



COMMISSION HEARING

TORONTO, ONTARIO – OCTOBER 8, 2009

**IN THE MATTER OF THE RACING COMMISSION ACT S.O. 2000, c.20;
AND IN THE MATTER IN THE APPEAL AND REQUEST FOR HEARING OF
GLENN T. JOHNSTON**

On April 27, 2009, the Executor Director of the Ontario Racing Commission (“ORC”) issued an Order of Immediate Suspension and a Notice of Proposed Order to Suspend the Licence of Dr. Glenn T. Johnston (“JOHNSTON”) for twelve years, with a \$50,000 fine.

On May 12, 2009, counsel on behalf of JOHNSTON filed a Notice of Appeal with the ORC.

On October 8, 2009, a Panel of the ORC, comprised of Chair Rod Seiling, Commissioner Brenda Walker and Commissioner Bernard Brennan, DVM, was convened to hear the appeal.

Jennifer Friedman appeared as counsel for the Administration. Doug Jack represented JOHNSTON.

Upon reviewing the Agreed Statement of Facts and upon hearing the argument and submissions, the Panel denied JOHNSTON’S appeal but varied the Director’s proposed penalties as follows:

- i) 10 year suspension;
- ii) \$40,000 fine.

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

DATED at Toronto this 27th day of October 2009.

BY ORDER OF THE COMMISSION

John L. Blakney
Executive Director



REASONS FOR DECISION

Overview

1. Dr. Glenn T. Johnston filed an appeal (Ex. 1a, tab 62) regarding an Order of Immediate Suspension and a Notice of Proposed Order (Ex. 1a, tab 61) issued by the Executive Director of the Ontario Racing Commission (ORC) on April 27, 2009 wherein he was suspended for a period of twelve years and fined \$50,000. A de novo hearing on the merits of the appeal took place on October 8, 2009.

Background

2. Counsel for the Administration of the ORC, Jennifer Friedman, and for the appellant, Douglas Jack, provided the Panel with an Agreed Statement of Facts (Ex. 6). The contents were as follows:

Agreed Statement of Facts

The licence holder (through his Legal Counsel) and Litigation Counsel for the Administration of the Ontario Racing Commission (the "ORC") agree to the following facts:

Involved Individuals and Horses:

1. Glenn T. Johnston ("JOHNSTON") is currently licensed (#0693W9) with the ORC as a Veterinarian. At all material times, JOHNSTON was the veterinarian for the horses, BARANS DESTINY, DR. SHARKEY, KATORS IMPACT, LOTTO KILLEAN, M G FINFILOU, and REASON TO CELEBRATE (collectively referred to as the "subject horses").
2. Daniel M. McFadden ("DANIEL") is currently on a ten-year licence suspension with the ORC as an Owner/Trainer (Licence #B03737). At all material times, DANIEL was the trainer for the subject horses.
3. Daniel McFadden Jr. ("DANIEL JR.") was formerly licensed with the ORC as an Owner (Licence #W87343). At all material times, DANIEL JR. was the owner of the horse, BARANS DESTINY. DANIEL JR. is the son of DANIEL.
4. Scott T. McFadden ("SCOTT") is currently on a ten-year licence suspension with the ORC as a Groom/Owner (Licence #M43234). At all material times, SCOTT was the owner of the horses, DR. SHARKEY and REASON TO CELEBRATE. SCOTT and DANIEL are second cousins.
5. Perry M. Holdsworth ("HOLDSWORTH") was formerly licensed with the ORC as an Owner (Licence #E34792). At all material times, HOLDSWORTH and SCOTT co-owned the horse, LOTTO KILLEAN. ---HOLDSWORTH also owned the horses, GRIP DOWN and KATORS IMPACT.
6. Derek L. Riesberry ("RIESBERRY") is currently licensed with the ORC as an Owner/Driver (Licence #P12000). RIESBERRY employed the services of JOHNSTON as a veterinarian.
7. Sandra Spencer ("SPENCER") is currently licensed with the ORC as a Trainer/Owner/Authorized Agent (Licence #V81116). SPENCER and RIESBERRY are spouses. At all material times, SPENCER was a co-owner of the horse, BRETTZILLA. BRETTZILLA was JOHNSTON's patient.



8. Jeremy M. Boakes (“BOAKES”) is currently licensed with the ORC as an Owner (Licence #Y57482). At all material times, BOAKES was the owner of the horse, ACTINLIKEUDONTKNOW, which horse was formerly named GRIP DOWN.
9. Gerald Schneider (“SCHNEIDER”) is currently licensed with the ORC as an Owner (Licence #W40086). At all material times, SCHNEIDER was the owner of the horse, M G FINFILOU.
10. Ross C. Siddall (“SIDDALL”) is currently on a ten-year licence suspension with the ORC as a Driver/Trainer/Owner (Licence #518613). At all material times, SIDDALL co-owned the horse, JOJOs IMAGE. JOJOs IMAGE was JOHNSTON’s patient.
11. Christopher R. Haskell (“HASKELL”) is currently licensed with the ORC as a Trainer/Owner (Licence #V23720). HASKELL employed the services of JOHNSTON as a veterinarian.

