



COMMISSION HEARING

TORONTO, ONTARIO – MARCH 30 & 31, 2009

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

**AND IN THE MATTER OF AN APPEAL AND REQUEST FOR
HEARING OF SIMON HUSBANDS**

On December 6, 2008, the Stewards at Woodbine issued Ruling Number TB 5731/08 to Simon Husbands (Husbands) for violating Rules 9.01, 15.09.01 and 16.13(c) of the Rules of Thoroughbred Racing “for an unsatisfactory ride on BUG’S BOY during the running of the third race at Woodbine on November 30, 2008”. Husbands was suspended for one calendar year from December 8, 2008 through December 7, 2009. The Ruling stated: “Mr. Husbands did not persevere with his mount throughout the race or demonstrate an effort to ensure the best and fastest race of which his mount was capable”.

On December 7, 2008, Husbands appealed Ruling Number TB 5731/08.

On December 12, 2008, pursuant to Ruling Number TB ADMIN 20/2008, the ORC granted Husbands a stay of his penalty “until the commencement of the 2009 racing season April 3, 2009”.

On March 30 and 31, 2009, a Panel of the ORC, comprised of Vice Chair Hon. James M. Donnelly, Commissioner Brenda Walker and Commissioner Bernard F. Brennan, DVM, was convened to hear the appeal.

Jennifer Friedman appeared as counsel for the Administration. Dan McMahon appeared as counsel for Husbands.

Upon hearing the testimony of Senior Steward Richard Grubb, Associate Steward Gunnar Lindberg, Woodbine Announcer Dan Loiselle, Dr. Jennifer Creer, Robert King Jr., Louis Cavalaris, ORC Licensed Trainer John Leblanc, ORC Licensed Trainer Larry Attard, ORC Licensed Jockey Slade Callaghan, Ronald Gierkink, ORC Licensed Jockey Richard Dos Ramos, ORC Licensed Jockey James McAleney, ORC Licensed Trainer Danny Yu, and Husbands, reviewing the exhibits filed, and upon reading the written submissions, the Panel allowed the appeal and quashed the suspension.

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

DATED at Toronto this 20th day of April 2009.

BY ORDER OF THE COMMISSION


John L. Blakney
Executive Director



REASONS FOR DECISION

The Appeal

1. TB licensee Simon Husbands (Husbands) appeals the ruling by Senior Steward R. Grubb, and Associate Stewards F. Platts and G. Lindberg, suspending him for one year, December 8, 2008 through December 7, 2009 for “an unsatisfactory ride on BUG’S BOY during the third race at Woodbine on November 30, 2008.”
2. Following the Hearing on December 5, 2008, the Stewards ruled that Husbands “did not persevere with his mount throughout the race or demonstrate an effort to ensure the best and fastest race of which his mount was capable”: ORC Rules 9.01, 15.09.01 and 16.13(c).
3. By ruling December 12, 2008, the Ontario Racing Commission (ORC) stayed Husbands’ suspension “until the Commencement of the 2009 racing season, April 3, 2009.”
4. At the conclusion of the evidence before this Panel and prior to written submission, the Stay was extended pending delivery of a Decision and Reasons in this matter (Rule 24.04.01).

Background

5. BUG’S BOY finished second in the race, beaten half a length by COME ON LOVE, ridden by Patrick Husbands, brother of Simon Husbands.

The Jockey

6. Husbands, age 39, married with children age 19 and 11, was first licensed as a jockey in 1985 in Barbados. Since 1989, he has been licensed by the ORC.
7. In recent times his accomplishments as a jockey may adequately be described as modest. He estimated his annual wins as numbering 10 or 12. (actually 13 to November 30) The purse winnings by his horses in 2008 were said to be between \$600,000 and \$700,000. (actually \$677,495 to November 30)
8. By comparison, his brother, Patrick Husbands on November 30, 2008, about 9 days before the end of the Woodbine season, had purse winnings exceeding \$9,000,000. With 157 wins, he was tied for the lead with James McAleney and went on to win his 5th Woodbine title as the jockey leading in wins.

