

IN THE MATTER OF AN APPEAL UNDER ENABLING LEGISLATION OF THE  
LEGISLATURES OF THE PROVINCES OF PRINCE EDWARD ISLAND, NOVA  
SCOTIA, NEWFOUNDLAND AND LABRADOR, AND NEW BRUNSWICK  
ESTABLISHING AN ATLANTIC PROVINCES HARNESS RACING COMMISSION  
AND UNDER THE RULES AND REGULATIONS OF THE ATLANTIC PROVINCES  
HARNESS RACING COMMISSION.

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Appeal Heard at Kensington, PE, August 1<sup>ST</sup>, 2018, 3:00P.M.

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BETWEEN: Michael B Downey (352831)  
APHRC Licensee  
NB  
APPELLANT

AND: Bob Wallace, Senior Judge  
Travis Fowler, Kevin Crowell,  
Associates, Judges' Panel EPR,  
June 23<sup>rd</sup>, 2017, Race #3  
RESPONDENT(S)

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PRESENT:

A panel consisting of Chair Frank Balcom (NS), Commissioners, Keith Gowan (NL), Lowell Stead (PE), Blair Hansen (PE), Cheryl Geldart Greer (NB) and Stefan DeCoursey (NB) convened to hear the appeal. Debbie Walsh and Paul Hogan appeared at the hearing for the Administration. Senior Judge Bob Wallace appeared on behalf of the Respondent(s). Appellant Michael B Downey appeared in person and was represented by Mr. David Shore. Appellant, witnesses Dr. Mitchell Downey (who testified by telephone), Susan Downey, Stephen Mason and Respondent(s) were affirmed by Commissioner Stefan DeCoursey.

The Appeal Hearing was conducted under the provisions of Section 7.3 of the Atlantic Provinces Harness Racing Rules and Regulations and the procedure for the conduct of the Appeal Hearing was guided by that Section.

The Chair introduced all those present and then asked both parties if they accepted the jurisdiction of the APHR Commission Appeal Panel of Six (6) Commissioners; at least one member from each of the participating Provinces of the Commission, to conduct the Appeal and to render a written Decision in due time. All parties accepted the jurisdiction of the Atlantic Provinces Harness Racing Commission Appeal Panel of Six (6) Commissioners.

PRELIMINARY MATTERS:

The Chair asked if there were any Preliminary Matters to be dealt with, and there being



none, the Hearing continued.

POSITION OF THE RESPONDENT JUDGES PANEL:

Judge Bob Wallace described the process after being notified of a Certificate of Positive Analysis from the June 23, 2018 race card at EPR. He contacted the CTI, Lorna Stevens who met he and Judge Kevin Crowell on July 7<sup>th</sup> and determined that Critique had tested positive for Acepromazine and its metabolite 2-(1-Hydroxyethyl) Promazine.

A hearing was held, and a 100-day suspension and \$500.00 fine were assessed because this was Mr. Downey's second offence.

Judge Wallace testified that during the hearing, Dr. Mitchell Downey who was present at the hearing stated that he and his father had concerns that someone was tampering with their horses.

Judge Wallace concluded by saying this was the involvement the Judges had with the case.

Mr. David Shore queried Judge Wallace on whether he was present when blood sample was drawn or when it was tested in BC, to which he answered "no".

Mr. Shore also asked Mr. Wallace if the Judges considered mitigating circumstances when assessing the penalty to which he answered, "there was nothing substantial to mitigate the penalty."

END OF RESPONDENT'S SUBMISSION

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POSITION OF THE APPELLANT – APHRC LICENSEE DRIVER / TRAINER  
MICHAEL DOWNEY

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The first witness who Mr. Shore called was Dr. Mitchell Downey who described his involvement in the industry and the type of veterinary practice he ran.

Mr. Shore asked Dr. Downey to explain the uses for acepromazine and if it was a commonly used drug to which he replied, "mostly in small animal surgical cases and powder form in feed for long term stall rest for horses".

