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## CASE SUMMARY: ONTARIO COURT CONFIRMS HORSE RACING COMMISSION PANEL'S FINDING THAT TRAINERS MET THE "DEFENCE" OF DUE DILIGENCE

**Administrative law – Decisions of administrative tribunals – Racing Commission;  
Horse Racers – Penalties and suspensions; Judicial review – Compliance with  
legislation – Validity and application of policies and guidelines**

*Ontario (Director, Racing Commission) v. Ontario (Racing Commission)*

The Director of the Ontario Racing Commission (the "Applicant") applied for judicial review of a decision made by a panel of the Commission (the "Panel"). The Panel had reduced the penalties imposed on four horse trainers after their horses tested positive for a controlled substance after a race. The Court dismissed the application for judicial review as the Panel's decision was reasonable.

[2016] O.J. No. 2445

2016 ONSC 2490

Ontario Superior Court of Justice

May 11, 2016

M.R. Dambrot, E.M. Stewart and J.A. Thorburn JJ.

The Respondents (Jeff Durham, Ron MacLean, Justin Robson, and Ed Hayter) are each horse trainers licensed by the Ontario Racing Commission (the "Commission"). These four trainers (the "Trainers") were each responsible for a horse that tested positive for isoxuprine after a race. Isoxuprine is used for foot problems in horses. Its use is not prohibited, but it cannot be present in a horse's system during a race. The Trainers were found guilty of offences contrary to the Standardbred Racing Rules (the "Rules"). Fines and suspensions were imposed on each of the Trainers.

The Trainers appealed to a designated panel of the Commission. The Panel found the Trainers had exercised due diligence and reduced the penalties to a fine of \$100 (and no suspension). The Director of the Commission (the "Director") applied for judicial review of the Panel's decision. The Director argued the Panel erred in finding the Trainers exercised due diligence warranting a lower penalty than recommended by the Commission's guidelines.

The Court reviewed the statutory scheme applicable to the Commission's regulation of horseracing. The Commission has the power to adopt the Rules. Rule 26.02 sets out obligations for trainers. Rule 26.02.03(c) makes it an offence for any trainer whose horse tests positive under specified regulations. This is an absolute liability offence and therefore due diligence was not a basis for an acquittal.

The Commission also issued a policy directive providing penalty guidelines for controlled substance offences. The directive provides: (1) the suggested penalties are guidelines only, and (2) the Commission may take into consideration mitigating circumstances and may impose a penalty that is lower than suggested in the directive.

The Court reviewed the decision of the Panel in light of the Rules and the penalty guidelines. The Panel recognized the offence was an absolute liability offence but the Panel made several findings of fact relating to the diligence exercised by the Trainers to avoid breaching the Rules.

The Court reviewed two errors that seemed present in the reasoning of the Panel.

First, the Panel misunderstood comments made in a previous decision of the Ontario Divisional Court [*Shakes v. Ontario (Racing Commission)*, 2013 ONSC 4229]. The Panel had interpreted the comments to say that a certain type of penalty will apply where a defence of due diligence can be established. The Court held this was not a correct interpretation as the comments in "*Shakes*" were specific to the penalty in that case.

Second, the Panel seemed to conclude that the actual defence of due diligence (as applicable to strict liability offences) had to be established before departing from the penalty guidelines. The Court held this was an erroneous view because the Panel was free to impose a penalty lower than the guidelines on the basis of any mitigating factors. For example, a panel could impose a lower penalty if it found a trainer had exercised diligence to avoid violating the rules.

Although the Court took issue with the Panel's reasoning, the Court nevertheless held the Panel's decision was reasonable. The Panel made several findings of fact relating to the steps taken by the Trainers and the Panel held the Trainers met the "defence" of due diligence. The Court held the Panel was owed deference in this decision. In the alternative, the Court held the Panel simply erred in labelling the Trainers' actions as "due diligence" instead of mitigating factors justifying a departure from the penalty guidelines.

The Court dismissed the Director's application for review. Costs were awarded to one of the Respondents (Mr. Hayter) in an agreed upon amount.

This case was digested by [Scott J. Marcinkow](#) of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact him directly at [smarcinkow@harpergrey.com](mailto:smarcinkow@harpergrey.com) or review his biography at <http://www.harpergrey.com>.