Investigation regarding JOHNSTON prescriptions:

12. On September 22, 2008, Investigator Colin Coleiro (“Coleiro”) received information from ORC veterinarian Dr. Bruce Duncan (“Duncan”) in relation to the prescription use of Aranesp (also known as Darbepoetin alfa or EPO). The information received was that JOHNSTON was writing prescriptions for Aranesp to be administered to horses, which were later being filled at the Shoppers Drug Mart Pharmacy, located at 3950 Dougall Avenue, in Windsor, Ontario (the “Windsor pharmacy”).
13. On September 30, 2008, a Production Order for Financial or Commercial Information was obtained and executed by Detective Constable Frankie Campisi (“Campisi”) and Coleiro at the Windsor pharmacy.
14. Information was seized as a result of the Production Order, including a Healthwatch Prescription Transaction List for all prescriptions written by JOHNSTON. The transactions covered the time period from December 4, 2006 through to September 20, 2008. In addition, copies of original hand written prescriptions for the drug Darbepoetin alfa (Aranesp), 4x20ug/0.5ml pre-filled syringes, and corresponding refill receipts were obtained as follows:

Date	Prescribed by	Medication	Client	Horse	Filled	Refills
Nov. 18/06	JOHNSTON	darbepoetin alfa (Aranesp)	DANIEL	ARVA CREST AGO GO	Dec. 4/06	N/A
Dec. 4/06	JOHNSTON	darbepoetin alfa (Aranesp)	HOLDSWORTH	KATORS IMPACT	Dec. 17/06	Jan. 17/07; June 27/07; Aug. 25/07; Oct. 26/07
Dec. 20/07	JOHNSTON	darbepoetin alfa (Aranesp)	HOLDSWORTH	LOTTO KILLEAN	Jan. 28/08	May 3/08; July 14/08; Aug. 1/08
May 1/08	JOHNSTON	darbepoetin alfa (Aranesp)	SCOTT	BARANS DESTINY	Aug. 16/08 for KATORS IMPACT (Horse HOLDSWORTH)	Sept. 20/08 for KATORS IMPACT (Horse HOLDSWORTH)

15. Investigation at the Windsor pharmacy revealed that on September 19, 2008, SCOTT called to order a refill of a prescription of Aranesp for BARANS DESTINY. The Windsor pharmacy was unable to locate BARANS DESTINY on the computer in relation to SCOTT. The records on the computer



indicated that HOLDSWORTH was the owner of BARANS DESTINY, and there were prescriptions for Aranesp on file under HOLDSWORTH's name.

16. Further investigation unearthed that on September 20, 2008, SCOTT requested information from the Windsor pharmacy, purportedly on behalf of HOLDSWORTH, about the number of refills of Aranesp remaining for KATORS IMPACT. The computer revealed that no refills remained for HOLDSWORTH. SCOTT persisted about the existence of refills on the prescription. The Windsor pharmacy conducted a search on its computer and found refills remaining for KATORS IMPACT with HOLDSWORTH's name in brackets. The Windsor pharmacy refilled the prescription of Aranesp for KATORS IMPACT. At the time, HOLDSWORTH no longer owned KATORS IMPACT, and KATORS IMPACT was in the United States.

Out of Competition Testing:

17. On September 23, 2008, Duncan, Campisi, Coleiro and Investigator Jamie Frye ("Frye") attended at DANIEL's training stable, located at the Louis Moison Stable at 21 E Puce River Road, in Belle River, Ontario, for the purposes of performing the Out of Competition Program.
18. Duncan and Frye obtained blood samples from the following four horses: DR. SHARKEY, M G FINFILOU, REASON TO CELEBRATE, and DBOYZNAGIRL.
19. After obtaining the blood samples from the four horses, Duncan, Campisi, Coleiro and Frye left the property to attend at 6338 Concession 6, in Harrow Ontario, for the purposes of obtaining a blood sample from a fifth horse, BARANS DESTINY.
20. Frye transported the blood samples to Dr. Robert McKenzie at Racing Forensics Inc. Laboratories for testing.
21. On September 30, 2008, Duncan received a Report of Analysis, signed by Dr. McKenzie of Racing Forensics Inc., disclosing the results of the Out of Competition Testing. The report indicated that the samples taken from REASON TO CELEBRATE AND DR. SHARKEY showed an ELISA Positive for the EPO/Aranesp antigen testing.
22. At the time, REASON TO CELEBRATE and DR. SHARKEY were JOHNSTON's patients.
23. The two samples, which showed an ELISA Positive for EPO/Aranesp were forwarded to the University of Pennsylvania for confirmatory testing.
24. On December 8, 2008, the ORC received the results of the blood analysis from the Pennsylvania Equine Toxicology and Research Laboratory. The analysis confirmed that the blood samples were positive for Darbepoetin alfa.

JOHNSTON communications and interviews:

25. On October 1, 2008, Campisi and Coleiro attended at JOHNSTON's clinic for the purposes of interviewing JOHNSTON. Among other things, JOHNSTON admitted the following:
 - b) HOLDSWORTH, RIESBERRY, BOAKES, SCOTT, and DANIEL were his clients.
 - c) He prescribed Aranesp to GRIP DOWN.
 - d) He does not keep Aranesp on hand due to its high cost and, accordingly, he writes prescriptions for clients with two to three refills.
 - e) He keeps records but it is possible that a script might not get recorded.
 - f) He prescribed Aranesp to BARANS DESTINY in SCOTT's name without examining the horse.



- g) He has not been completely diligent in diagnosing whether or not a horse requires a prescription for Aranesp before prescribing it.
26. On October 2, 2008, JOHNSTON sent an electronic mail to Coleiro and indicated, among other things:
- I had opportunity to do a search on the ORC web site and read the search results posted referencing EPO. It made me sick considering the potential impact I've had not only on myself, but on my clientele as well. I wish to let you know that I was unaware of the information contained in the notices...you may get the feeling that I had blatant disrespect for the ORC rulings, when in fact it was my ignorance of the situation.
27. On November 17, 2008, Coleiro had a follow-up interview with JOHNSTON via telephone. Among other things, JOHNSTON admitted that he prescribed Aranesp to HASKELL for the horses, GRIP DOWN and BRETTZILLA (on behalf of RIESBERRY who was out of town at the time) but JOHNSTON may not have recorded the prescriptions properly. Investigator Coleiro asked JOHNSTON to search all of his records.
28. On November 18, 2008, Coleiro received an electronic mail from JOHNSTON indicating, among other things, that aside from the documents provided on October 1, 2008, he had no further records in relation to Coleiro's request.