The Horse

9. That BUG’S BOY despite patient, persistent resolve by his owner and trainer has yet to break his maiden as a six-year-old pretty much says it all.
10. Including November 30, 2008, he had eight starts lifetime, one in 2007, seven in 2008. In the 2007, he earned \$2,118. In the six 2008 starts prior to November 30, he earned \$3,980. He had never finished first, second or third.



11. In his first six 2008 starts, he had been in order:

12 th beaten	11 ¹ / ₂ lengths
6 th beaten	5 lengths
6 th beaten	4 ¹ / ₂ lengths
5 th beaten	5 lengths
10 th beaten	10 ³ / ₄ lengths
9 th beaten	8 ³ / ₄ lengths

12. In his start prior to the November 30 race (November 22), BUG'S BOY finished 9th, beaten eight and three-quarter lengths. At the top of he stretch he had been 8th by five and three-quarter lengths. In the stretch drive, he lost one placing and three lengths. The Equibase commentary on BUG'S BOY performance was – "BUG'S BOY mid pack – 4 wide, chased 5 wide into stretch, all out, flattened out." Simon Husbands was the jockey on BUG'S BOY.

The November 30th Race

13. The wagering public assessed BUG'S BOYS probability of coming home a winner by sending him off at odds of 14.⁵⁵ to the dollar. The winner was 1.⁶⁵ to the dollar.

14. The race was unremarkable to the final ¹/₈ pole. BUG'S BOY broke well from the gate, was rated, covered by but in range of the leaders. He saved ground, tracked along the fence drafting behind COME ON LOVE, the eventual winner, and came out into a passing lane past the final ¹/₈ pole.

The Final 1/8th (a furlong, 220 yards to the wire)

15. Between the ¹/₈th and ¹/₁₆th poles, Husbands took the horse out for the run to the wire. He switched leads successfully, seeking best performance. BUG'S BOY closed on COME ON LOVE but was second, beaten half a length.

The Conduct In Question

16. As is seen in the video replay, there is sharp contrast between the relatively uniform riding tactics of the other seven jockeys and Husbands in the drive to the wire. The seven are flattened out, hand driving or scrubbing with intermittent vigorous resort to the whip. Husbands taps BUG'S BOY on the shoulder briefly and hand drives the horse keeping it on the bit. In the last 4 – 6 strides he scrubs more with his hands. The Equibase commentary is: "BUG'S BOY rated in range, saved ground, closed into stretch, chased, came out."

17. The simple reality was that BUG'S BOY had just run the best race of his life. BUG'S BOY was racing up a Class from his last start. The improvement in his Beyer rating was 10 points. The difficulty was that in achieving that result, Husbands' driving tactics were sharply different from conventional vigorous or aggressive whip resort and scrubbing or hand driving. That contrast triggered the Stewards' Inquiry. That short run to the wire raised a variety of interesting aspects.



Composition of the Panel of Stewards

18. Stewards Grubb, McMahon and Platts officiated during the race. Stewards Grubb, Lindberg and Platts conducted the Hearing, Steward McMahon being otherwise engaged.

19. No issue was taken with Steward Lindberg's authority to participate in the Hearing having not officiated during the race. The issue being neither raised nor argued, we are not called upon for formal decision. For today's purpose, we accept Steward Lindberg's jurisdiction.

20. There may be benefit in continuity of personnel. It would seem probable and proper that the Stewards' panel would consider as part of its evidence the live race. That being so would tend to support no change in the Panel for a Hearing arising from the race. However, exigencies of moment may render this impractical.

21. 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. To preclude a Steward from participating on the Panel because he/she did not see the live race would be inconsistent with a decision rendered following a de novo appeal before a Panel of three ORC Commissioners, none of who may have seen the live race. Where reasonably possible there should be continuity in the membership of the Panel of Stewards.

