



COMMISSION HEARING

TORONTO, ONTARIO – AUGUST 29, 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, WILLIAM COMPANION AND REG HIGGS**

Standardbred Licensees William Companion (“Companion”), and Reg Higgs (“Higgs”) appealed Ruling SB 123/2011, dated August 25, 2011, which denied a request for a stay of Ruling SB 43259, wherein the horse UNDERCOVER STRIKE was declared ineligible to race for 90 days (August 17 to November 14, 2011 inclusive) in accordance with Rules 11.10.01(2) and 20.01.01(i) of the Rules of Standardbred Racing, for a positive test result for the Class 2 medication, Lidocaine, Desethyl Lidocaine, taken on August 7, 2011 at Flamboro Downs Raceway.

The appeal was heard on August 29, 2011, by a Panel of the Ontario Racing Commission consisting of Chair Rod Seiling.


Angela Holland appeared as counsel for the Administration. Robert Burgess appeared as counsel for Companion and Companion appeared in person. Higgs appeared in person and was self-represented.

Upon reviewing the exhibits filed, upon hearing the testimony of Companion, and of Ms. Aislin Rees, and upon hearing the submissions of counsel for the Administration, Counsel for Companion, and of Higgs, the Panel denied the appeal.

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

Dated at Toronto this 12<sup>th</sup> day of September 2011.

BY ORDER OF THE COMMISSION

  
Rob McKinney  
Acting Executive Director



## REASONS FOR DECISION

### Overview

1. Standardbred licensees, William Companion and Reg Higgs appealed SB Ruling No.123/2011 wherein the Executive Director of the Ontario Racing Commission (ORC) denied their requests for a stay for the horse, Undercover Strike. SB Ruling No. 3259 ruled the horse ineligible to race for 90 days (August 17, 2011 to November 14, 2011) as per SB Rules Nos. 11.10.01 and 20.01.01.

2. An oral decision denying the stay was rendered with written reasons to follow. These are those reasons.

### Background

3. Undercover Strike raced at Flamboro Downs on August 7, 2011 winning an Ontario Sires Stakes (OSS) event thereby earning a purse of \$20,000 for co-owner of the horse, William Companion. The win, by way of the OSS Breeders Awards Program, provided \$3,000 in breeders awards for the breeder, Reg Higgs.

4. Post race testing of Undercover Strike revealed that the horse had a positive test result for the Class II drug Lidocaine. Under the Rules of Racing, as was not disputed by the parties, this is an absolute liability infraction with the resulting penalty under SB Rules Nos. 11.10.01 and 20.01.01, a 90-day suspension of racing for the horse.

5. Mr. Companion received verbal notification of the positive test result by the Flamboro Downs ORC Judges on August 17, 2011. Subsequently SB Ruling No 3259 was issued thereby formally ruling the horse ineligible to race for 90 days. Mr. Higgs who represented himself submitted that he, as the breeder, should have been notified as well.

6. The appellants appealed the ruling on August 24, 2011 (Ex. 1, tabs 9 & 10) requesting a stay on the suspension of the horse. On August 25, 2011, the Executive Director of the ORC, via SB Ruling No. 123/2011, denied the appeal. On that same day, the ORC received verbal notice that the appellants wanted to appeal that decision and an emergency hearing was scheduled for August 29, 2011 to accommodate the appellants as the horse could possibly be made eligible for a race wherein the entry box was closing the next day, August 30, 2011.

7. Robert Burgess, legal counsel for Mr. Companion and Mr. Higgs agreed to combine their respective appeals as one, which is allowed under the ORC Rules of Procedure. The Chair of the Panel, Rod Seiling, at the onset of the hearing advised the parties that the hearing was only related to the merits of the stay and to refrain from raising matters related to the merits of the positive test result. It was noted that the appellants had not had their hearing with the Judges given that the various aspects related to due process were still not complete. The Chair offered to expedite a hearing before a Panel stating that the week of September 12, 2011 was the earliest one that could be accommodated given previous hearing commitments.



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8. Angela Holland, legal counsel for the ORC, submitted that the Executive Director's decision should be upheld stating that a stay can only be granted if there are exceptional and or mitigating circumstances.

9. Mr. Burgess submitted that the stay should be granted given the financial hardship impact on his client a denial would create. He was in support of the rule's objectives but argued that the intent of it was not to catch persons like Mr. Companion who, he claimed, had no intent on violating the rules.

10. He also stated that there were mitigating circumstances as they related to the testing of the horse post race on August 7, 2011, and indicated that he wished to lead evidence from his witness, Mr. Companion, in that regard. He submitted that it was the only way to be able to demonstrate the mitigating factors which was the basis of the appeal. If allowed, it would have resulted in having at least some of the merits of the unscheduled hearing coming forth. The appellant also wished to lead evidence regarding Polysporin, the product used by the appellant that allegedly resulted in the positive test result.