Follow-up Investigation regarding JOHNSTON prescriptions:

29. On December 9, 2008, a Production Order for Financial or Commercial Information was obtained and executed at the business premises of Shoppers Drug Mart, located at 6020 Malden Road in Lasalle, Ontario ("Lasalle pharmacy").
30. Among other things, information seized from the LaSalle pharmacy, pursuant to the Production Order, was a prescription written by JOHNSTON for Darbepoetin Alfa (Aranesp), dated August 9, 2007. The prescription was in the name of SIDDALL for the horse, JOJOs IMAGE.

Documentary request of JOHNSTON:

31. On January 13, 2008, a notice was issued to JOHNSTON requiring him to provide documents by January 31, 2009.
32. On February 5, 2009, counsel for JOHNSTON furnished the ORC with additional documents on behalf of JOHNSTON, including patient histories for BARANS DESTINY, REASON TO CELEBRATE, DR. SHARKEY, and LOTTO KILLEAN, along with a statement of professional services for RIESBERRY. Among other things, the documents confirm that JOHNSTON had prescribed Darbepoetin Alfa (Aranesp).
33. On March 23, 2009, further to a telephone request, a written request for documents in respect to SIDDALL and JOJOs IMAGE was issued to JOHNSTON.
34. On March 31, 2009, counsel for JOHNSTON furnished the ORC with records in respect to SIDDALL and JOJOs IMAGE. Among other things, the records confirm that JOHNSTON prescribed Darbepoetin alfa (Aranesp) to SIDDALL and JOJOs IMAGE.



35. On April 27, 2009, the Executive Director of the ORC issued an Order of Immediate Suspension and a Notice of Proposed Order to Suspend the Licence of JOHNSTON for twelve years, with a \$50,000 fine.
36. On May 12, 2009, counsel on behalf JOHNSTON filed a Notice of Appeal with the ORC.
37. On August 18, 2009, a Notice of Hearing was issued to advise that a Panel of the ORC would be convening on October 8, 2009 for the purposes of hearing JOHNSTON's appeal.
38. On August 19, 2009, the Administration of the ORC received correspondence written by JOHNSTON that confirmed that he prescribed Aranesp to JOJOs IMAGE without examining the horse.

3. There were 18 separate ORC Communications/Notices commencing on September 22, 2005 ending on May 14, 2009 included, numbered from 39 to 56 inclusive. Ms. Friedman pointed out that all these were notices not rules.

4. It was also agreed that the prescriptions written by Dr. Johnston to the various owners/ trainers occurred over a period of years such that both the 2005 and 2008 Commission Rules would be applicable. While the changes were more to do with terminology, Dr. Johnston, as a licensee of the Commission, was required to comply with them. Both counsel also agreed that SB Rule No. 8.11 was not an issue in the hearing.

5. Ms. Friedman submitted that the Notice of Proposed Order and the Order of Immediate Suspension issued by the Executive Director were reasonable. Furthermore, this complied with the requirements as reasons and notice of the right to appeal, were given therein (Ex 1a, tab 61). Under Section 19 of the Act, "the Director shall refuse to issue a licence to an applicant or to renew the licence of an applicant if (a) there are reasonable grounds to believe that, while the applicant carries out the activities for which a licence is required, the applicant will not act in accordance with law, or with integrity, honesty, or in the public interest, having regard to the past conduct of the applicant; or (b) the applicant is carrying on activities that are, or will be, if the applicant is licensed, in contravention of this Act, the regulations, the rules or terms of the licence". Dr. Johnston was writing prescriptions for an illegal non-therapeutic drug, Aranesp (DPO) and thereby he had violated SB. Rules Nos. 3.09.01, 6.05, 6.20 (a) & (b), 8.08.01, 8.08.02, 8.10.01, 02 and 03, 8.12 in the view of the Administration of the Ontario Racing Commission (ORC).

6. It was her position that in regards to Section 6 of the Racing Commission Act, 2000, the Commission was acting accordingly in exercising its powers and performing its duties in the public interest, and in accordance with the principles of honesty, integrity, and social responsibility. Under Section 7 of the Act, the Panel notes the Commission has the power to license tradespersons and "to impose those terms on a licence that the Commission feels expedient." Two of the stated objectives of the Commission are to protect the health and welfare of the horse and to protect the public interest. Ms. Friedman submitted that in this regard, the Administration needs only general proof.

7. Previous undisputed evidence before the Commission related to EPO/DPO is that it is used in a racehorse to affect performance and that it can threaten the health of a horse. The only other reasons for its use are to treat anemia or renal failure, and in those cases, the horse would be in no condition to race.



8. 75% of Dr. Johnston's practice was racehorses. In the Agreed Statement of Facts, he put forth that he was unaware of the information contained in the notices (Ex. 6, para 26 and that he was not relying on SB Rule No. 1.04, ignorance of the Rules is not a valid defense (Ex. 3, para 36).

9. On pages 310 and 311 of Exhibit 1 a, tab 51, the Panel notes that the Shoppers Drug Mart pharmacist, Natalie Packer, told ORC investigators that on September 19, 2008, the pharmacy received a phone call from Scott McFadden to pick up a prescription for the horse, Barans Destiny. The pharmacy's records indicated that Perry Holdsworth was the owner of the horse and that there were prescriptions on file for him but she was unable to contact Holdsworth. She then attempted to contact the veterinarian who wrote the script, Dr. Johnston, whose answering machine had a message to contact another veterinarian. On contacting that veterinarian about the refill for Aranesp, Ms. Packer stated that the person who answered the phone told her that she felt uncomfortable processing the refill because she did not know the horse and she knew that a veterinarian should not be prescribing this drug to a horse as it was not legal in racehorses. She instructed her to tell the person she would not refill the prescription without examining the horse. Tab 7 of Exhibit 1, the owner history of Barans Destiny, indicates that Mr. Holdsworth never owned the horse.