Jockeys Competition

22. Patrick Husbands was a leading contender for the most wins by a jockey at Woodbine. To the close of racing on November 30, 2008, he was tied for the lead with James McAleney. Was this an influence on his brother Simon's motivation to win this race?

23. There was substantial credible evidence from witnesses in a position to be knowledgeable that the relationship between the Husbands brothers was cool and remote.

24. The leading jockey receives a watch with no monetary reward. Nonetheless, the riding title would be a significant career accomplishment that could only enhance a jockey's marketability and indirectly could precipitate significant opportunities for reward.

Multiple Factors

25. A convergence of factors drew attention to the race:

- That Patrick was dueling down to the wire in a two-rider competition for the most wins by a jockey.
- That the Husbands brothers finished first and second with Patrick winning in a close finish.
- That Simon's horse was well positioned for the stretch run.
- Simon's passivity and the contrasting riding style in the stretch exhibited by the other seven jockeys.



- The Track Announcer's race call about the final $\frac{1}{16}$ pole that "BUG'S BOY has yet to be asked". The reference to the race call is simply to the fact that such a comment was made. No impropriety is suggested. The comment was factual based on what the Announcer was seeing.
- Public participation in an Internet Racing blog site where gratuitous opinions abound. This blog evidence was sparingly introduced, it being recognized that the evidentiary use was limited. The relevance was to demonstrate the existence of controversy, pro and con. That evidence was not introduced for the truth or reliability of its content. In passing, it is noted that irresponsible blog participation dealing in misinformation, innuendo and lack of informed opinion has an immense capacity to inflict irreparable harm on individuals and upon racing itself. An uninformed opinion is probably expressed more for the benefit of the declarer than for the reader, if there be one.
- A viewing of the two contrasting riding styles during the stretch drive clearly supports a call for an inquiry. It does not, standing alone, call for judgment and condemnation. In riding BUG'S BOY in his previous race on November 22, Husbands had aggressively used the whip. BUG'S BOY responded negatively and "hit the wall" or "went flat."
- The controversy may have been further fueled by the passage of time between the race on Sunday, November 30 and the Stewards' Hearing Friday, December 5. On November 30, Husbands left the track before the Stewards' Notice of Inquiry was served. Monday and Tuesday were "dark" days. He was notified on Wednesday (the next racing day), and the Hearing was set for Friday. Normally the Hearing would have been on the day following the race.

26. The upshot of this controversy as disclosed by the evidence on this Hearing has been a polarization of opinion into a group strongly opposed to Husband's stretch drive tactic and a group equally strongly supportive of that tactic.

27. The witnesses marshaled on either side are impressive - a formidable array of thoroughbred racing talent and experience. Their qualification to express opinions of substantial weight was of the highest order.

Collateral Support

28. Was there collateral support for the contention that Simon Husband's by non-feasance or mis-feasance prevented BUG'S BOY from winning the race?

- Husbands earns his livelihood as a jockey. Presumably he has the financial obligations of a man married with two children in or near the teenage range. His racing success is modest or less. There is no hint of any wagering irregularity. His fee for finishing second was less than \$200. Had he won that would have increased by \$1,000 - \$1,200. He testified that increase would be a substantial sum for him. That evidence is not difficult to accept.
- On the evidence before the Panel, the hypothesis that Simon was helping Patrick in his effort to win the jockey title is a non-starter. There was no evidence of collusion, brother and brother. Had it been Simon's intent from the start of the race to prevent BUG'S BOY from winning that could have been readily accomplished without criticism by taking the



horse to the outside, perhaps five wide and whaling away with the whip. Instead, he gave the horse a textbook ride to the deep stretch.

- Simon Husbands testified denying any attempt to assist brother Patrick. Patrick Husbands did not give evidence.
- If the Administration case were to be proven, this would be violation serious indeed. The integrity of racing would have compromised. The penalty of a one-year suspension would not have been excessive. On balancing such a risk against the reward of having helped his brother toward a riding title, the scenario seems unlikely.

