Horse Racing Appeal Panel

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HORSE RACING APPEAL PANEL

TORONTO, ONTARIO – NOVEMBER 12, 2020
SB HRAP 05003 2021

NOTICE OF DECISION

IN THE MATTER OF THE HORSE RACING LICENCE ACT, S.O. 2015 C. 38 Sched. 9;
AND IN THE MATTER OF THE APPEALS BY JAMIE COPLEY, DEAN NIXON, AND LEONARD LALONDE OF RULING NUMBERS SB ADMIN 45/2019, SB ADMIN 47/2019 AND SB ADMIN 36/2019

Dates of Hearing:	November 3-5, 10 and 12, 2020
Horse Racing Appeal Panel (Panel/HRAP):	Sandra Meyrick, Vice-Chair Dr. John Hayes, Member Bruce Murray, Member
Representative for the Registrar:	Nicolle Pace
Representative for the Appellants:	Jim Evans
Decision:	The Panel dismisses the appeals.

WHEREAS Jamie Copley ("COPLEY") is licensed with the Alcohol and Gaming Commission of Ontario ("Commission") as a Driver/Trainer/Owner, Licence Number 071E63;

AND WHEREAS on October 20, 2019, COPLEY was the trainer of record for the horse "Avatar J", freeze brand number 7M055;

AND WHEREAS on December 17, 2019, COPLEY filed a Notice of Appeal of Ruling Number SB ADMIN 45/2019, issued December 11, 2019, with the Panel;

WHEREAS Dean Nixon ("NIXON") is licensed with the Alcohol and Gaming Commission of Ontario ("Commission") as a Trainer/Owner/Authorized Agent, Licence Number P90758;

AND WHEREAS on October 29, 2019, NIXON was the trainer of record for the horse "Big Boy Frazier", freeze brand number 79N38;

AND WHEREAS on January 8, 2020, NIXON filed a Notice of Appeal of Ruling Number SB ADMIN 47/2019, issued December 24, 2019, with the Panel;

WHEREAS Leonard LaLonde Jr ("LALONDE) is licensed with the Alcohol and Gaming Commission of Ontario ("Commission") as a Trainer, Licence Number J87062;

AND WHEREAS on October 5, 2019, LALONDE was the trainer of record for the horse "Taurus du Parc", freeze brand number 0FT420;

AND WHEREAS on December 9, 2019, LALONDE filed a Notice of Appeal of Ruling Number SB ADMIN 36/2019, issued November 21, 2019, with the Panel;

AND WHEREAS on November 3, 4, 5, 10 and 12, 2020, the Panel convened to consider COPLEY's, NIXON's and LALONDE's appeals;

TAKE NOTICE that the Panel dismisses the appeals.

The Panel's Reasons for Decision are attached to this Notice

DATED on this 6th day of January, 2021.

Sandra Meyrick, Vice-Chair Horse Racing Appeal Panel	Dr. John Hayes, Member Horse Racing Appeal Panel	Bruce Murray, Member Horse Racing Appeal Panel

REASONS FOR DECISION

Leonard Lalonde, Jamie Copley, Dean Nixon

The Panel denies the appeals and upholds SB Rulings 36/2019, 45/2019, and 47/2019.

Background

(1) Leonard Lalonde ("Lalonde") is a licensed trainer with the Alcohol and Gaming Commission, License # J87062. The horse "Taurus du Parc" (freeze brand #OFT42) is trained by Lalonde.

(2) On October 5, 2019, Taurus du Parc finished third in the fifth race at Flamboro Downs Raceway. Taurus du Parc was selected for TCO2 testing.

(3) On October 8, 2019, Racing Forensics reported that the blood sample with test tag #331927810 (Taurus du Parc), contained TCO2 with a value measured over 40.0 mmol/L, above the permitted level. As an absolute liability offence, Lalonde was found in violation of 22.38(a), 26.02.01, 26.02.02, and 26.02.03 of the Standardbred Rules of Racing.

(4) This is Lalonde's second TCO2 overage within a two-year period, and a breach of the terms attached to his license.

(5) SB Ruling 36/2019 was issued. Lalonde was fully suspended for a two-year period (730 days – October 9, 2019 – October 8, 2021, inclusive) and issued a monetary penalty of $10,000.

(6) Jamie Copley ("Copley") is licensed as a trainer/owner/driver and authorized agent with the Alcohol and Gaming Commission, License # 071E63. The horse "Avatar J" (freeze brand #7M0555) is trained by Copley.

(7) On October 20, 2019, Avatar J finished sixth in the eighth race at Rideau Carlton Raceway. Avatar J was selected for TCO2 testing.

(8) On October 22, 2019, Racing Forensics Inc. reported that the blood sample with test tag # 451929315 (Avatar J), contained TCO2 with a value measured of 38.7 mmol/L, above the acceptable level.

(9) Copley was found to be in violation of the Rules of Standardbred Racing as set out above. SB Ruling 45/2019 was issued.

(10) Copley had a previous positive Class II offence in 2014, and a Class IV offence in 2018.

(11) He was fully suspended for eight months (240 days - December 24, 2019, through August 19, 2019, inclusive), and issued a monetary penalty of $5000.

(12) Dean Nixon (“Nixon”) is licensed with the Alcohol and Gaming Commission as a trainer/Owner and Authorized Agent, License #P90758. The horse “Big Boy Frazier” is trained by Nixon.

(13) On October 29, 2019, Big Boy Frazier finished third in the eighth race at Western Fair Raceway. Big Boy Frazier was selected for TCO2 testing.

(14) On October 31, 2019, Racing Forensics Inc. reported that the blood sample with test tag #491930216 (Big Boy Frazier), contained TCO2 with a value measured 40.0 mmol/L.