10. On page 311 of that same exhibit, the report indicates that Shoppers Drug Mart pharmacist, Kevin Perrone, processed a prescription for Aranesp for the horse, Kators Impact, on a prescription written on August 16, 2008. Mr. Holdsworth told the investigators in his September 30, 2008 interview (Ex. 1a, tab 39) that the horse was sold in January or February 2006 and it had moved to the United States. In that same interview, Mr. Holdsworth told ORC investigators that he did not know what Aranesp was, he had never paid for it, never picked it up nor did he ever authorize Scott McFadden to have a prescription for Aranesp filled. Mr. Perrone told investigators that on September 20, 2008, Scott McFadden inquired as to how many refills Kators Impact have left. Mr. Perrone told him that the prescription was for Perry Holdsworth, that there was none under that name but that there were refills remaining under Kators Impact with Holdsworth's name in brackets. The prescription was refilled. In that same exhibit, on page 326 of the investigator's report, it indicates that refills for Aranesp were also processed without any specific horse named.

11. Ms. Friedman referenced twelve separate industry notices/communications. The first two, September 22, 2005 (Ex. 1, tab 13) and September 28, 2005 (Ex. 1, tab 14) dealt with Drs. Kennedy and Flanagan who both were suspended for violations related to controlled substances. Tab 15 of the same exhibit is an industry notice dated April 19, 2006. It communicates severe penalties will be imposed for the acquisition, possession or administration of Aranesp. Tab 16 contains another notice to industry dated August 3, 2006. Tab 17 contains the fall 2006 edition on Integrity Matters which featured an article on the medication control re illegal drugs and the rationale behind the formation of the Medication Control Task Force. Tab 18 was another industry notice dated December 13, 2006, wherein two trainers, Brian Scott and Kenneth Parsley were both issued 10-year suspensions and \$100,000 fines for use, possession and acquisition of drugs for the former, possession and acquisition for the latter. Tab 19 is another industry notice dated January 19, 2007, notifying the industry that the acquisition, possession and administration of illegal and non-therapeutic drugs will not be tolerated. Tab 20 contains another industry notice reinforcing the message that the acquisition, possession and administration of illegal, non-therapeutic drugs will not be tolerated. It was dated February 16, 2007. Tab 23 contains an industry notice dated August 15, 2007, warning trainers about the use of non-therapeutic medications and that ignorance of medication control rules is not a "defensible position". Tab 24 is an industry notice dated August 30, 2007, informing the industry of the 10-year suspension and \$40,000 fine for Brett Robinson for a confirmation of EPO/DPO in one of his horses and a reinforcement of the message that the acquisition, possession or administration of illegal and non-



therapeutic drugs will not be tolerated. Tab 25, the summer 2007 edition of Integrity Matters, contains a similar reinforcing message to the industry.

12. The Administration submitted that Dr. Johnston had breached SB Rule No. 3.09. 01. It reads, “Any act or omission in business practices related to Standardbred horse racing in any or all of its forms, which, when measured against accepted standards of good conduct would be regarded as dishonest, unfair or unsportsmanlike or contrary to the public interest, shall be deemed an illegal practice under these Rules.....”

13. SB Rule No. 6.05 reads, “Any attempt to violate any of the rules of the Commission falling short of actual accomplishment shall constitute an offence.”

14. SB Rule No. 6.20 reads, “A participant shall be guilty of an offence of the rules: (a) for any misconduct which is injurious to racing although not specified in these rules; (b) for any misconduct prejudicial to the best interests of racing. ”

15. Ms. Friedman submitted that Dr. Johnston prescribing Aranesp to numerous licensees as per the Agreed Statement of Facts represented a breach of this rule. As per Dr. Johnston’s own admission, it was “questionable” that Grip Down required Aranesp and that he prescribed Aranesp without examining or diagnosing Barans Destiny. He admitted this to the ORC investigators (Ex. 1a, tab 41, p 249) in his October 1, 2008 interview. He did the same for the horse, JoJos Image for trainer Siddall (Ex. 1a, tab 54, p 392) on the basis of an alleged blood report from a veterinarian who was not in Canada and had allowed the McIntosh stable to use his instruments in his absence. The records indicate that he prescribed Aranesp for Grip Down and Brettzilla, both owned by Jerry Boakes on June 19, 2007 and May 15, 2006 respectively. Mr. Derek Riesberry, in his interview with ORC investigators Waithe and Coleiro (Ex.1a, tab 45) stated that Mr. Boakes was not connected to Brettzilla, that the horse was owned and trained by his wife, Sandra Spencer and could not explain why Dr. Johnston would write a prescription for Aranesp. This statement is confirmed in the November 5, 2008 interview with Mr. Boakes (Ex. 1a, tab 46) by the same investigators wherein Mr. Boakes states that he has no knowledge of the horse Brettzilla and that he has never received a prescription for Aranesp from Dr. Johnston nor has he ever received an invoice for it.

16. The Veterinarians Act (Ex. 4) under the heading Practice Standards, (p 11) Section 17 (1) reads, “For the purpose of the Act, professional misconduct includes the following: 7. Providing, or attempting or offering to provide, services that are not reasonably useful or needed. 9. Making a claim respecting the utility of any remedy, treatment, device or procedure other than a claim which can reasonably be supported as professional opinion. 44. An act or omission relevant to the practice of veterinary medicine that, having regard to the circumstances, would be regarded by members as disgraceful, dishonourable or unprofessional”.

17. Dr. Dorothy Bienzle, Associate Professor from the University of Guelph, in her interview of April 25, 2008 (Ex. 1, tab 26, p 125) stated that the only reason a veterinarian would prescribe Aranesp to a horse would be to enhance performance. She added that no veterinarian would prescribe Aranesp for renal failure as it would be too sick to race. This response is not in conflict with Dr. Duncan on the same subject (Ex. 1a, tab 51, p 309) who added that administration of the drug for renal failure would be in a clinic. In a follow up interview re Aranesp and anemia she added that anemia in horses is extremely rare and no horse with anemia should be eligible to race.