The Administration Evidence

29. Senior Steward Richard Grubb and Associate Steward Gunnar Lindberg testified describing Husbands' ride in similar terms. Coming down the lane, Husbands was high in the stirrups. Remaining in that position he had a hard hold on the lines and was said to be in position to "blow them away." He made no attempt to urge his mount until about five jumps from the wire and that was too late. Richard Grubb's evidence was that if Husbands tapped BUG'S BOY with the whip it was barely evident on the video replay. After the wire, the race being finished, BUG'S BOY passed COME ON LOVE, as did three of the other horses. This is depicted in the video replay and is contended by the Stewards to indicate lack of effort during the race. In their reasons the Stewards state, "at the wire when he stood and dropped his mount's head the horse took off." Their conclusion was "lack of effort" by Husbands, thereby depriving the horse of the opportunity to win.

30. Steward Fenton Platts notes of the Stewards' Hearing made December 7, 2008, include the following:

"Having only the one horse #2 COME ON LOVE to beat, Mr. Husbands failed to use conventional methods in this part of the race."

31. The reference to "conventional methods" was explained to mean no longer keeping the horse on the bit, using the whip and urging by hand action or scrubbing.

32. Steward Platts' notes further state:

"It was apparent that the rider on BUG'S BOY limited his efforts to win the race."

33. All of the four Stewards involved are of vast experience, conscientious, competent and dedicated to their craft. Accordingly, the testimony before this Panel by Richard Grubb and Gunnar Lindberg as to their opinions and conclusions must be accorded substantial deference and weight.

34. From the advocacy component of their testimony, and there definitely was such a component, it was apparent that their conclusions were firmly held and acceptance there of was sought.



The Defence Evidence

35. John Leblanc, trainer of BUG'S BOY, has been a licensed trainer since 1992, currently operating a small 12-horse stable at Woodbine. Mr. Leblanc bought BUG'S BOY as a yearling and trained it as a 2-year and 3-year-old. It had a tendon injury at age 4 and raced once. At age 5, it raced in the 2008 season as detailed earlier.

36. Trainer Leblanc tested different strategies. He raced the horse "from behind" or "covered up" on August 29, 2008. It finished 12th, beaten 11¹/₂ lengths and losing 4¹/₄ lengths in the stretch.

37. The next race, September 19, he tried racing the horse "on top" and it finished 6th by 5 lengths, losing 4 lengths in the stretch.

38. On November 8, he tried racing the horse with blinkers. It finished 10th by 10³/₄ lengths losing 8 lengths in the stretch.

39. In the next race, that being November 22, he decided to race the horse "covered up" and "make a big run in the stretch." As he told the Stewards, he had expected to win by open lengths. Simon Husbands rode BUG'S BOY in the November 22nd race and aggressively used the whip. Upon being whipped, in Mr. Leblanc's description, "he stopped like he hit the wall," finished 9th, beaten 8³/₄ lengths losing 3 lengths in the stretch.

40. With a small stable, as trainer, Mr. Leblanc rides his horses and in so doing is in a position to personally try different tactics with them. Having tried a number of alternatives, he concluded that BUG'S BOY would run better if he was not whipped. Mr. Leblanc was reluctant to have the jockey race without a whip because it can be a significant safety implement in controlling the horse in the event of trouble. He explained that BUG'S BOY had a history of "lugging in" so prudence dictated that the rider carry a whip. Had the horse been ridden without a whip that announcement would have been made over the public address system and "carried on the program" - Rule 9.27.02 provides "the use of a whip is not required."

41. Accordingly, for the race in issue, trainer Leblanc instructed jockey Simon Husbands to start off slow with a nice hold on the bit, keep him covered up and in the stretch bring him out, tap him on the shoulder, keep him together racing into the bit.

42. Trainer Leblanc's response to Husbands' ride is noted in Steward Grubb's notes:

"I was tickled pink with Simon's ride. Couldn't have asked him to ride any better."

