager while not using his player's card. Mutuel clerk Ladouceur, testified that in such circumstances Summa did not use the card.

October 11, 2009, Race 10

40. Wallis (3rd favourite) finished 6th. Piroski (2nd favourite) finished 5th in an eight horse field. Summa excluded Wallis and Piroski from his Triactors. He bet 50% of the total Windsor bet and won 65% of the Windsor winning money.

41. Miller's analysis - Wallis made no effort following long shot horses along the rail. Piroski backed off and followed the pace, although in Miller's opinion, his horse had plenty of energy.

42. Ackerman was in complete disagreement with Miller. Wallis' horse was in well over its head. He saw "nothing strange". Piroski's drive was good. The horse just would not go.

43. In Hardy's opinion, the fractions were too fast for this class. The top two horses went on. The rest of the field staggered home, gapped out. The race was poorly classified and so was non-competitive.

44. Piroski explains that the race was too fast for his horse. It paced in 1.55 and 4. Although it won its next start with a different driver, that race time was much slower, 1.57.

45. Wallis' horse was second in its next start with a different driver.

October 27, 2009, Race 5

46. Wallis won this race and Piroski finished second at odds of 8.50 to 1 and 3.00 to 1 respectively.

47. The Administration contends that Piroski was to finish out of the money but his horse could not be held back. Summa bet 17 Superfectas, 8 Triactors and 1 Exactor, all betting Wallis to be first or second (except for one ticket). Summa lost all his bets because he failed to include Piroski's horse.

48. Upon Miller's analysis, Piroski deliberately moved out at the head of the stretch to let Wallis through. Miller saw no sign of a steering problem with Piroski's horse, Prince Rave. This race is subject to comment later.

October 11, 2009 Race 7

49. Summa excluded drivers Brad Forward (alleged to be a co-conspirator) and Wallis from his Triactor bets. He bet 13% of the total wager, 41% of the Windsor total and had 55% of the winning money. A $100 bet was placed at 8:22 by a person unknown and cancelled at 8:55.44. The race went off at 8:56.48.

50. Miller's analysis of the race was essentially - "The horse wanted to go, Wallis, driving it, did not." In Miller's opinion, Wallis whose horse had a "good head of steam" was prevented by Wallis from getting in a "hole" along the rail and thereby lost opportunity. It was pointed out that contrary to the Miller evidence, the horse was clearly seen to be on one line and lugging in at the end. In Hardy's opinion, there was something wrong with the horse.

51. Wallis started from the unfavourable outside post #8 at odds of 17.50 to 1.00 finishing 7th in a seven horse field.

October 18, 2009, Race 10

52. Wallis drove the second favourite, leaving from the 5 post. Forward the fourth favourite, McIlmurray the fifth favourite. They finished eighth, fifth and sixth respectively. Summa bet $1,634.00 and cashed $3,817.95 for a net win of $2,183.95. He excluded Wallis, Forward and McIlmurray. Summa wagered 10% of the Triactor pool and cashed 49%.

53. According to Miller, those three drivers demonstrated little effort. Wallis' horse won its next start in London with Forward driving. Piroski explained that his horse made a move to the front during the slowest quarter. With no hole opening up and to avoid being three wide from the gate he had to use the horse early and it raced badly coming home. Miller's criticism of Wallis included an allegation that he intentionally got the horse in trouble by failing to leave with him.

January 13, 2009, Race 5

54. The Administration contention is that McIlmurray and Piroski permitted horse #1 driven by Charles Taylor to win the race. Miller's analysis is that Piroski never gave his horse a chance to win (content to sit along the rail). Ackerman disagreed completely with Miller. Piroski got away in the two hole and finished third, constituting a good drive and a good result.

55. Piroski denies making a hole for Brad Kramer who, according to Piroski, made his own hole. Piroski's horse went off at 18 -1 and finished 5th. The winning horse went off at 8.90 to 1.00. Piroski described his drive as "a perfect drive" for that horse.

56. The Administration cites Summa's telephone activity on that date. Art McIlmurray phoned Summa's home phone number at 10:49.47 a.m. for 254 seconds and at 10:54.17 a.m. for 57 seconds. A call was made from Summa's phone to Art McIlmurray at 2:12.17 p.m. for 163 seconds.

Calls were made to and from Summa's phone:

7:28.49 (20 seconds) inbound from Piroski's phone
7:29.55 (184 seconds) in bound from Piroski's phone
7:30.24 (53 seconds) outbound to Piroski's phone. Piroski claims to have no recall of that phone conversation but goes on to say – *"they were all the same – I need a winner."*

Calls were made to Summa from McIlmurray:

10.48.15 p.m. (53 seconds)
11:30.59 p.m. (297 seconds)
11:56.02 p.m. (309 seconds)

57. These are suggested to be calls explaining why Piroski finished "in the money". This postulates the unlikely scenario that Piroski could not finish "off the board" with 18-1 shot.

58. With no wagering records for Summa in relation to this race, there is no evidence that he made any wagers.

November 15, 2009, Race 7

59. Piroski drove the 7th favourite from the 4 post and finished 3rd. Forward drove a co-favourite from the 1 post and finished 7th in a 9-horse field. McIlmurray, driving the 5th favourite, finished 8th.

60. Summa bet $1,640 and cashed tickets for $3,898.45 for a return of $2,258.45. McIlmurray and Forward were excluded from these bets. Piroski was included.

61. Summa bet 3% of the total Exactor money, cashing 7% and bet 15% of the Triactor total, cashing 48% of the winning money.

62. Miller offered the opinion that in finishing 3rd Piroski urged this horse more vigorously than he urged horses in the other races shown in evidence. In Ackerman's opinion, there was absolutely nothing wrong with Piroski's drive; gave him a good trip. In his view, McIlmurray's horse was off form.

63. Piroski explained that the horse "Bad Dillinger" was owned by a friend and Piroski rarely drove it. The horse needs an aggressive drive – to rough him up. This was not Piroski's driving style. Piroski's assessment of the 7th favourite going off odds of 18.90 to1 and finishing third, *"I did a great job."*

February 28, 2010, Race 7

64. Forward left from the 6 post with the short priced favourite (0.70 to 1.00). He was parked two wide past the quarter, got to the top by the half, was first by a head at the top of the stretch, finished second and was placed back to 4th by the judges. That placing took Forward's horse "off the board", out of the mutuel payoffs. Summa's bets failed largely because Forward did not win.