18. SB Rule No. 6.46.01 reads, No person shall possess or use a drug or medication on a horse: (e) which is listed hereafter: Erythropoietin, Darbepoetin. Darbepoetin is also known by its trade name Aranesp. The evidence (Ex. 1a, tab 51, p 325) that on September 19, 2008 Dan McFadden instructed Scott McFadden to pick up an Aranesp prescription written by Dr. Johnston at Shoppers Drug Mart in Windsor. The script was for the horse, Kators Impact and was written on August 16, 2008. The horse had been sold by its owner, Perry Holdsworth in January/February of 2006 and was in the USA. Dr. Johnston stated that he had never prescribed Aranesp to Scott McFadden, only to Mr. Holdsworth. Page 189 of Ex. 1, tab 33 is a photocopy of a prescription to Scott McFadden dated May 1, 2008 for Aranesp.

19. Adding to the credibility issue of Dr. Johnston is his statement to the Commission investigators. He told them that he only prescribed to owners as he knew Dan McFadden had money problems. Owner Holdsworth (Ex. 1a, tab 51, p 314) told the investigators that he did not know what Aranesp was, that it had never been prescribed for his horses, that he has never picked up a prescription, that he has never paid for it and he never authorized Scott McFadden to pick up the drug on September 22, 2008.

20. SB Rule No. 8.08.02 reads, "The records maintained and kept by a veterinarian shall include the name of the horse, the names of the owner and trainer, the date of the administration or prescription of the drug, substance or medication, and its nature."

21. SB Rule No. 8.10.01 reads, " A veterinarian shall: (a) determine from the trainer or owner what drugs, substances or medication are being administered to the horse before prescribing or administering any drug, substance or medication and shall maintain that information in his or her records, (b) determine from the trainer or owner prior to prescribing or administering any drug, substance or medication to a horse if the horse will be entered into race during the period of time in which any drug, substance or medication may affect the performance of the horse or could result in the issuance of a certificate of positive analysis, if an official sample were tested for that drug, substance or medication, or metabolite or derivative of the drug, substance or medication, (d) advise the trainer or owner in writing of the potential or anticipated results of the administration of the drug, substance or medication on the horse and shall maintain a copy of that written advice in his or her records, (e) advise the trainer or owner in writing of any potential or anticipated side effects.... and shall maintain a copy of that written advice in his or her records." SB Rule No. 8.10.02 states that a veterinarian can comply with 8.10.01 (c), (d) and (e) if he or she provides advice to the trainer in writing at least once a year. No such documentation was submitted.

22. SB Rule No. 8.12 reads, "Should any veterinarian licensed by the Commission be found guilty of any offence contrary to the rules or be found guilty of any actions that would be considered a breach of ethics by the veterinary profession, that veterinarian may be fined, and/or suspended by the Judges, or may be referred to the Commission for disciplinary action under the rules." Mr. Jack referenced the appellant's factum (Ex. 3) in paras 32 and 33 wherein he submitted that Dr. Johnston's conduct as disclosed in the Agreed Statement of Facts would not be found to be a breach of ethics of the veterinary profession and that he had sufficient knowledge of the horses by virtue of a history of the animal, and a physical examination of the horse was not required in order to write the scripts. Ms. Friedman asserted that Dr. Johnston's conduct was tantamount to a breach of ethics.

23. In terms of the penalty, it was Ms. Friedman's position that the penalty was appropriate given the elevated responsibility of a licensed veterinarian, the expectation of such a person to perform those services in an ethical manner and the need for such a person to set an example as it relates to the whole issues surrounding illegal medications. She also referenced the need to consider the impact his



actions had on other licensees. As a result of his prescribing Aranesp to some of his ORC licensee clients, they received severe penalties, i.e., Siddall, 10-year suspension, \$20,000 fine, Scott McFadden, a 10-year suspension and a \$40,000 fine, Dan McFadden, a 10-year suspension and a \$40,000 fine.

24. Mr. Jack stated that his client, as per the Agreed Statement, was not denying prescribing EPO as alleged nor was he using SB Rule No. 1.04 as a defence. He also recognized that the penalties for Aranesp (DPO) are appropriate and reasonable but it was his position that Dr. Johnston had not breached the rules, either in a substantive or procedural way with the proof contained in the Agreed Statement of Facts (Ex. 6).

25. It was Mr. Jack's position that the reasons set forth in the Notice of Proposed Order and the Order of Immediate Suspension were unsubstantiated and went to his client's character which, he claimed, was unblemished, that there were no reasonable grounds that he would not act in accordance with the law, integrity or the public interest. Further, that such power rested with the Judges. He also, without admitting a breach occurred, stated that the proposed penalties would have an impact on Dr. Johnston's professional life.

26. Mr. Jack argued that the Commission must follow its own rules in judging Dr. Johnston and on that basis he did not violate any Ontario Racing Commission (ORC) rule based on the Agreed Statement of Facts.

27. The basis for this position was a number of established rules for the interpretation of the Rules or the Act. It was his submission that three rules of interpretation apply. They were "Ordinary Meaning", "No Tautology" and "Strict Interpretation". He tabled a photocopy of Chapter 3 from a publication entitled Essentials of Canadian Law, Statutory Interpretation (Ex. 8) in support of his argument.

28. Mr. Jack submitted that under "Ordinary Meaning" the "words in any of the Rules or Act are to be interpreted in accordance with their ordinary meaning" (Ex. 3, para 9). In support of his argument, he submitted that the Commission does adhere to this interpretation and he referenced the Aimonetti decision, Ruling Number TB 009/2009, para 8 wherein Vice Chair Donnelly wrote "It is unnecessary to embark upon a dictionary definition, legal dissection and analysis of the term "friend". From the context, it must be obvious that the term has its ordinary usage".