43. That attitude by Leblanc was confirmed in evidence by veterinarian, Dr. Creer, and Danny Yu, trainer of the #1 horse in that race and by Mr. Leblanc himself.

44. BUG'S BOY is owned by Mr. Leblanc's wife and son (who attended the hearing –apparent age about 10). Mrs. Leblanc was out of the country and was unavailable to testify. In a letter filed in evidence she stated in part:



“Simon could not have followed John’s instructions more precisely resulting in the best race of this horse’s career and a 10 point increase in his Beyer figure while moving up in class from his last start.”

45. Simon Husbands testified that he rode BUG’S BOY on two occasions, November 22 and November 30, 2008 and gave him two very different rides. On November 22, he aggressively used the whip. On November 30, he rode in accordance with the instructions detailed by trainer Leblanc. He observed that this was contrary to his usual course as by nature he is an aggressive rider.

46. He described the stretch run on November 30. He maintained his hold on the horse keeping him on the bit as directed. The horse was slow to switch leads. Husbands was patient, keeping him going smoothly, tapping him on the shoulder. He testified that he was very happy and could not believe what a great race the horse ran. He denied any complicity with or attempt to help his brother, Patrick Husbands.

47. The difference to the owner of BUG’S BOY in terms of purse money was \$16,380 to the winner, \$6,000 to the second place finisher. Trainer Leblanc’s evidence was that \$10,000 would be very welcome and would go a long way with his small stable.

48. Lou Cavalaris, a Canadian thoroughbred racing icon, a leading trainer for 30 years and a Hall of Famer who will be 85 in 2009, testified that he had viewed the video replay 5 times. He acknowledged that it looks like Husbands is not trying at the end. In his opinion, Husbands rode properly. “He did it right – letting him run on the bit.” He testified Husbands should not turn the horse’s head loose as had been suggested. “I don’t agree and that’s why I’m here” summarized his position. In Cavalaris’ opinion, it was of no significance that BUG’S BOY passed the winner after the wire.

49. Robbie King, Manager of the Jockey’s Benefit Association of Canada, described watching the video and at the crucial time seeing Husbands switch leads as if he were looking for another gear and nudging or pushing on the horse’s neck. His support for Husbands crystallized with the observation.

“We should not be here.”

50. Veterinarian Dr. Jennifer Creer cared for BUG’S BOY. She described examining him, scoping his lungs, checking his legs for soundness and finding no physical reason why he was quitting at the head of the lane. Trainer Leblanc discussed with her the tactic of having the horse run into the bit with no whipping in the hope of having him run to expectations. Dr. Creer was present when these racing instructions were given by trainer Leblanc to Husbands.

51. Larry Attard, a retired Hall of Fame jockey, testified that he had viewed the race video replay. He observed that horses react differently to the whip. Some will be urged on, others will stop and there is no purpose in whaling away on a stopper. In his view, Husbands got the best from the horse. There was nothing more he could do. The horse was well ridden in traffic but not too close to the pace and kept on the bit. He approved of the switch in leads as soon as the horse came out. He observed that the horse had run its best race. Mr. Attard had volunteered



to come and give evidence commenting that if he thought there was anything wrong with Husbands' ride he would be elsewhere.

52. Slade Callaghan, the jockey who rode BUG'S BOY on October 19 and November 8, 2008, gave evidence of using the whip and getting no response. He confirmed that trainer Leblanc subsequently discussed with him changing tactics by not whipping and keeping the horse on the bridle. His evidence was that he saw nothing improper in Husbands' ride which was in accordance with Leblanc's comments. In cross-examination, he commented:

"Keep trying, do something to improve, that's the game."