11. The Chair ruled that he would allow the examination in chief to proceed regarding these matters if there was an agreed acknowledgement that to be fair to the Administration, time be taken for it to try and contact the test inspector who took the sample and allow that person to give testimony via telephone. The Chair also put on the record that he would recuse himself from the hearing on the merits of the future appeal. The Administration was able to contact that person, Ms. Aislin Rees, and made arrangements for her to stand by to testify via telephone.

12. Mr. Companion testified that it was an accident as to having the positive test in as much as he used Polysporin on the horse, a product he has used for many years as a trainer and never had a resulting positive test. Following notification of the positive test by the Judges he conducted his own research and discovered that some Polysporin products contain Lidocaine.

13. In terms of issues relating to the correct test collection procedures, the appellant testified that he first realized something was different on the drive home from the race in question and told his wife who works with him. This information, he admitted, was never communicated to the Executive Director or to the Judges or the ORC investigator. He also agreed with Ms. Holland on cross examination that if the test inspector were to state that the test procedures were followed that he would accept that fact. Ms. Rees subsequently testified via telephone that if her name was on the test sample which it was, that she would have collected it and that nothing unusual occurred related to following all the test procedures on August 7, 2011.

#### **Issue**

14. Did the Executive Director correctly interpret and apply the Rules of Racing in denying the request for the stay for the horse, Undercover Strike?



### Reasons for Decision

15. The Commission has a stated policy on stays. That policy has been previously communicated to the industry. The Jordan case [2009] O.R.C.D. No. 47, Ruling No. COM TB 013/2009 simply reconfirms that policy wherein at para 27 it states “No stay is to be granted unless an appellant can demonstrate exceptional or mitigating factors.” The appellants did not meet this test.

16. Vice Chair Donnelly in Moffatt [2008] O.R.C.D No. 4, Ruling No. COM SB 005/2008 at para 61 bullet #2 “...On an application for a stay, the positive drug test which shifts the burden of proof on a balance of probability to the defence is already before the tribunal. Given the prima facie guilty act and its profound gravity, protection of the public, of the competing racing community and of the integrity of racing mitigate against a stay. This is particularly so in relation to illegal performance enhancers such as EPO/DPO and the more serious Class I and Class II breaches.” Lidocaine is classified as a Class II drug.

17. The bar is rightly set high to protect the integrity of the sport as well as the public interest. Too often in the past, licensees utilized due process by way of obtaining stays to continue to participate in racing all the while earning monies they possibly were not entitled to earn. They would wait till a time of the year when they often would abandon the appeal or accept a penalty at their convenience. Allowing continuance of this practice negated the deterrence value contained in the Rules of Racing with a net effect of lost faith in the integrity of the sport by both participants and the public who often inquired how an alleged rule violator was still racing quite some time after the race in question.

18. The Rules of Racing should and must be applied by a Panel of the Board, the ORC officials and to licensees equally. Financial hardship, in and of itself, is not a reason for the granting of a stay. While the Panel may be empathetic to the plight of the appellant from that perspective, it must, in the end, ensure it follows the Rules of Racing.

19. The penalties are severe for Class I, II and III drug violations. That was and is the intent of the rule given their inherent ability to affect outcome. As per para 25 in Jordan as referenced above, “Only by removing income earning potential has the Commission been able to directly involve the owner into the manner in which his/her horse is treated when racing.” It is disingenuous, at best for the industry to argue that the “owner responsibility” rule should only apply to some and not others. “Owner responsibility” has its genesis with the industry that brought the concept to the ORC as a means to combat the use of illegal medications. The ORC has a mandate to protect the public interest. A key component is to ensure no horse races with any prohibited substance. To deliver on that mandate requires a deterrent sufficient to stop illegal and or unethical practices such as the use of Class I, II or III drugs when racing.

20. The alleged mitigating circumstances related to the collection of the test sample became irrelevant with the testimony of Ms. Rees and the appellant’s testimony that he would accept that nothing was amiss with the testing procedures, if such testimony was forthcoming.



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21. Licensees, as Panels in past rulings have stated, need to be aware that the onus is on them to provide the ORC with any and all information that may be relevant in the decision making process. In this appeal, notwithstanding it becoming irrelevant due to the appellant's own testimony, he did not inform the Executive Director of his concerns related to the possible testing procedures not being followed. One cannot and should not expect to have favourable decisions if information is withheld that may turn the tide in their favour, be it from the Executive Director or at a later stage, a Panel of the Governing Board.

22. As to intent, that issue is to come before another future Panel. It certainly is not a mitigating factor as it relates to the granting of the stay but could be a factor under a strict liability defence argument related to penalty. In that regard, the appellants were offered a hearing on the merits of their matter as soon as possible and with this Ruling the week of September 12, 2011, has been set aside with the parties to agree on a specific day.

23. In protecting the public interest, the ORC must treat everyone equally and fairly. That means it must ensure that the Rules apply to everyone equally as per para 18 of this Ruling. There cannot be nor should there be differing sets of rules be they for overnight events versus stake races per se. One cannot support "Owner responsibility" for some and argue against it for others.

DATED this 2<sup>nd</sup> day of September 2011.

Rod Seiling  
Chair