65. Summa made 20 wagers (all excluding Piroski) totalling $1,297. Summa excluded Piroski from his wagers.

66. Piroski finished last with Prince Rave from the unfavourable 8 Post at odds of 5.45 to 1. Piroski didn't specifically recall the race but commented from watching the video replay that the horse just would not go.

67. Miller testified that Piroski made no effort to urge his horse. The Administration contends: "The race was fixed by Piroski for the benefit of Summa." Summa did not benefit, cashing zero in both Exactor and Triactor pools.

March 2, 2010, Race 6

68. Piroski, Forward and McIlmurray drove the third favourite and finished 9th, the fourth favourite and finished 4th and the seventh favourite which finished 5th respectively. All of Summa's wagers excluded Piroski and McIlmurray. Summa made 24 wagers, all losers.

69. Miller testified that Piroski held back and wrestled his horse (PBNJAM). The horse finished last, so far back (25 lengths) that it was required to qualify before being eligible to race again. Having so qualified, it won its next start. Miller's analysis of this race is subject to later comment.

THE MILLER EVIDENCE

70. Miller's quest was to determine whether there was evidence on the racing tapes to support the allegations made by the Ontario Racing Commission. The Miller evidence is opinion evidence. His qualification to offer opinions on race analysis was unchallenged.

71. Opinion evidence of alleged discernible lack of effort goes to the very core of a case that, subject to comment on the McIlmurray evidence that is otherwise circumstantial.

72. A series of significant issues bear on the reliability of Miller's race analysis:

- Miller was not demonstrated to be superior in qualification or experience to either Douglas Ackerman, called by Piroski or Ken Hardy, called by Wallis, both of whom are career horsemen having driven in thousands of races. Each rejected Miller's analysis of lack of effort. With conflicting expert opinions from equally credible sources, the trier of fact can only accept and act upon one of those opinions if satisfied that the opinion is correct. The Administration alleging wrongdoing bears the burden of proof.

- In terms of impartiality of the three expert witnesses, Ackerman and Piroski were unknown to each other; Hardy and Wallis knew each other as western Ontario horsemen. Otherwise there was no business or personal relationship. Miller lacked the important quality of independence. His employer is the ORC. He holds a senior position amongst the ORC judges. Impartiality may be difficult in that circumstance.

- As suggested by Douglas Ackerman there may be a subjective element of seeing what one wants to see? The attribution of body language to driver and horse with video race tapes of this quality may require some measure of subjective input.

- There is generally acknowledged advantage in watching a live race as opposed to a video replay. As stated in Re Husbands 2009 ORCD No 11:

  "It is often said to be an advantage to see the live race. That proposition is not difficult to accept. That the Steward did view the live race may properly be an element supporting the reliability of his/her opinion evidence."

  If that statement is accepted as accurate and thereby reliable then the converse must be accepted. Miller's evidence must be assessed in light of that restricted opportunity to observe. That opportunity was not enhanced by the quality of the tapes recording night races.

- When cross-examined about the fact that none of the four judges on duty for each of the nine races in evidence either noted any irregularity in their Judge's Reports or gave evidence of irregularity, Miller suggested that the race judges would not be concentrating on the non-competitive horses in the race. This suggestion of chronic violation of the Judge's bed-rock responsibility to enforce the rules of racing requires some analysis.

    - The Judge's responsibility is for supervision of the race. Nowhere do the rules suggest that responsibility is confined to the contending horses.

- The Judges were required to enforce the Rules of Racing, among them Rule 22.10 and Rule 22.13 as follows:

  Rule 22.10

  If the Judges believe that a horse is, or has been driven with design to prevent it winning a race or races, they shall consider it a violation by the driver.

  Rule 22.13

  If the Judges believe that a horse has been driven in an unsatisfactory manner, not otherwise specified in these rules, they shall consider it a violation and furnish particulars thereof to the driver, prior to the instituting of any action therefor.

- Judges at Windsor could be expected to be on the alert because of reported suspicious races.

- The Judges had the advantage of observing the live races. There were four on duty, one in the starting car which accompanies the horses around the track, three in the Judges Stand equipped with binoculars, video displays and replay facilities. Those judges were under a duty to enforce the rules of racing and thereby to be on the watch for infractions such as:

  - Laying off a normal pace and leaving a hole when it is well within the horse's capacity to keep the hole closed – Rule 22.05.01 (j).
  - Failing to properly contest a slow pace - Rule 22.05.01 (l).

- They would be alive to circumstances where a favourite raced in a suspicious manner. They had individual opportunity to observe. They had collective opportunity to confer. None detected perceptible lack of effort. None was disciplined for failure to perform duty. That none of the race judges testified for the Administration gives rise to the inference that such evidence would not have advanced the Administration case.

- Not only did the presiding judges make no observation of impropriety, no person having a financial interest in any of the races - owners, trainers, drivers, was heard to make objection.

73. In support for his opinions, Miller made reference to a horse winning its next start. This to support the inference that it raced below form in the start in issue. The bald statement that a horse won its next start has little value in comparative terms. Helpful would be, the class of the race, post position, whether the track was half-mile or larger, track and weather conditions, the driver, the race or flow of the race such as a fast half, the date of the race, equipment changes

and other similar routine handicapping features. Miller's evidence of subsequent race performances would have been rendered more relevant by such information.

- An opinion may be advanced under the guise of fact or conclusion. An example of stating an opinion as fact may be found in Miller's analysis of Race #5, January 13, 2009. Miller refers to driver Charles Taylor winning the race. By stating this opinion:

  "I would say that he was "put over" in this race." (underlining added)

  Miller goes further by propounding his opinion under the guise of an emphatic statement of fact:

  "Mr. Taylor "was put over" in that race." (underlining added)

74. The expression "put over" has the connotation - pushed home to win or permitted or set up to win. It is noted in passing that Taylor had the rail or #1 post, one of the preferred post positions, left with the horse, set the pace and won wire to wire.

- Repeatedly Miller strove for acceptance of his opinions, commonly advancing them under the guise of fact. Miller was very much the advocate witness. Enthusiasm for one's own advocacy can lead to overstatement; and attempted demonstration can become attempted persuasion. .

- A series of vulnerabilities give rise to grave concern over the objectivity and reliability of Miller's opinions.

