



COMMISSION HEARING

TORONTO, ONTARIO – JANUARY 21, 2009

**N THE MATTER OF THE RACING COMMISSION ACT, S.O. 2000, c.20;**

**AND IN THE MATTER OF THE APPEAL OF  
STANDARD BRED LICENSEE SCOTT MCFADDEN**

Scott McFadden (McFadden) appealed against the Deputy Director's Rulings S.B. 180/2008 and 181/2008 to render the horses, Dr. SHARKEY and REASON TO CELEBRATE, ineligible to race in Ontario for a period of 90 days and placed on the Judges' List from December 8, 2008 to March 8, 2009, pursuant to Rules 11.10.01 and 20.01.01(i) of the Rules of Standardbred Racing. The Rulings were issued further to confirmation of positive tests for Darbepoetin-Alpha (EPO).

On January 21, 2009, a Panel of the Ontario Racing Commission consisting of Vice Chair Hon. James Donnelly, Commissioner David Gorman, and Commissioner Pam Frostad was convened to hear this matter.

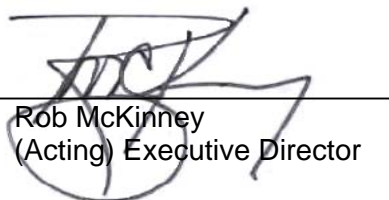
Scott McFadden appeared on his own behalf. Jennifer Friedman appeared as counsel for the Administration.

Upon hearing the testimony of Deputy Director Rob McKinney, reviewing the exhibits filed, and upon hearing the closing submissions, the Panel dismissed Mr. McFadden's appeal.

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

DATED at Toronto this 2<sup>nd</sup> day of February 2009.

BY ORDER OF THE COMMISSION

  
Rob McKinney  
(Acting) Executive Director



### REASONS FOR DECISION

1. Standardbred licensee (owner/trainer) Scott McFadden (McFadden), Licence No. M43234, appeals from the Deputy Director's Rulings SB 180/2008 and SB 181/2008 respectively dealing with his horses DR. SHARKEY and REASON TO CELEBRATE.

2. By those rulings, the horses are ineligible to race in Ontario for 90 days from December 8 to March 8, 2009 as a result of positive tests for Darbepoetin-Alpha (EPO).

3. Premised upon investigative information, ORC officials conducted out-of-competition blood testing of DR. SHARKEY and REASON TO CELEBRATE at a training center at Belle River on September 23, 2008.

4. Precise recitation of the testing history and procedure is unnecessary as the two positive tests are undisputed. In consequence, McFadden was fully suspended for ten years and fined \$40,000. The suspension and fine have not been appealed. In this Notice of Appeal, McFadden states:

"I acknowledge and accept my penalty – 10 years and \$40,000."

5. McFadden was self-represented on the Appeal. He acknowledged awareness of his right to counsel and indicated that it was his choice to proceed.

6. The evidence consisted of an Agreed Statement of Facts (Exhibit 2) and a Book of Documents (Exhibit 1).

7. The issue for determination is the duration of the suspension period.

8. In the Notice of Appeal, Mr. McFadden requests that the suspension run for 90 days from September 23 (the date the blood was drawn) and not from December 8 (the date on which the ORC received confirmation of the positive test from the laboratory). In his submissions on Appeal, Mr. McFadden abandoned that request to make the suspension retroactive. Instead he contended for termination prior to the expiration of 90 days.

9. The suspensions were imposed under the Authority of SB Rule 11.10.01 which specifies both duration and commencement as follows:

"Shall be ineligible to race for a period of 90 days from the date of the identification of the horse with the positive test."

10. The relevant dates are:

Sept 23/08	Out-of-competition blood test.
Sept 24/08	Blood samples delivered to Racing Forensics Inc. for Elisa testing.
Sept 29/08	Racing Forensics Inc. conducted tests on the blood samples.
Sept 30/08	Racing Forensics Inc. reported to the ORC positive Elisa tests for indication of EPO/Aranesp on both horses.