29. Furthermore, he argued that the Commission's communications related to Aranesp all referenced the words "acquired", "possessed" or "administered" (Ex. 1, tabs 18, 19, 20, 24, 25, 27, & 29). Nowhere, he submitted, is there a prohibition to prescribe and there is no evidence that Dr. Johnston ever acquired, possessed or administered the drug. It was not until the Notice to Industry re Dr. Johnston was the wording changed to include prescribing, he submitted (Ex. 1a, tab 63). The Panel notes that while the word prescribe was added there was no accompanying rule change. In this respect to word change, Mr. Jack referenced that in the May 12, 2008 Notice to Industry, (Ex. 1, tab 28) that communication added the words supply to the industry. He submitted that this was proof that the ORC had no consistent pattern as to what the prohibitions were.

30. Mr. Jack filed a photocopy of the Oxford Canadian Dictionary (Ex. 7) and Black's Law Dictionary (Ex. 9) wherein on the respective pages for both publications he submitted that the words possess, acquire or administer do not cover the word prescribe. Ms Friedman tabled a photocopy of the Dictionary of Canadian Law (Ex. 5) wherein the definition of the word administer includes the word prescribe. Mr. Jack admitted that some dictionaries may include it.



31. Under the “No Tautology” provision, Mr. Jack submitted that “It is presumed that every feature of a legislative text has been deliberately chosen and has a particular role to play in the legislative design. The legislature does not include unnecessary or meaningless language in its statutes;” On that basis, he argued that with no reference to prohibiting prescribing Aranesp that if there was, in fact an intent to do so, it would have included the word prescribe.

32. With respect to the “Strict Interpretation” rule Mr. Jack submitted that it directs any rule that is regulatory or punitive in nature must be interpreted strictly and, in as much as the penalties are severe as the Commission has told the industry, one must favour the person under scrutiny when interpreting. He referenced Ibid, Sullivan at page 168 “English courts have distinguished legislation that calls for strict construction and legislation that should be interpreted liberally. The first category is comprised of primarily of Acts that interfere with individual liberty or rights. This includes penal legislation, regulatory legislation... When the legislation is strictly construed, it is applied as narrowly as possible”.

Issue

33. Was Dr. Johnston aware of the Commission directives/communications regarding EPO/DPO? Was there a breach of the rules? Were the Order and penalty appropriate?

Decision

34. After carefully reviewing the testimony, the evidence and the documents, the Panel denies the appeal but varies the suspension to 10 years and the fine to \$40,000. Furthermore, the Panel will leave it to the discretion of the Administration whether to advise the Ontario Veterinary Board of the results of this decision.

Reasons for Decision

35. On a balance of probabilities it is reasonable to accept that Dr. Johnston would have been aware about the prohibitions and consequences related to EPO/DPO. It is simply not credible to accept his claim of ignorance. The prohibition and consequences re acquiring, possessing and administering EPO/DPO were well known across the entire breadth of the horse racing industry in Ontario. This fact goes to the very heart of the appellant’s credibility. He based a defence on a perceived technicality in the Rules of Racing as Mr. Jack submitted. There was no dispute as to the authority or purpose of the Commission’s initiative in this area.

36. There was ample uncontradicted evidence that it was well known within the horse racing industry about the prohibitions of acquiring, possessing and administering EPO/DPO. It is impossible to comprehend how a person with an admitted 75% of his practice dealing with racehorses could not somehow be aware. Dr Joe Johnston was certainly aware as per his response to the Commission Investigators and he was out of the country for part of the time in question. So was the unnamed veterinarian who Dr. Johnston was referring calls to in his absence. And perhaps more importantly, so were the horse people to whom he was writing the scripts as per their answers denying acquiring or using Aranesp. They were well aware or would not have been in a denial mode. As in the Siddall decision, “It is also not reasonable to accept his claim that he was unaware of the Notice to Industry re Aranesp. Even if he did not see the Directive, one can reasonably assume he would have been made aware of the direction given the magnitude of the communication and the high profile it received within the industry. The industry’s internal personal communication network is well known and effective.



Notwithstanding the aforementioned, under SB Rule No. 1.04, ignorance of the rules will not be accepted as an excuse for their violation,” Ruling Number Com SB 022/2009.

37. The Panel agrees with Mr. Jack that it should use the reasonable interpretation of the words as they relate to the Rules and the Act. To that end, the Panel believes it is reasonable to accept that the word administer can also mean to prescribe. Mr. Jack admitted as such. That definition is contained in the Dictionary of Canadian Law. The Panel also notes that administer, as per Black’s Law Dictionary, means to manage. Prescribing has an element of managing as the person writing the script is, in effect, managing the health care (process) of the recipient. Under that same definition it refers to apply, as medicine. The critical first step in a remedial health care process is the writing of the script following, of course, the assessment. In the Oxford Canadian Dictionary, second Edition, administer can be interpreted “application of medicine”. It is reasonable to accept that prescribing falls within that purview. In that same definition, it references “to provide what is necessary to satisfy”. Certainly Dr. Johnston was satisfying the need/desire for a number of licensees to acquire an illegal, non-therapeutic drug with the end result to gain an unfair advantage.

38. Therefore, it is reasonable to conclude that administer includes the meaning to prescribe. It would be unreasonable to think that the rules would allow a veterinarian to circumvent the intent of prohibition in this regard. The Panel takes this position supported by the test for reasonableness as stated at para 47 of Dunsmuir, supra: “Reasonableness is a differential standard animated by the principle that underlies the development of two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within a range of acceptable solutions. A Court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to process and of articulating reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law.”

39. SB Rule No. 1.09 states that “If any case occurs which is not or which is alleged not to be provided for by the rules, it shall be determined by the Judges or Commission as the case may be, in such manner as they think is in the best interests of racing.” Certainly it is in the best interests of racing to interpret administer to include prescribe. The industry would lose all confidence in the Commission’s ability to regulate the industry and to protect both the health of the horse and the public interest to rule otherwise.