Firstly PBNJAM

75. Miller's evidence was emphatic and repetitive. That Piroski wilfully drove PBNJAM (Race 5, March 2, 2010) so that the horse finished last, beaten 25 lengths. Miller's evidence was:

- *"This is going to be Mr. Piroski backing out of it just before the start. He has got a pretty good hold on his horse here."*
  "Mr. Piroski is in last place out of the picture here."
  "Mr. Piroski was 4 to 1."
  "He is wrestling his horse pretty good here, has a pretty good hold on him."
  "He is going to start backing away from the field."
  "Mr. Piroski is now beginning to back away from the field."
  "Mr. Piroski is beaten 25 lengths on a horse that is 4 – 1."
  "This horse (Piroski's) went on the list for performance and had to qualify. Mr. Piroski's horse did qualify and won the next start after that when he was given a chance to win."

76. Miller was given opportunity to consider the issue of a possible health problem with the horse. His cross-examination by Piroski's counsel was in part as follows:

Q. Could it be that there was some health problem with this horse?
A. Nothing was reported---. Up until the half, Mr. Piroski has a very, very hard hold on this horse and continues to lose ground after that. He is sitting last with this horse most of the way and just continues to lose ground. A lot of horses will lose interest - a lot of hoses will lose their wind because they have been taken so hard a hold of.

77. The next question to Miller suggested that at first Piroski pushed (or raced) the horse but as breathing problems developed, for safety reasons, Piroski eased up. Miller responded:

> *"No I don't think that is possible. He just continues to lose ground on the field in front of him and the horse loses interest."*

78. Through that sequence, the correct scenario was put to and was rejected, by Miller. He steadfastly contended for his conclusion that Piroski was engaged in deliberate wrongdoing.

79. Piroski explained that during the race, "PBNJAM" had flipped its pallet blocking its airway and he had to ease up for safety reasons. The owner and trainer were present when Piroski stopped the horse and it was still making gasping sounds. On Piroski's recommendation, the owner supplied and the trainer immediately used corrective equipment. Thomas Bain, who has trained horses for 40 years and is currently the Warden of Essex County, trained "PBNJAM". He testified confirming the breathing problems and the use of a corrective plate. As Piroski recommended to him following the race, Bain used a "Protecto-no Choke" plate after that race.

80. Piroski commented that holding back a horse to the extent of being beaten by 25 lengths and thereby winding up on the Judges List, barred from racing would be an unlikely scenario. Ackerman's analysis of the race was simple, direct and correct. The horse was way off form - sick, lame or tied-up.

81. This race was selected by Miller and others as a blatant example of Piroski wrestling his horse back in furtherance of the conspiracy. That analysis was refuted by powerfully buttressed evidence which is accepted as credible and reliable. Searching for the subtle, Miller missed the obvious. The spectre arises as to whether the analysis started with an assumption of guilt.

Secondly

82. Miller's analysis of Piroski's driving of Prince Rave was subjected to persuasive and credible contradiction from multiple sources. In his analysis of Race # 5, October 27, *2009*, Miller describes Piroski as "wrestling" with the horse (Prince Rave) *"which wanted to go"*. Piroski

explained that the steering was *"awful"*. Piroski denied Miller's suggestion that he deliberately made a hole for Wallis. Piroski describes his horse as *"darting out"* in consequence of steering difficulty. Piroski explained that he looked over his shoulder to yell a warning at driver Rankin that he was having trouble steering as they came off the turn into the stretch. After the race, Piroski commented on the steering problem to the trainer in light of the many variations in equipment tried in the past. Piroski recommended that all that equipment be taken off. This was done; the horse won its next start. That equipment change can be seen on video tape of the races.

83. In Ackerman's opinion, Piroski was having observable steering issues; the horse was uncontrollable, all over the track. In Hardy's opinion, Piroski did not deliberately move out to let Wallis through (and go on to win). He supported his opinion by the credible observation that the horse's head was turned in as it moved out. If Piroski was reining his horse out to let Wallis through on the inside, the probability is that the horse's head would be turned out by the reining action. Accordingly, it was going against the reins, against Piroski's attempt to keep it in by turning its head in.

84. Nick Stewart, a harness horse driver who had driven Prince Rave about ten times, testified that it was a hard horse to hold, drive and steer notwithstanding multiple experimental equipment changes. Driver Mark Pezzarello filed a statement in evidence stating that he drove Prince Rave twice in 2010; that it was a difficult horse to steer with a tendency to run in and out.

85. Miller's inability to detect the difficulty in steering Prince Rave reflects upon the validity of his opinions in the three races in evidence in which Piroski drove Prince Rave. As well, Miller was clearly wrong about the PBNJAM RACE. That renders Miller's opinions open to serious challenge in four of the six races in which Piroski drove and four of the total of nine races in evidence.

Thirdly

86. In relation to race 5, January 13, 2009, Miller's contention that Piroski whose horse left from the 3 hole at 18-1 could not prevent the horse from finishing third is beyond credulity.

Fourthly

87. Miller's explanation for no detection of irregularity by the on site Race Judges is suggestive of attempted bootstrapping or bolstering of his own testimony - a form of advocacy.

88. The allegations against Wallis and Piroski are grave. A high standard of care would be appropriate both in coming to conclusions and then in not overstating them in evidence. The cumulative result of these deficiencies in the Miller evidence fosters profound concern as to its

reliability. Undoubtedly his evidence was well-intentioned. Enthusiasm, however, may have overwhelmed accuracy.

89. The cumulative effect of those frailties in the Miller evidence is to raise insurmountable doubt about the value of this opinion evidence.

In consequence, this race analysis opinion evidence is fragile, suspect and of negligible, if any probative value.

THE MCILMURRAY EVIDENCE

90. The Administration proposed calling Arthur McIlmurray, a Michigan-based race driver. The ORC has no power to compel McIlmurray to attend and testify at the Hearing in Ontario. The Director of the ORC petitioned the United States District Court for the Eastern District of Michigan Southern Division to take the deposition of Art McIlmurray, resident of Oakland County, Michigan. By Order, February 18, 2011, the Court granted the Director's petition for discovery in aid of international proceedings by deposition of Art McIlmurray. McIlmurray's attorney, James L. Feinberg, responded by letter March 4, 2011.

> "Please be advised that Mr. McIlmurray asserts his privilege under the Fifth Amendment not to testify on this basis that to do so might tend to incriminate him. He will not answer any questions if the examination proceeds."