Dr. Downey in response to questioning from Mr. Shore testified that does not see the possibility of environmental contamination or the drug being in their horses' feed because they have their grain locked up. He thought it more likely that some unknown person administered the drug.



On the day of the race, Dr. Downey drove Critique and thought she wasn't as sharp as usual and even scoped her thinking she may be sick.

Dr. Downey gave a summary of the routine followed with their horses when medications are administered to them. He stated that he did not administer acepromazine and "I never administer anything that Dad doesn't know about".

Mr. Shore then showed some video clips from security cameras at EPR, however the video was from early morning July 7<sup>th</sup> which was two weeks after the horse tested positive. Video from June 22<sup>nd</sup>, 23<sup>rd</sup> was not available because the recording devices are motion sensitive and the video from June 22<sup>nd</sup>, 23<sup>rd</sup> had already been taped over by more recent recordings. The videos from July 7<sup>th</sup> showed unknown people walking in the barn area.

Dr. Downey continued his testimony by stating that he was approached by Stephen Mason on July 8<sup>th</sup> asking if he would draw some blood on JK Down a horse trained and driven by Mr. Mason at EPR on July 7<sup>th</sup> because the horse had not raced well. Blood sample was sent for testing to see if Acepromazine could be detected, but the result was negative.

Dr. Downey concluded his testimony by stating that they now have two motion sensitive cameras in their barn since this incident, but do not lock their barn. He also said that there have been times when security guards have been employed by the Exhibition Association, however these patrols stopped some time ago.

Stephen Mason was the next witness called by Mr. Shore. Mr. Mason gave a brief history of his involvement in the industry over the past forty-five years. He confirmed that he asked Dr. Downey to pull blood on JK Down on July 8<sup>th</sup> because he had raced so poorly the previous day after having raced so well the week before.

Mr. Mason told the Appeal Board members that two or three weeks earlier (unable to say the exact date) he noticed a lump on the jugular of one of his other horses, KD Overdrive, "which indicates to me something was administered to the horse by someone not authorized by me".

When asked why he thought someone might do this, Mr. Mason mentioned that the Downey barn (Dr. Mitchell Downey and Michael Downey) as well as his stable were two of the most powerful on the grounds and in his opinion, there was a lot of jealousy and animosity amongst others on the grounds.

Mr. Mason concluded his testimony by saying that nobody locks their doors and "I really think someone has done something, that is why I am here today".

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Susan Downey, wife of Michael Downey was the next witness. She gave a history of her involvement in the industry and a detailed description of the daily routine with the horses that she and Mr. Michael Downey follow each day. She said the other than their son Dr. Mitchell Downey only her sister, Ellen Stevenson helps on race days with the horses. She said "Mitchell looks after all medical treatment for the horses. I am in range when medical treatment is being done and am aware of any treatment". She indicated that Acepromazine is administered to the horses at times during the winter months especially if horses have been in the barn for a few days in a row.

On questioning from Mr. Shore, Mrs. Downey stated that neither Michael Downey nor Dr. Mitchell Downey administered Acepromazine. "Someone did, but not us".

Mrs. Downey concluded by saying that she and Michael Downey make their living racing horses and the suspension is devastating.

The final witness called by Mr. Shore was Trainer Michael Downey who started by giving a history of his involvement in the industry and the daily routine at the barn.

He said that he had positive tests in the late 1970s, mid 1980s, June of this year and the one being dealt with today.

Mr. Downey said, "we know what drugs can be administered and we play by the rules". He stated that they take pride in their horses and do whatever they can to keep them safe but can only do so much and are the only occupant of the barn in which they are stabled.

Mr. Shore summed up by asking if there was enough evidence to ensure that this is really a positive test. Why did this happen, is there someone who has been tampering with horses? There isn't clear evidence, but there is circumstantial evidence of tampering.