40. Dr. Johnston was in breach of SB Rule No. 6.46.01 (e). While he personally did not possess or use Aranesp, he facilitated its use. He told the investigators that he had educated trainer, Dan McFadden, how to inject horses and was confident in his abilities to administer drugs via injection (Ex. 1a, tab 41, p 247). Mc Fadden became, for all intents and purposes, Dr. Johnston’s assistant and should be viewed as such.

41. At para 27 in Aubrey Friedman and the Ontario Racing Commission and Woodbine Entertainment, Divisional Court, File No. 512/07 the Court stated, “In order to find a breach of the Commission’s rules he would have had to have been involved in the administration of the prohibited drug, or he would have had to influence or conspire with another person to administer the substance (Rule 9.09).” There can be no question, based on the facts, that Dr. Johnston violated SB Rule No. 9.09 (a). The Commission unraveled a conspiracy related to multiple prescriptions for Aranesp, all for the purpose of affecting



performance in a number of identified horses. It all started with the writing of the prescriptions by Dr. Johnston.

42. Dr. Johnston was in violation of SB. Rule No. 3.09.01. Veterinarians, by virtue of their position, have an elevated responsibility. Licensees expect them to be honourable, honest and professional in their respective dealings with them. His actions, as the facts clearly demonstrate, were dishonest, unfair to other licensees who obey the rules, and contrary to the public interest.

43. As per the Agreed Statement of Facts (Ex. 6, para 25), Dr. Johnston was in violation of SB Rules Nos. 8.10 .01 and 02. He did not examine the horse, he failed to check if any other drugs were being administered and did not advise the trainer in writing as required.

44. Dr. Johnston, on a balance of probabilities, violated SB Rule No. 6. 20 (a), (b) and (c). There is no doubt his actions, notwithstanding if they were not covered by the rules, were injurious and prejudicial to racing. As was stated by the Commission in Flamboro Downs and Belmont Holdings, SB 129/1995, July 14, 1995: Horse racing must be conducted and be seen to be conducted with the utmost integrity. The future of the industry depends on maintaining the public's confidence that it is being operated totally "above board". In the matter of Todd Gray v. the Ontario Racing Commission, [2007] O.R.C.D. No. 19, Ruling Number Com SB 023/2007, the Court restated at para 35 "The devastation of public confidence exacted by the use of EPO/Aranesp requires a hard line response. That response is stern but fair given the high profile, long term program responding to this industry threat to the future of horse racing". Acting as the source/supplier for illegal/non-therapeutic drugs for horse racing is akin to the local drug supplier. They strike at the very foundation of a sport whose future is directly tied to integrity and fairness. Aggravating the situation is the appellant's professional position.

45. The appellant was also in violation of SB Rules Nos. 1.02, 6.05, 8.08 01 and 02. While every rule promulgated by the Commission is important in its own right, those violations seem minor in comparison and only add weight to the breaches.

46. Dr. Johnston breached the regulations of the Veterinarians Act, R.R.O. 1990, Regulation 1093. Specifically Section 17, numbers 7, 9 and 44. Number 7 states that misconduct includes providing services that are not reasonably necessary or useful. No credible evidence was provided that these horses needed Aranesp except to gain an unfair racing advantage. The documents show that Dr. Johnston was writing scripts without any reference to a patient horse. Number 9 refers to misconduct by making a claim respecting the utility of any remedy, treatment, device or procedure other than a claim which can reasonably be supported as professional opinion. The statements of Dr. Joe Johnston, the unnamed vet covering for the appellant accompanied by both Dr. Duncan and Dr. Bienzle's evidence, overwhelmingly speak to this breach. Similarly the aforementioned veterinarians' evidence also weighs in favour as to misconduct related to number 44. It reads misconduct to be "An act or omission relevant to the practice of veterinary medicine that, having regard to the circumstances, would be regarded by members as disgraceful, dishonourable or unprofessional". Aiding and abetting licensees to use illegal, non-therapeutic drugs whose sole purpose, under the circumstance, meets this definition. So too, does Dr. Johnston, in his seemingly "drive thru" prescription business, writing scripts for a horse he agreed he had not examined, Barans Destiny, prescriptions were being filled for a person without any reference to a horse (Holdsworth), other prescriptions being filled for a horse that was not even in Canada as it had been sold the prior year (Kators Impact).



47. The evidence is clear and it is convincing, Dr. Johnston violated numerous Commission rules. In doing so, he was also in breach of the Veterinarians Act. These facts, therefore, put him in violation of SB Rule No. 8.12 and eligible for disciplinary action by the Commission.

48. The Director acted reasonably in his decision to issue the Order to Dr. Johnston. Writing prescriptions for Aranesp in the manner and fashion the investigators reported, certainly made it reasonable for him to assume that, allowed to continue those activities under his licence would not be in the public interest, it would contravene the rules and it would place the integrity of horse racing in Ontario in question. Commission Chair Tanaka wrote in the appeal of veterinarian, Dr. Blaine Kennedy on page 12, "The Commission in this case is dealing with whether or not the Executive Director has reasonable grounds to believe that Dr. Kennedy will not abide by the principles of honesty, integrity and the public interest and will not abide by the Rules of Racing. It is a lesser test than the proof on the balance of probabilities. Further the Administration does not have to prove a breach of the Rules on the balance of probabilities to support the Director's finding that a licensee will not act with honesty, integrity and in the public interest under the terms of his licence." Ruling Number Com SB 007/2006.

49. Unfortunately, the Commission is fast approaching double digit numbers as it relates to EPO/DPO violations. The gravity of this situation is well documented in previous reasons for decision regarding penalty in Moffatt, [2008] O.R.C.D. No. 4, Ruling Number SB 005/2008 at para 62, and need not be restated. At para 64, Vice Chair Donnelly writes, "EPO/DPO places the horse at risk and imperils the industry. Performance enhancing drugs cast an executioner's shadow across horse and industry. The message, clear, concise, emphatic, irreversible is reasserted. "EPO/DPO is an exit ticket." The Panel concurs.