91. However, McIlmurray had two prior interviews with Police; the first audio taped in the presence of Sergeant Schandlen during execution of a search warrant at Summa's home. The second was a conversation secretly taped by Michigan Police Officer, Tom De Clerq, at a Big Boy Restaurant in Michigan. Present during the second taping were Michigan racing official Coberly, McIlmurray, ORC Investigator Sgt. Schandlen and De Clerq. No notes were made by any of the parties. The interview was not under oath or affirmation. Since McIlmurray refused to testify, an issue arose as to the admissibility of his recorded statements.

Section 15 SPPA provides:

> *"….a tribunal* <u>may</u> *admit as evidence at a Hearing whether or not given or proven upon oath or affirmation or admissible as evidence in a Court:*
>
> *a) any oral testimony and*
>
> *b) any document or other thing*
>
> *relevant to the subject matter of the proceeding and* <u>may</u> *act upon such evidence …"*

(underlining added)

92. The purpose of that two-fold permissive power is to facilitate the expeditious quasi-judicial function of the Administrative Tribunal. The safeguard is that upon admission, the evidence is assessed and evaluated according to its worth.

93. The race fixing allegation strikes at racing integrity and so is of fundamental importance. The presentation of evidence ought not to be impeded by an overly formalistic adherence to rules of admissibility in the criminal trial setting. Section 15 gives a permissive power. That power should be invoked because of the importance of the issue. In the interests of fairness and natural justice, the countervailing remedy must be careful scrutiny of the evidence so admitted in itself and in the context of the entire evidence.

94. There is secondary avenue of admissibility. *Under the principled approach Hearsay Evidence is admissible if it is necessary to receive it and if it is reliable in the sense that there are sufficient guarantees of trustworthiness to receive it.* R. v Smith 1992, 2 SCR 915 paras 30 – 36. The requirement of necessity is flexible and may be satisfied by such as invoking the Fifth Amendment right by a U.S. citizen. Evidence of a conspiracy is often circumstantial, direct evidence being so difficult to obtain with co-conspirators protecting themselves. This bears on the necessity component of admissibility.

95. The principal focus of the inquiry into reliability is on circumstances concerning the declarant's testimonial qualities. The Panel determines threshold reliability, that is, whether the evidence is reliable enough to be considered by the trier of fact. If the statement is admitted in evidence, then the trier of fact determines its ultimate reliability, that is, to what extent the evidence is true or what inferences are to be drawn from it. Hearsay evidence may meet the test of threshold reliability and thus be admitted in evidence only to be rejected or given little weight.

96. In terms of "necessity", McIlmurray's solicitor confirms that McIlmurray is invoking his constitutional right to silence. This is an effective mode of satisfying the necessity component.

97. In terms of "reliability", there is a measure of threshold reliability in that the content was preserved by audio-tape. Both tape and transcript have deficiencies. So accuracy is uncertain. This is particularly so in relation to some segments claimed to be incriminating. Transcripts of this Hearing will enable ready identification of some of those obscure passages because of replaying sections of the tape in an attempt to improve comprehension.

98. A third issue of the balance between probative value and prejudicial effect was not argued. The prejudice element relates not to the extent of the incrimination but to the fairness issue.

99. Admissibility of the two statements was determined in an informal voire dire setting. The Panel instructed itself that the tape recorded evidence is what is heard. The transcript representing only what someone else thought he/she heard has no evidentiary status and is used only as a guide in following the audio tape.

100. The following comment is instructive:

"The tribunal must listen fairly to both sides giving the parties to the controversy a fair opportunity for correcting or contradicting any relevant statement prejudicial to their views". Board of Education v Rice 1911 AC 179 (H.L.) at P 182. Local government Board v Arlidge supra at PP 122 and 141. Racing and its integrity must be protected but not at the expense of procedural fairness and natural justice.

101. In result, on the authority of Section 15 SPPA, guided by hearsay principles and at least not unmindful of the balance between probative value and prejudicial effect, the McIlmurray statements were received in evidence.

102. On March 4, 2010, the date of execution of a search warrant at McIlmurray's residence by Michigan State Police, McIlmurray made the first of two statements admitted in evidence. The latter part of that interview was not recorded. Sgt. Schandlen who participated speculated that the tape recorder battery failed. He testified from his notes and memory that McIlmurray said during that unrecorded portion the following:

- He met Summa at MacDonald's near Windsor for payments.
- Summa had McIlmurray deliver rolls of money to Forward and to Piroski.
- McIlmurray had delivered money to the Windsor paddock.
- Kevin Wallis was close to Summa and was the "main guy" setting up at Windsor for Summa.
- Kevin Wallis has delivered money from Summa to him.

103. The recording lapse was in part compensated by the Michigan Police report which supported Schandlen's note and memory.

104. The first statement was in part:

McIlmurray *Here's what Sam – here's what he wants to do – and I – many, many times have I said, no, I pass, no I don't want nothing to do with it.*

105. That passage was submitted as indicating McIlmurray's knowledge of proposed race fixing activity by Summa and denial of any participation. In another passage, McIlmurray purports to implicate others.

McIlmurray	*Like I said, one guy might come up and say - hey that guy wants – wants you to take care of this, and I'd say no, no.*
D. Sgt. Yonker	*And who would that guy be?*
McIlmurray	*Donnie Harmon or Gene Piroski, whatever in – you know in Windsor.*
D. Sgt. Yonker	*You threw out Gene Piroski's name at – at Windsor.*
McIlmurray	*And Brad Forward, yeah, whatever.*

106. On March 11, 2010, McIlmurray made his second statement, this to Det. Sgt. Tom De Clerq. McIlmurray acknowledged distributing money to other drivers. He implicated Wallis as having driven in a suspicious manner and as one of the participants in Summa's activity. He referred to Piroski as being involved in Canada. He stated that Wallis was above McIlmurray in the hierarchy and had more to do with Summa than McIlmurray did, and that Piroski had distributed money on behalf of Summa at Windsor. His testimony is that the payments to participants ranged from $300 to $700 per race. His statement incriminating Wallis and Piroski was contradicted by them under oath and directly challenged as untrue and unreliable.

107. With disputed hearsay evidence, credibility is a central issue. The necessity for cross-examination is heightened. There is an overriding duty of basic fairness and natural justice which requires that McIlmurray's evidence be assessed in light of there being no opportunity to cross-examine and secondly of the patent vulnerability of that evidence to cross-examination. Before accepting and acting upon evidence, the trier of fact must be satisfied that it is truthful and reliable.