COMMISSION HEARING

TORONTO, ONTARIO – JANUARY 21, 2009

- Oct 1/08 Blood samples delivered to the Pennsylvania Equine Toxicology and Research Laboratory (Petrl) by Racing Forensics Inc. for confirmatory testing.
- Dec 3/08 Petrl testing confirmed Darbepoetin-Alfa (EPO) in both blood samples.
- Dec 8/08 Petrl's report was received by the ORC.
- Dec 12/08 The Deputy Director issued Rulings suspending each horse for 90 days (SB Rulings 180/2008 and 181/2008).

11. The starting date for the suspension is governed by Rule 11.10.01. A cause and effect relationship is created:

- The cause - confirmation of a positive test
- The effect or result - suspension

12. Absent proof of the positive test, there is no authority for suspension. It would be grievous error to suspend upon suspicion of a positive test. The Rule properly makes no provision for retroactive suspension.

13. As Chairman Seiling stated in the Prushnok Appeal 2008, ORC D No. 17 – Ruling COM SB 026/2008:

“This Commission rightly only acts once a confirmatory result is communicated by the official testing body” (paragraph 26).

14. For that reason, the suspension must start from December 8.

15. Mr. McFadden contends for equitable relief because effectively he is out of racing for life. The horses are receiving proper care and training but are not readily saleable because of the suspension. He asks for termination of the suspension to enable him to sell now as part of his exit from racing.

16. The issue then becomes:

- Is there authority to truncate the 90-day period?
- If so, are there circumstances warranting that intervention?

**Power to Intervene**

17. Rule 1.09 states in part:

“Provided however the Commission in its absolute discretion may waive the breach of any rules which waiver or breach the Commission does not consider prejudicial to the best interests of racing.”

18. Power to waive the whole must implicitly include power to waive a part. Accordingly, the Commission would have authority to abridge the suspension period.



### **The Propriety of Intervention**

19. The competing interests are:

- That of an individual. The extent of the benefit to be conferred relates to enhanced ability to sell the horses now as opposed to about six weeks from now (the end of the 90-day period).
- The public interest in a drug-free viable racing industry, which is protected in part by penalties carrying an element of general deterrence.

20. Much has been written and said by the ORC about the pall cast over racing by the illegal use of drugs. Repetition here is not appropriate. Suffice it to say, by Notice to the Industry April 19, 2006, the ORC cautioned that there would be severe penalties for Aranesp (EPO) offences. As stated by Chairman Seiling in the Knight Appeal, COM SB 013/2008, "Medication is a very large concern as it relates to the integrity of horse racing." and further, "Owners have a responsibility to the sport and to the horse."

21. Mr. McFadden seeks equity but he does not come with "clean hands". He abandoned his owner's responsibility for the welfare of his horses by his EPO violation.

22. Mr. McFadden contended that he should derive some benefit for the delay between the taking of the blood and the confirmed result. There was hearsay evidence that the delay resulted firstly, from Dr. Uboh, who is in charge of the Petri Lab being in Turkey, and secondly, from some difficulty with the laboratory equipment. Whatever the reason in Pennsylvania, there was no institutional delay by the ORC and so no reduction is indicated on that ground.

23. Rule 11.10.01 confirmed the concept of owner responsibility as a part of the industry response to the illegal medication plague. The importance of owner responsibility was underscored by designation as an absolute liability offence. (Rule 11.10.03), General deterrence, was one of the objectives underlying the new Rule. Inherent in general deterrence is a hardship element. Deterrence is eroded if compassion overwhelms hardship absent good cause.

24. Rule 1.09 confers a discretion to waive provisions in the Rules of Racing. That waiver is not whimsical. There is a precondition in that the waiver must not be considered prejudicial to the best interests of racing.

25. That precondition cannot be said to exist in this case. Clearly the overall good of racing takes precedence over the convenience and financial benefit of a sale of these horses now as opposed to about six weeks hence.

26. The Appeal must be dismissed. An Order will issue to that effect.

DATED this 2<sup>nd</sup> day of February 2009.

James M. Donnelly  
Vice Chair