He stated that under APHRC Rules 122 (1) (2) and 368 (1) (c) both use reasonable and/or appropriate steps to prevent a positive test. All evidence, from Dr. Mitchell Downey, Susan Downey, and Michael Downey show they took reasonable steps, clear evidence of due diligence backed up by the fact that Mr. Downey did not have a positive test for more than thirty years.

Mr. Shore went on to say that the Appeal Board members had the opportunity to look Mr. Downey in the eyes and accept credibility "because he came before you very honestly". The suspension has a significant impact on his livelihood.

Mr. Shore argued that there is the possibility of tampering, but no evidence from June 23<sup>rd</sup> and the timeline of 2-3 weeks with the KD Overdrive incident of a lump on the jugular matches up with the week of the Critique race which makes it more probable that some unknown individual tampered with Critique resulting in the positive test.

In this case, Mr. Shore argued, an alternative explanation for the positive test is probable and under the balance of probability, the Appeal Board must decide if it is more likely

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that an intruder injected the horse, or more likely that Mr. Downey did it. According to Mr. Shore, if tampering is more likely, then it removes the trainer responsibility.

Since the incident, Mr. Downey and Dr. Downey have done their due diligence by installing two motion sensor cameras and by contacting Saint John Police, more police patrols are being done.

In conclusion, under 369 (1) if there are mitigating factors the penalty can be modified and the same is true under Rule 420. The key mitigating factor is due diligence by the Downey's by taking all precautions possible and taking very good care of their horses.

END OF SUBMISSION OF APPELLANT APHRC LICENSEE DRIVER / TRAINER  
MICHAEL DOWNEY

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UNANIMOUS DECISION 5-0 OF THE ATLANTIC PROVINCES HARNESS  
RACING APPEAL PANEL OF SIX (6) COMMISSIONERS, CHAIR NOT VOTING.

After a thorough Appeal Hearing, a review of evidence and post hearing deliberations, your APHR Commission by a unanimous decision of 5-0 finds as follows:

**The Appeal of MICHAEL B DOWNEY is DENIED; HOWEVER, THE PENALTY IS VARIED as follows:**

**Mr. Downey's suspension is reduced to 45 days from July 11, 2018 to August 24, 2018 (inclusive).**

**The remaining fifty-five days is conditionally dismissed.**

**Mr. Downey will be placed on two years' probation from August 25, 2018 to August 24, 2020 (inclusive). If Mr. Downey during his probation violates the Equine Medication Control rules, the fifty-five days that have been conditionally dismissed will be added to any penalty assessed.**

**The fine and suspension of Critique remain unvaried.**

**Reasons for Decision:**

1. Critique, a horse trained by Mr. Downey on June 23<sup>rd</sup>, 2018, tested positive for Acepromazine and its metabolite 2-(1-Hydroxyethyl) Promazine on June 23<sup>rd</sup>, 2018.

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2. Mr. Downey did not prove, on a balance of probabilities, that the positive test was a result of tampering and that he took all reasonable precautions and made every diligent effort to protect Critique against tampering or unauthorized administration of drugs or foreign substances, as required by Rules 122 and 368. He had no lock on the door, no security cameras were installed in the barn, and there was no system in place for continuous monitoring of his horses.
3. There are mitigating circumstances that warrant a lesser penalty than the penalty recommendation contained in the Uniform Classification Guidelines of Foreign Substances for this offence.
4. All of Mr. Downey's staff appeared to testify and verified that they take very good care of their horses and work hard to protect against positive tests.
5. Another trainer, Stephen Mason, testified that he believed there was suspicious activity around the barns at various times, and on one occasion one of his horses had a lump on the jugular.
6. Mr. Downey's veterinarian accounted for all medications administered to Critique.
7. Mr. Downey has taken further precautions since the incident to protect against tampering.



FRANK BALCOM

Chair

Atlantic Provinces Harness Racing Commission Appeal Panel of SIX (6),

DATED AT KENSINGTON, PRINCE EDWARD ISLAND THIS 1<sup>ST</sup> DAY OF AUGUST, A.D., 2018.

PH/Kensington, PEI, 01/08/18