108. Accordingly, McIlmurray's evidence in this hearsay form must be carefully scrutinized. In terms of substantive reliability, the utterances by McIlmurray were:

- Surreptitiously recorded on the second occasion with the result that no complete and accurate record remains.
- In threatening and intimidating circumstances at different time during the interviews, McIlmurray was told by Police that he was:
    - Facing a 20-year felony charge.
    - Guaranteed that he would never again hold a racing licence.
    - That the case against him was solid.
- His statement was made in response to offers of substantial inducement as follows

- A better chance of not going to jail.
- A better chance of restoring his racing licence.
- A "lot easier trip" if he "played ball".
- The inducement "Canada wants your help and will go a long way".
- "We will protect you" from the consequences of having provided information or evidence incriminating others.

109. Following these threats and inducements by a person in authority, McIlmurray was careful to further his own interest by a declaration of innocence in that *"I never fixed a race"* and an offer of cooperation in order to have his licence restored (*"I still have good years left"*). The vulnerability of his recorded conversations is demonstrated by:

- That evidence is unsworn.
- The Panel had no opportunity to observe McIlmurray's demeanour (an element in assessing reliability and credibility).
- No opportunity for defence cross-examination. This significant issue relates to fair opportunity for correcting or contradicting any relevant prejudicial statement. This parallels the sixth amendment right in the USA, "to be confronted with the witnesses against him."
- Evidence from any accomplice has inherent frailty.
- Evidence from a person of unsavoury character such as a participant in dishonest racing must be carefully assessed.
- McIlmurray may seek to curry favour with authorities to derive a benefit by providing untruthful evidence implicating Wallis and Piroski, that benefit being avoidance of a significant prison term and restoration of his racing licence.

110. Bearing on McIlmurray's credibility, McIlmuray claimed to investigators that Wallis was "higher up" in Summa's activity than was McIlmurray. This assertion must be assessed in light of:

- 12 telephone contacts between Wallis and Summa; 600-700 telephone contacts between Summa and McIlmurray.
- When asked by investigators for names of persons involved, McIlmurray named others but did not mention Wallis. Investigators Schandlen suggested Wallis' name to him. McIlmurray continue his pattern of groping for favour agreed with the suggestion.

111. Having thus implicated Wallis to Michigan Police, McIlmurray denied having done so in a recorded telephone conversation with Wallis. The taped conversation discloses his lies, his

propensity to babble answers which the other party seeks and his concern with exoneration. McIlmurray's statements were self-serving in the extreme.

112. Twin significant indicators of the value of McIlmurray's accusations are:

Relating to Piroski

"Q. What have you heard?

A. Over in Canada I've heard that he's been talking to a couple of other drivers over there.

Q. Okay?

A. Do I know that for a fact ? No. Do I ask the guys? no.

Q. Right?

A. It's none of my business, I don't wanna get involved.

Q. Okay?

A. That – that's the way I want it. I don't wanna get involved.

Q. Who have you heard he's……?

A. Brad Forward and Piroski, Piroski you know.

Q. But you don't know of any…any……?

A. No, I….no, I don't; like I said, all of that's all hearsay too."

113. In that brief sequence, McIlmurray acknowledges that he has no personal knowledge. He is dealing in hearsay. He reports that he does not want to be involved – and that is the theme of his entire interview. In consequence, his statement in evidence is what is sometimes termed "double hearsay".

Relating to Wallis

114. McIlmurray's statement to police was strongly suggestive that he was involved with race fixing by Summa. As such, he had powerful motivation to curry favour with racing and legal authorities. During his interrogation, McIlmurray was immersed in self-interest, groping desperately for a way to find favour and with it preferential treatment. McIlmurray's assertion that he had been threatened and was apprehensive about his personal safety, and nonetheless went on to win races when he was supposed to finish off the board, is beyond credible acceptance.

115. That Wallis taped his telephone conversation with McIlmurray is not surprising given McIlmurray's patent unreliability. That state of affairs was capsulized by Mr. Cooke's assessment of the McIlmurray evidence. *"His evidence was given unimpeded by any allegiance to truth."* - An appraisal memorable for elegance and accuracy.

116. Standing alone, McIlmurray's accusations are unsupported by either internal specifics, detail or consistency or by external corroboration. There are no indicia of reliability by oath, demeanour long-standing good character or the like. McIlmurray, himself, is devoid of credibility or reliability. His motivation is self-preservation at any expense. His evidence adds nothing to the Administration case.

WAGERING PATTERNS

117. The wagering pattern is the foundation for the Administration case. It is a component in assessing the validity of Miller's claim of obvious holding back of horses.

118. Unquestioningly, Summa was a gambler and generally known as such. Boxes of mutuel tickets in his basement, his regular attendance at the track, his preferential treatment by track management, the amounts, frequency, sophistication of his wagers, his use of the early large wager later cancelled in order to manipulate odds, his use of self service terminals, his use of wagering vouchers all support that conclusion. That Summa bet early and at different terminals carries no incriminating inference. Those may be tactics of someone knowing his selections and not wanting to create unwelcome attention to the amount of his/her wagers.

119. Summa sought information from Wallis and Piroski and according to their evidence received it. Information that the horse was off form, in "too tough", or needed a training mile or a "tightner", could have just as much value and be probably a lot more reliable than an opinion that a certain horse would win.

120. With one exception (Race # 5, October 27, 2009 which Wallis won) the nature of his wagers was not consistent with Summa's information relating to probable winners. Generally his exotics were not based on a certain "key" or "wheel" horse being the winner, (example, #7 to win, with 3, 4, 5 to place, with 3, 4, 5, 6 to show). With that scenario, he would cash only if the 7 horse won followed by correctly forecasting the place and show horses. His pattern is that of a person being given horses that were not expected to feature in the mutuel payoffs. For a driver to respond - "I don't expect the horse to race well because he is (sick, sore, in over his head and so on) may be a breach of the touting prohibition; standing alone it is not race fixing.

121. Racing is competitive with reward for success. Trainers, drivers and owners strive for that success. This can include the elusive pursuit of an "edge". Wagerers or punters compete. Individually they seek an edge. Information has value. Much of it is public provided by race

lines, trackman's selection, articles and opinions published in race programs, opinions of drivers and trainers elicited by track interviewers and published over close circuit TV monitors immediately before the race goes off. A less public form of that same information is to have the trainer or driver mark the race card for one of his/her owners or friends. That information may relate to horse's blood being "down", virus in the barn; recovery from some minor disability and the like. That information is assessed for reliability or probability in light of the punter's own capability based on races, training miles or warm-ups that he/she has observed.