50. Dr. Johnston chose not to testify and as such, the Panel has a more difficult task in assessing his honesty, integrity and credibility as no testimony under oath was made before it. For example, Mr. Jack submitted that Dr. Johnston did not charge for his script writing yet the Panel notes the scheme appears to be a "cash on the barrel" arrangement as prescriptions at the dispensary appear to be cash payments. Mr. Jack submitted that he is of good character, community minded and had an exemplary record. Aggravating factors are the gravity of his misdeeds in the face of countless warnings on the prohibition and the severity of the consequences coupled with the impact on the industry and other licensees. At least three of his clients, Siddall and the two McFaddens have received 10-year suspensions and substantial fines.

51. In the Scott Decision, the Court said at para 74, "Imposition of penalty is neither a precise equation nor is it intended to be. Hence a "range of appropriate penalty" evolves. The general rule is that similar offences by similar offenders in similar circumstance should be visited by similar penalties". [2007] O.R.C.D. No. 18, Ruling Number Com SB 021/2007. While other EPO/DPO suspensions have been set at 10 years as per the Commission's Penalty Guidelines (appended to this decision) this is the first case involving a professional, veterinarian whom is expected to set an example as it relates to honesty, integrity and professionalism. In as much as the Guidelines speak to a 10-year suspension, the Panel therefore believes the reduction appropriate in this case. However, it sees the merit in the added timeframe, and recommends that given the gravity of the misconduct the added time frame is appropriate in the future.

52. In terms of the fine, the Panel agrees with Vice Chair Donnelly as he wrote in Scott (see above) at para 88. "The amount of the fine is properly determined by the degree of responsibility and the gravity of the offence without regard to the wrongdoer's resources. Thereafter, that amount is subject to adjustment on considerations of hardship and ability to pay." Mr. Jack submitted that a fine of \$50,000



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would be hardship to his client that would require him to seek a loan to repay and asked for a fine about half that assessed. The fine is set at \$40,000.

DATED this 27th day of October 2009.

Rod Seiling
Chair

Attachment



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January 23, 2008

POLICY DIRECTIVE NO. 1–2008

Penalty Guidelines for Equine Drug, TCO₂ and Non-Therapeutic Drug Offences

The Ontario Racing Commission at its meeting of Tuesday, January 22, 2008, approved the Penalty Guidelines for Equine Drug, TCO₂ and Non-Therapeutic Drug Offences Policy as follows, effective January 31, 2008:

Guidelines

Penalties for Equine Drug, TCO₂ and Non-Therapeutic Drug Offences

Class of Drug	1st Offence	2nd Offence	3rd Offence	4th Offence
Class I	1 – 5 years plus \$5,000 fine	5 – 10 years plus \$20,000 fine	10 year suspension plus fine	
Class II	1 – 5 years plus \$5,000 fine	2 – 10 years plus \$10,000 fine	10 year suspension plus fine	
Class III	60 – 180 days plus \$1,500 fine	6 months – 1 year plus \$5,000 fine	1 year – 2 years plus \$10,000 fine	2 years or more plus \$20,000 fine
Class IV	15 – 75 days plus \$1,000 fine	30 – 150 days plus \$2,000 fine	60 – 300 days plus \$4,000 fine	1 year or more plus \$8,000 fine
Class V	15 – 75 days plus \$1,000 fine	30 – 150 days plus \$2,000 fine	60 – 300 days plus \$4,000 fine	1 year or more plus \$8,000 fine
Non- Therapeutic	10 years plus \$40,000 fine	25 years plus \$100,000 fine		

Application of the Guidelines will take into consideration the following:



1. The Commission and/or its representatives will consider all offences for the purposes of assessing a penalty as a second or subsequent offence under these Guidelines.
2. The suggested penalties (suspension and fines) are guidelines only.
3. The Commission and/or its representatives may take into consideration any mitigating circumstances surrounding a positive test case, and may do any of the following:
 - i. Impose a penalty that is lower than suggested in these guidelines.
 - ii. Subject to due process, find other licensed individuals responsible and impose penalties upon such licensee as deemed appropriate.
4. The Commission and/or its representatives may exercise discretion in interpreting these Guidelines and assessing penalties, and may consider all prior offences, in and outside of Ontario, involving any drug, medication, bicarbonate (TCO₂) or any other substance prohibited by rule or law. Although all prior offences may be considered in determining the appropriate penalty, the penalties for second and subsequent offences suggested in these Guidelines are based on:
 - i. The assumption that the previous offence(s) being considered were in the same class of drug, and
 - ii. The date of conviction or ruling for the previous offence(s) occurred within 3 years of the first offence.
5. For second or subsequent offences which occurred within 3 years of the first offence but in a different class of drug, the Commission and/or its representative will exercise discretion in assessing the penalty by considering the following:
 - i. The number and class(es) of all previous offences;
 - ii. The time frame between offences; and
 - iii. Any mitigating circumstances.
6. For the purposes of these Guidelines, a TCO₂ offence is considered a Class III drug.
7. On a first offence, the Commission and/or its representatives may impose a penalty beyond or below the range in appropriate circumstances.
8. Multiple offences occurring on the same race day to different horses of the same trainer may be considered as individual offences in appropriate circumstances.
9. Suspension periods are full suspensions as described in the Rules of Racing.
10. Regardless of the penalty imposed, the horse in question will be disqualified and the purse will be redistributed.
11. Class I through V drugs are based on the *Uniform Classification Guidelines for Foreign Substances*, published by the Association of Racing Commissioners International.
12. Non-Therapeutic will include any drug, substance or medication that is determined to be in the system of a horse that has no therapeutic value to the horse.

BY ORDER OF THE COMMISSION

John L. Blakney
Executive Director