53. Ron Gierkink, a long-time employee with the Racing Form as a handicapper and writer, has been covering Woodbine for twenty years. He noted that BUG'S BOY'S last ride improved his Beyer rating 10 points. This equated to a four-length improvement attributable to different race tactics. He was familiar with BUG'S BOY'S recent race and race lines and described aggressive whipping as ineffectual. He saw no improper restraint by Husbands who "sort of sat and guided." He pointed out that the winner, COME ON LOVE, won its next start and that on November 30, BUG'S BOY was virtually dismissed in the betting, at 14-1, the second longest shot on the board. He pointed out that John Leblanc trains two horses for him and his father. According to Mr. Gierkink, it is of no significance that BUG'S BOY (and three other horses) passed COME ON LOVE after the wire.

54. Richard Dos Ramos has been a jockey for 28 years chiefly based at Woodbine, and had been the local representative on the Jockey's Benefit Association for twenty years. He heard of the controversy and viewed the film. In his view, Husbands ride was proper. He offered to come and give evidence and stated that if he thought anything was amiss he would not be here. In his view, the race cannot be interpreted to support the conclusion that Husbands deliberately finished second. He further dropped the remark that you cannot keep everyone happy around the racetrack, the theory being "Pay your \$2 and have your say."

55. James McAleney is the jockey who was tied with Patrick Husbands with 157 wins on November 30, 2008. He has been a licensed jockey since 1985. He felt so strongly about Husbands difficulty that he drove for 22¹/₂ hours non-stop from Florida arriving at Woodbine at 4:00 a.m. in order to give evidence. He testified that he and Husbands share the same valet and are well known to each other. In his opinion, Husbands does not have it in him, to act as he is accused. He commented on Husbands' ride saving ground and avoiding the whip as instructed. He described the 10-point Beyer improvement as "dramatic". He alluded to the many factors that bear on how a horse runs and how difficult it is to analyze and attribute results. He confirmed that at best there is a distant relationship between the Husbands brothers. In his view, Patrick Husbands wants to achieve on his own, neither wanting nor accepting assistance.

56. Danny Yu, trainer of BLU THEM AWAY, another horse in the November 30 race, testified that generally he considered the horses in the race to be "dogs" barring one or two – and BUG'S BOY was not included in the "one or two". Yu expected to win the race (and judging by the replay, probably should have. From leaving the gate, his horse ran all over the racetrack). He paid no attention to BUG'S BOY. "That kind of horse has no chance." He was surprised at



BUG'S BOY'S result and was of the opinion that Leblanc and Husbands were correct in riding the horse in that manner. His point – BUG'S BOY raced well beyond reasonable expectation.

Character Evidence

57. As well as the character endorsement in James McAleney's evidence, eleven character references were filed on Husbands' behalf. Evidence of good character has twofold use. Firstly, it may render it unlikely that the person of good character did a wrongful act. Secondly, it may tend to support the truthfulness and reliability of the testimony of that person. That this evidence was filed by letter precluded cross-examination and that diminishes in some degree the persuasive force of the evidence of good character.

Analysis

58. The burden of proof rests with the Administration. The standard of proof is on a balance of probabilities. Since the issue bears on Husbands' right to practice his profession, the evidential burden is by clear, cogent and compelling evidence.

59. The Panel accepts the evidence of John Leblanc. He was an impressive witness. His recitation of the horse's background is accepted as reliable. His efforts to improve the horse's performance were proper, varied, persistent and commendable. When he finally came upon the solution his instructions were properly motivated in getting the best race available by proper means. Husbands was entitled to abide by those legitimate instructions and he did.

60. By complying, Husbands kept the horse together racing on the bit. It is all very well to suggest:

"Having got the horse in contention by keeping him on the bit, Husbands should then have given the horse its head and driven more aggressively specifically by hand scrubbing if not by whipping in the closing stages".

61. The assumption is, had he done so, the horse would have raced faster and won. Is that assumption justified? Would resort to aggressive tactics have returned the horse to its established response to aggression by "hitting the wall"? That remains as one of racing's imponderables.

62. Husbands' choice cannot definitively be said to be wrong and was probably right. Certainly he was entitled to stay with the tactics that had served him so well.