122. Bettors may be assisted by good or bad news relative to a certain horse. If the bettor has any level of wagering sophistication, he/she will be playing the exotics. The wagering question may be approached firstly - what type of bet? (A "box" bet covers any order of finish for the horses selected) and secondly, which horses are to be included or excluded.

123. Summa was everyone's friend, ingratiating himself with drivers, seeking an edge. Through his persistent quest for information possibly provided by some of the 30 odd drivers that he contacted, he hit "the big ones" well beyond normal experience. McIlmurray's utterances may excite a vigorous suspicion that Summa and McIlmurray may have been engaged in race fixing but that issue is not for determination in this forum.

124. If there is a reasonable explanation found in the evidence for the few instances where Summa excluded Wallis and Piroski that undermines the claimed incriminating effect of the wagering pattern. Such a plausible explanation is not conjecture. There is no need to search beyond the evidence. Both Wallis and Piroski testified that as requested, they offered opinions about their horses' chances. That conduct could reasonably be expected at every racetrack on every race date. From the public perspective, the sport is about entertainment and gambling. Those who have access to "barn information" will seek it and act upon it. If Summa acted upon opinions expressed by Wallis and Piroski, the same betting pattern would result.

TELEPHONE RECORDS

125. The comprehensive investigative review of telephone records revealed that the only calls between Summa and Wallace were in July and August, 2009 when the Windsor track was closed for the summer season.

Summa called Wallis' home twice:

January 6, 2009	11:09 p.m. for 0 seconds
January 13, 2009	7:30 p.m. for 59 seconds

Wallis called Summa's home phone 11 times:

July 6, 2009	7:36 p.m. for 195 seconds
July 20, 2009	3:08 p.m. for 188 seconds

	5:26 p.m.	46 seconds
	5:27 p.m.	44 seconds
July 24, 2009	2:33 p.m.	40 seconds
July 27, 2009	6:01 p.m.	123 seconds
August 3, 2009	5:11 p.m.	141 seconds
	10:26 p.m.	42 seconds
August 7, 2009	5:58 p.m.	18 seconds
	8:20 p.m.	34 seconds

Summa called Wallis a third time:

August 3, 2009	10:26 p.m.	2 seconds

Piroski called Summa's home number three times:

January 11, 2009	9:04 pm. for	65 seconds
January 13, 2009	7:28 p.m.	20 seconds
January 13, 2009	7:29 p.m.	184 seconds

There were seven calls from Summa to Piroski.

126. With the one exception noted herein, there were no Summa telephone contacts with Wallis or Piroski on the dates of the nine races in evidence.

THE PIROSKI EVIDENCE

127. Piroski has been licensed in Ontario as a driver since 1991. His ORC record for racing violations is unremarkable over about 20,000 races.

128. The evidence was that Piroski had raced in Michigan once in the last ten years. He testified that he met Summa at the racetrack backstretch and started to get phone calls asking for tips. On a couple occasions he returned the calls. Piroski responded giving his opinion, nothing more nothing less. He was paid nothing by Summa or anyone else. When he learned that McIlmurray had implicated him, he was dumfounded because his career could be in jeopardy. He had conspired with no one to finish out of the money.

129. He described his relationship with Wallis as competitors. He denied knowing McIlmurray very well. He and Brad Forward had been friends. He had no association with the Michigan drivers who were under investigation. Piroski stated that he phoned Wallis two or three times and never phoned McIlmurray.

130. On March 8, 2010, a statement by Piroski to Investigator Arrand was video taped. That statement was introduced in evidence. Piroski described his state of mind during that interview as confused and uncomfortable wanting time to process information coming from Arrand.

131. Peroski explained that his assertion *"sometimes yeah I guess"* was in the context of and in relation to speculation about scenarios that could be construed as race fixing. It was not an admission to complicity in the claimed conspiracy. His statement -"I guess I could be one of those involved" was in relation to his broad definition of racing conduct that could be seen as race fixing.

132. Piroski's utterances during the video taped statement clearly indicating that he contemplated a further interview were such as:

- His references to a lifeboat (assistance from the Administration).
- His enquiry as to what advantage had been offered to informants.
- His repeated references to a further interview may be taken to indicate he may have more to say.
- That there were currently no offers on the table by the Administration.
- His statement that he would rather be a "liar" than a "rat".

133. In relation to that contemplated second interview, Piroski testified that he "knew some stuff" related to race fixing in the sense of less than maximum effort resulting from racing considerations such as post position, track condition, an overmatched horse and so on. In that context he raised the issue – Is giving the horse an easy trip for seemingly valid reason race tampering? He stated every driver has encountered similar situations. To discuss such information would ruin his career - no more drives. In that context he claimed to have used the expression that he would rather be a "liar" than a "rat". By saying he would rather deceive than give information incriminating his associates, he casts a significant shadow over his own credibility. On March 11 Piroski advised Constable Arrand that he did not want to meet again.

THE WALLIS EVIDENCE

134. Wallis' racing record spans a 35-year interval with one TCO_2 violation in Florida resulting in a 30-day suspension. Other than that, he has mainly driving violations with suspensions not exceeding 3 days. He has driven in an estimated 50,000 races with 9071 wins. Wallis, although not regularly racing at premier tracks, has been a prominent driver in the south-western Ontario and Michigan circuits and at Pompano Park.

135. In response to investigator Arrand's instruction, Wallis attended for an interview in London on May 25, 2010. By then he knew of this investigation and attended without counsel. He acknowledged meeting Summa at the racetrack. Wallis found Summa to be friendly and spoke to him occasionally by phone. His wife trained a horse for Mrs. Summa about 2003 for less than a year. From 2002 to 2009, Summa and Wallis were out socially on three occasions. He had

never been to Summa's private room at Windsor Raceway. Summa would ask if Wallis had horses that he "liked or didn't like." Wallis estimated the frequency as monthly. Summa brought Wallis a gift of inexpensive cigars or vodka on a few occasions.

136. Wallis denied any knowledge of race fixing and receipt or handling of money for Summa other than for training and racing Mrs. Summa's horse. Until March 25, 2010 he was unaware that he was suspected or accused of race fixing. He described no social interaction with any of the suspected participants in a race fixing conspiracy. Wallis testified that after learning that the investigation included him, he phoned McIlmurray endeavouring to recruit him for his defence. The conversation was taped by Wallis unknown to McIlmurray.