63. The Administration cites with approval the statement in the Todd Decision (ORC 2000 No.5) that:

"The confidence of the public in the integrity of horse racing will be adversely affected if efforts exerted to win are not visible and obvious." Paragraph. 30.



64. The validity of that maxim will not be diminished by this observation. The essential characteristic of that effort to win is that the exertion be genuine as opposed to cosmetic, not just a few good licks with the whip in front of the grandstand for public consumption. Effort properly determined to be genuine must not be faulted solely because it falls outside “conventional methods” (as referred to in Steward Fenton Platts’ handwritten reasons).

65. The evidence of trainer Leblanc is decisive. That evidence is clear, cogent and powerful to the extent of compelling, that the instructions given by Leblanc and followed by Husbands were intended to and did in fact “demonstrate the best and fastest race of which his mount was capable.”

66. That Husbands’ riding style was different from that of the other seven jockeys was never in contention. In John Leblanc’s view, that contrast did create an appearance that Husbands “held him”. That appearance was obvious to all and justified the Inquiry by the Stewards. The issue, however, goes far beyond “appearance”.

67. There is no direct evidence of an intent by Husbands to finish second. Collateral evidence of such as collusion, conspiracy, wagering anomaly, race fixing or the like is totally absent.

68. Circumstantial evidence is limited to Patrick Husbands’ quest to be leading driver. The inference that Simon allowed Patrick to win is raw speculation, unsupported by the evidence. The evidence of Husbands’ financial situation, of the brother’s relationship, and of Husbands’ good character, renders it unlikely that Simon allowed Patrick to win. The character evidence was impressive by source, content and sincerity.

69. In his closing submission, counsel for Husbands properly points out that the issue is not whether Husbands rode a perfect race. The Stewards drew inference of lack of effort. Clearly there is a second rational inference that may be drawn from the proven facts. That second rational inference is of prime importance when proof is by circumstantial evidence. That second inference is that the riding tactic was changed from “conventional means” for the express purpose of attaining “the best and fastest race. That inference is abundantly supported by the Leblanc/Husbands’ testimony.

70. With great deference to the presiding Stewards, the standard of proof upon a balance of probability by cogent evidence clear and compelling has not been met. There is doubt sufficient to prevent discharge of the Administration’s burden of proof.

71. In a word, the defence evidence individually and cumulatively was powerful in content and presentation. The Appeal must succeed.

72. An Order will issue allowing the Appeal and quashing the suspension.

Two Further Issues Merit Comment

73. The first issue deals with the public perception of racing. As observed by ORC Chairman Frank Drea in the Henri Fillion Hearings July 18, 1990:



“No sport or entertainment relies as heavily on the public perception of its honesty and integrity as racing.”

74. This furore in the case is directly attributable to two elements in combination:

- Mr. Husbands’ “failure to use conventional method” in the stretch drive.
- The public had no knowledge of the trainer’s instruction prohibiting use of the whip.

75. The importance of full, accurate and timely information for the wagering public cannot be overemphasized. Racing tactics and strategy do not come within this scope. Equipment changes do.

76. The Administration in concert with the industry may be well to consider means by which repetition can be averted. Rule 9.27.02 deals with the absence of a whip. Whipping rules are currently under review. Should some thought be given as to announcement and publication if the whip is carried as a safety measure only and is not to be used to urge the horse toward greater effort.

77. The second issue relates to ORC Judges and Stewards whose daily performance is characterized by ability, integrity and professionalism. They are the public face of the Commission. They enjoy the confidence of the industry and so it must remain. Wrong indeed it would be to diminish that stature by misunderstanding of the ORC adjudicative function. The basic principles are:

- Stewards by the nature of their responsibility are cast in a role difficult and complex. Firstly, they view the race for impropriety. Thereby, they have a limited investigative responsibility. Secondly, they determine whether there should be a Hearing. Thereby they have a qualified role as a complainant or accuser. Thirdly, they conduct a Hearing in the course of which their professional opinion is a vital but uncross-examined component. Thereby they have a limited function of providing evidence. Fourthly, if there is a prosecutorial element to their Hearing, they bear that burden. Fifthly, they must render an impartial and fair adjudicative decision.
- It is only right that such a multi-tasked process should be subject to review.
- The nature of the review is by a completely new Hearing – a trial de novo before a Panel of ORC Commissioners.
- At that trial de novo, the Judges/Stewards are witnesses and are in no way to be preferred over other witnesses.
- The essential nature of the Stewards’ testimony as it relates to a racing incident is opinion evidence.
- The opinion expressed by the Stewards who testified is but one aspect of the entire evidence.
- There are and will be many instances where reasonable minds will come to conflicting opinions.
- Conflicting opinions perhaps by persons of similar experience, stature and knowledge, are to be considered and assessed in light of the entire evidence.
- One of the factors for consideration is the impartiality of the person offering the opinion.



COMMISSION HEARING

TORONTO, ONTARIO – MARCH 30 & 31, 2009

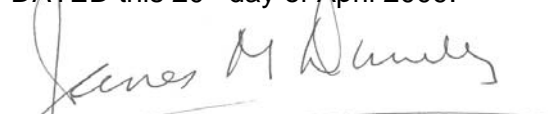
- Issues involving the right of a licensee to earn his living in his/her chosen profession require a very high standard of justice.
- The burden of proof is on the party alleging a breach of the Rules. That is the Administration.
- The extent of that burden is on a balance of probability by cogent evidence, clear and convincing.

78. If the decision of this Panel is challenged, the matter is decided by Judicial Review before three Judges of the Superior Court of Ontario sitting in Divisional Court who will have wide generalist experience, perhaps not heavily weighted by horse racing. That Panel will test the reasonableness of the decision by the ORC Panel.

79. In net result, this Panel does not decide between the Stewards' opinion and the Panel members' opinion. Having regard to the experience, expertise, ability and dedication of Stewards and Judges, such an exercise would be ludicrous. Rather the Panel function is to proceed as outlined to determine if on all the evidence be it factual, opinion, oral, documentary or video, the Administration has discharged its burden of proof.

80. Accordingly, the Stewards should soldier on secure in the knowledge that their authority and stature remain intact and that their unflinching conscientious discharge of duty is recognized and appreciated by the industry.

DATED this 20th day of April 2009.


James M. Donnelly
Vice Chair



Thoroughbred Rules

Rule 9.01

Every horse shall be ridden out in a race unless it has been injured or is obviously suffering from some physical impairment, and any instructions or advice to jockeys to ride or handle their mounts otherwise than for the purpose of winning are forbidden and will subject all persons giving or following such instructions or advice to disciplinary action by the Stewards. Every rider must persevere throughout the race in order to finish as nearly as possible to first position and must demonstrate the best and fastest race of which their mount is capable.

Rule 15.09.01

Any act or omission related to Thoroughbred horse racing in any or all of its forms, which, when measured against generally accepted standards of good conduct would be regarded as dishonest, unfair or unsportsmanlike or contrary to the public interest financially or otherwise, shall be deemed to be an illegal practice under these Rules and shall be dealt with accordingly at the discretion of the Stewards. The ruling and subsequent publication regarding penalty shall include the specific part of the Rule which the licensee violated. In determining whether any act or omission offends this Rule, regard may be had to any Code of Ethical and Professional Business Conduct that may have been adopted by a horsemen's association.

Rule 16.01.01

There shall be a board of three Stewards appointed by the Commission for each racing day

Rule 16.13

The Stewards may impose any or all of the following penalties for conduct prejudicial to the best interests of racing, or for a violation of the Rules:

(c) Suspend any Commission licensee for any length of time or indefinitely.

Rule 24.04.01

Subject to Rule 9.14.1 penalties other than fines are effective forthwith or as of the date stated in the ruling except in the case of an appeal when they may be stayed by authority of the Commission.