137. Wallis testified that in none of the races replayed during the hearing in which he participated (5, one of which he won) did he have complaints from any driver, trainer, owner or race judge. In response to and denial of Miller's accusation of failure to urge the horse, Wallis described some of the many ways in which a horse may be urged, a variety of voice commands, use of the driver's foot (not uncommon and not according to the rules), striking the wheel disc with the whip to create noise or striking the saddle pad.

138. In assessing the credibility and reliability of testimony by Wallis and Piroski, it stands to their credit that through long involvement in horse racing neither has any record for honesty or integrity violations. Their denials were under oath. The significance that witnesses attribute to their oaths covers a broad spectrum.

139. The Administration seeks to discredit Wallis' testimony because he offers no other explanation for Summa's conduct. Wallis is under no obligation to explain Summa's actions or thought process and ought not to be called upon to speculate.

140. The Administration seeks to impugn the Wallis and Piroski denials because as persons charged they have a motive to mislead or lie. That assertion is improperly premised upon an assumption of guilt. An accused person has a right to a fair and reasonable assessment of his/her testimony. That the person is on trial is but one of the elements for consideration.

141. Both Wallis and Piroski have major credibility problems. The Wallis call to McIlmurray has troubling undertones. Wallis' reference to no expectation that something would "explode"; his comment about all being on the same page; his blanket denial of hearing of suspicious conduct; Piroski's contemplated second meeting with Arrand and the reason for it; his interest in the "lifeboat", his reference to a "rat".

142. In relation to Piroski's contemplated further discussion with Arrand, the Administration contends for the leap of faith that if one accepts that Piroski indicated knowledge that must mean guilty participation. An alternative reasonable conclusion on the evidence may be that,

although not involved, he had information either by knowledge or scuttlebutt but was apprehensive of recriminations and wanted time to think about making disclosure. If so, that he had knowledge or hearsay scuttlebutt falls far short of guilty participation.

143. Piroski presented as a bright and articulate witness. Whether his explanations are true or conceived after the fact, only he knows. The aspects of racing to which he made reference did not seem to cause him concern prior to Arrand's intervention. Acceptance of Piroski's proffered reason for wanting to delay further discussion with Arrand would require benevolence of a high order. The more probable explanation would seem to be possession of information.

144. Utterances or disclaimers by Wallis and Piroski are of little persuasive force. Nonetheless, if every word from each is rejected, the burden of proof to the required extent remains on the Administration.

A HIGH STANDARD OF JUSTICE

145. A disciplinary suspension can have grave and permanent consequences upon a professional career. The Supreme Court of Canada in Kane v University of British Columbia, 1980 1 SCR 1105 Dickson J. adds a cautionary instruction of prime importance.

> *"A high standard of justice is required when the right to continue in one's profession or employment is at stake. A disciplinary suspension can have grave and permanent consequences upon a professional career."*

THE STANDARD OF PROOF

146. In closing submissions, the Administration describes the standard of proof - *"simply needs to establish that it was more likely than not that the licensees engaged in the race fixing duct alleged."* That civil standard is correct. The criminal standard of "beyond reasonable doubt" does not apply (F.H. McDougall 2008 SCC 53 at para 40). "Balance of probabilities" means evidence which compared with the opposing evidence has the more convincing force or greater probability of truth. If the trier of fact can say about a particular issue – "We find it is more probable than not," - then the burden of proof has been met.

147. It would be over simplification to consider that the McDougall case negates the need for caution sounded by Justices Rand and Cartwright in the following references in Bernstein. The standard of proof for an Administrative Tribunal dealing with allegations of professional misconduct has been reviewed by Canada's most prominent jurists with authoritative direction from our highest Courts. In the1977 case before the Divisional Court, Bernstein & College of

Physicians1977 15 O.R. (28) 447, those cases were thoroughly reviewed resulting in the following statement by O'Leary J.:

"In my view discipline committees whose powers are such that their decisions can destroy a man's or woman's professional life are entitled to more guidance from the Courts than the simple expression that "they are entitled to act on the balance of probabilities". By referring to the decisions of several distinguished jurists I hope I have made it easier for them to understand the kind of proof required before a conviction can be entered in a particular case. The important thing to remember is that in civil cases there is no precise formula as to the standard of proof required to establish a fact.

In all cases, before reaching a conclusion of fact, the tribunal must be reasonably satisfied that the fact occurred, and whether the tribunal is so satisfied will depend on the totality of the circumstances including the nature and consequences of the fact or facts to be proved, the seriousness of an allegation made, and the gravity of the consequences that will flow from a particular finding. The grave charge against Dr. Bernstein could not be established to the reasonable satisfaction of the Committee by fragile or suspect testimony. The evidence to establish the charge had to be of such quality and quantity as to lead the Committee acting with care and caution to the fair and reasonable conclusion that he was guilty of the charge. In this case where Dr. Bernstein, a man of good reputation swore that no impropriety occurred between himself and Jo-Anne Johnston it would take very strong evidence to destroy his defence of his reputation."

148. That need for caution flows from the following concepts expressed by the eminent jurist Cartwright J., soon to be Chief Justice of the Supreme Court of Canada:

"Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction <u>is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved…"</u> Cartwright J. in Smith v Smith and Smedman 1952 2 SCR 312. (underlining added)

Cartwright J. goes so to state at P 331-2:

"I wish to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required. To be proved it must be reasonably satisfied, and whether or not it will be so satisfied must depend <u>upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding."</u> (underlining added)

Cartwright J. then goes on to conclude his judgement stating:

"The <u>gravity of the consequences</u> flowing from a particular finding assumes great importance in such a case." (underlining added)

149. That there is no incompatibility between the civil standard in McDougall and the high standard of justice in Kane and the need for caution in the Bernstein line of cases is demonstrated by the passage from McDougall in para 40:

> "*Of course context is all important and a Judge should not be unmindful where appropriate of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof."* (underlining added)

150. A similar theme relating to the evidentiary burden which is a component of the standard of proof was sounded in Zubcoff and Lester ORC SB 011/2008 as follows:

> *"53. The burden of proof before administrative tribunals is the subject of comment in the Reasons for Decision in the Appeal of SB Licensee Brian Scott, August 1, 2007 as follows:*
>
> *54. "8. As endorsed by the Divisional Court in L.S.U.C. v. Neinstein March 19, 2007:*
>
> *"While the civil standard of a balance of probabilities applies in the professional discipline context the authors say:*
>
> *Probability depends on the circumstances and where there are serious consequences at issue, a higher or more rigorous evidentiary standard must be met for the fact to be found probable. This more rigorous approach to the evidence involves a qualitative assessment of the evidence for cogency and persuasiveness in determining whether the fact in question has been demonstrated to be probable."*
>
> *"9. The standard of proof issue is resolved by Stetler v. Agriculture 2005 (76) O.R. 321 ONT. C.A. Although generally categorized in administrative matters as being on the balance of probability, by reason of vital issues relating to employment and more distantly to livelihood, "clear, cogent and convincing" evidence is required (Bernstein Standard). See "Coats v. Registrar" 1998 65 O.R. (2nd) 526)." For further information on this issue, please refer to Administrative Law by David T. Mullans, 2001, p. 97 and 98, Onus and Standard of proof re further discussion Bernstein and Stetler."*

151. In result, the civil standard applies. However, the evidential burden remains as cogent, clear and convincing as it applies to the elements which must be proved - all to be assessed in context and that context includes the seriousness of the consequences. It would be patently and grievously wrong to act upon evidence which is unclear and unconvincing.

152. The testimony underlying findings of fact must be credible and reliable. Evidence that is fragile, dubious or suffering from inherent unreliability, falls short of the mark. Weak and non-

persuasive evidence supplemented by weak and non-persuasive evidence does little to augment probative force. Vigilance of a high order is required in assessing the evidence and determining that the proper inferences are drawn.

CIRCUMSTANTIAL EVIDENCE

153. Proof by circumstantial evidence is proof of the fact in issue by rational inference from other proven facts. The more circumstances, the more important and independent they are, the more strength there is to the circumstantial evidence. That evidentiary standard requires the trier of fact to examine the items of evidence separately and to assess them collectively. Lacking any credible direct evidence, does this evidence, properly assessed, meet the standard and burden of proof required of the Administration?

THE ADMINISTRATION CASE

154. Wide-ranging phases of the investigation failed to implicate Wallis or Piroski in any way as follows:

Surveillance in the US

- From Sept 27 – Nov 23/09, Summa was under surveillance at various intervals while in the United States and on twelve occasions at Windsor Raceway.

Surveillance in Canada

- Wallis and Piroski were subject to surveillance in Canada by three teams on three occasions.

Search Warrants

- On March 3, 2010, Michigan search warrants were executed at the residences of Summa and McIlmurray.

Seizures

- Seizure of Summa's computers yielded nothing relevant to the investigation. Photos of winning horses and boxes of losing mutuel tickets were located. Nothing was seized.

Interviews with 27 persons at Windsor Raceway

- Yielded only the Ladouceur testimony in which neither Wallis nor Piroski is mentioned.

The McIlmurray evidence

- Is patently unreliable.

The Miller evidence

- Miller's evidence although undoubtedly well-intentioned, suffers from numerous and significant frailties. It adds no support to a fragile case.

155. Leaving aside McIlmurray's self-serving utterances and accusations, all hearsay and totally untested by cross-examination, although patently vulnerable, the case is circumstantial. There is no evidence of payment of money to either Wallis or Piroski, nor is there evidence of the content of any communication between conspirators, telephone intercepts, race planning, requests for participation, meetings, or such as discussions recorded by means of one party wearing a wire. There is no evidence of telephone contacts between Wallis and Piroski. Nor is there evidence of improper communication between them by any method. There is no evidence of betting by or on behalf of Wallis or Piroski. It is noted that the scheme is claimed to be of long standing but there is no evidence of financial success sufficient to carry the claimed burden of payments to drivers. There is no evidence by co-conspirators. Of direct evidence of involvement by either Wallis or Piroski, there is none. There is no proof that either Wallis or Piroski deliberately held back a horse to accommodate Summa, or that either was paid to do so.

156. Of the thousand plus races that were examined, the Administration has cited four in which both Wallis and Piroski participated and were excluded by Summa. If evidence of additional such races existed, it would have been capable of dual function.

- To support the inference of their participation by further circumstantial evidence.
- To identify the extent of that participation which would bear on penalty. If either did participate, there may have been a gross divergence in the extent of that participation.

157. Absent direct evidence, a weak circumstantial case remains. That in itself dictates caution. Beware the weak circumstantial case. Circumstantial evidence is to be assessed by its cumulative effort. Moving from one weak phase to a second phase suffering from equal frailty does little if anything to bolster the cumulative result.

RESULT

158. This is not to be interpreted as a finding that Summa and McIlmurray were not involved in a race fixing conspiracy. McIlmurray's evidence is peppered with indelible references against his own interest, which if there is any accuracy and reliability in his utterances, strongly suggest such activity. These findings relate only to the issue of proof of race fixing by Wallis and by Piroski.

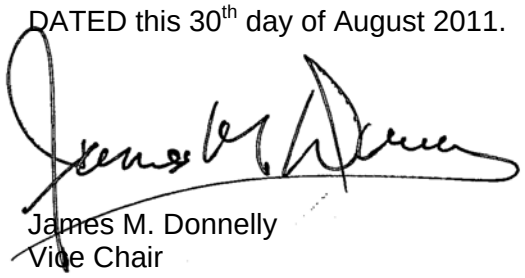
159. This evidence when critically examined as it must be, fails to meet the standard as clear and convincing support for a finding on a balance of probability that either Wallis or Piroski participated in the claimed conspiracy in any way. No finding can be made on this evidence that either Wallis or Piroski conspired or acted to fix the results of races. The Administration case fails to meet the burden of proof. Had that standard been established and subject to submissions, this Panel may have considered varying the penalties to lifetime suspensions.

160. Touting is prohibited by Standardbred Rule 3.06. On the evidence, Wallis and Piroski consorted in some measure with and provided racing information to a known gambler over an extended period, and in Wallis' case, accepting occasional gifts in return. That conduct is contrary to the best interest of racing. No such charges were laid. No opportunity to defend such charges was provided. Accordingly, natural justice requires that no such verdict be rendered and no penalty imposed.

161. Nonetheless, that conduct was voluntary, serious, sustained and characterized by appalling judgment. Perhaps there is no inequity in the fact that their licenses were under ORC suspension from July 3, 2010, to the release of these Reasons.

162. For both Wallis and Piroski, the Director's Suspensions of September 2, 2010 are terminated and the Notices of Proposed Order are rescinded.

DATED this 30th day of August 2011.



James M. Donnelly
Vice Chair