(15) Nixon was found in violation of the Rules of Standardbred Racing. SB Ruling 47/2019 was issued. Nixon was suspended for a period of ninety (90) days (December 24, 2019 through March 22, 2020, inclusive), and issued a monetary penalty of $5000.

(16) Lalonde, Copley, and Nixon appeal their respective rulings. The appellants, through their counsel Jim Evans (“Evans”), assert that there are numerous discrepancies with the testing equipment, and in particular, the Beckman Synchon EL-ISE and the methodology employed by Racing Forensics Inc. in testing TCO2 levels with these Appellants. Evans argues that there was a spike in TCO2 positives at the time that these Appellants tested positive (12 TCO2 positives between August 5 – October 29, 2019 – page 29, Appellant’s Hearing Brief) which aligns with his concern over testing methods.

(17) Of primary concern, the laboratory report that accompanied the Lalonde and Copley Certificates showed that the Control 2 substance had an expiry date of September 26, 2019, well past “best before date” at the time of testing.

(18) The Appellants have not applied for a stay of their respective penalties. Copley and Nixon have served their suspensions. None of the Appellants has paid their fines.

(19) The Chair of the HRAP held two pre-hearing conferences in this matter. Chair Sadinsky also entertained a motion on various issues in advance of the hearing de novo. The hearing was originally scheduled to be heard in April, 2020. By their own motion, the HRAP, as a consequence of pandemic response to Covid-19, adjourned the matter sine die from April. On September 10, 2020, Chair Sadinsky scheduled this hearing for November 2020, peremptory on both the Registrar and the Appellants. The panel and parties convened for 5 days, November 3-5, 10, and 12, 2019, for the hearing de novo.

(20) On the third day of the hearing, after the Registrar had closed their case, Evans requested an opportunity to retain an expert to provide a Report and expert testimony in relation to the viva voce evidence provided by Registrar's witnesses. The Motion was heard on September 10, 2020.

The TCO2 Infraction

22.38(a) An excess level of total carbon dioxide (TCO2) in a racehorse is deemed to be adverse to the best interests of harness racing, and adverse to the best interests of the horse in that such condition alters its normal physiological state. Accordingly, a person designated by an approved TCO2 laboratory may, subject to the Horse Racing Licence Act, 2015, obtain venous blood samples from the jugular vein of a horse for the purpose of the testing of said samples by that laboratory for TCO2 levels as outlined in Rule 22.38.05. Where the TCO2 level, based upon such testing, equals or exceeds the following levels, the Judges or Administration shall order the relief authorized pursuant to Rule 22.38.06:

a. Thirty-seven (37) or more millimoles per litre of blood for horses not competing on Furosemide;

b. Thirty-nine (39) or more millimoles per litre for those horses competing on furosemide at a track where the EIPH Program is offered.

26.02.01 A trainer shall be responsible at all times for the condition of all horses trained by him/her. The trainer must safeguard from tampering each horse

trained by him/her and must exercise all reasonable precautions in guarding, or causing any horse trained by him/her to be guarded, from time of entry to race until the conclusion of the race. No trainer shall start a horse or permit a horse in his/her custody to be started if he/she knows, or, if by the exercise of a reasonable degree of care having regard to his/her duty to safeguard their horse from tampering, he/she might know or have cause to believe, the horse is not in a fit condition to race or has received any drug that could result in a positive drug test. Without restricting the generality of the forgoing, every trainer must guard, or caused to be guarded by the exercise of all reasonable standards of care and protection, each horse trained by him/her so as to prevent any person from obtaining access to the horse in such a manner as would permit any person not employed by or not connected with the owner or trainer from administering any drug or other substance resulting in a pre-race or post race positive test. Every trainer must also take all reasonable precautions to protect the horse and guard against wrongful interference or substitution by anyone in connection with the taking of an official sample.

26.02.02 Any trainer who fails to protect or cause any horse trained by him to be protected and a positive test thereby results or who otherwise violates this rule, violates the rules.

26.02.03 Notwithstanding 26.02.01, the Commission and all delegated officials shall consider the following to be absolute liability violations:

(c) any trainer whose horse(s) tests positive resulting from testing in accordance with the Pari-Mutual Betting Supervision Regulations;

Issues

(21) The Panel is asked to consider the following issues:

i. Are the tests that have been conducted by Racing Forensics Inc. to find elevated levels of TCO2 in the above named horses valid:

(a) Is the expiry date of September 26, 2019, on the laboratory report supporting the Certificate of TCO2 positive sufficient to void the Certificate?

(b) Is the expiry date as set out in (a) sufficient to tip the balance of probabilities in the Appellant's favour?

(c) Is the failure to disclose a manual for Standard Operating Procedure from Racing Forensics Inc. reason to question the validity of the test or to void these tests for lack of transparency?

(d) Is the practice by Racing Forensics Inc. to compound Verichem substances for the purpose of creating a Control Substance appropriate in these circumstances?

(e) If yes, was the handling of the Verichem substances contrary to the manufacturer's instruction and therefore likely to skew test results?

(f) Was there a spike in TCO2 cases in and around the same time as these three Appellants tested positive which confirmed irregularities with the testing methodology?

The Motion

(22) Evans brought a motion before the Panel seeking various relief, primarily to allow Dr. Thomas Tobin, a Toxicologist/Pharmacologist/Veterinarian (according to his 91 page Curriculum Vitae) to review the evidence proffered by the Registrar, most importantly the evidence and expert report of Dr. Robert McKenzie, and to prepare either a Report or Critique to Dr. McKenzie's Report.

(23) The Registrar, represented by Nicolle Pace ("Pace"), strenuously objected to the introduction of expert evidence at the late stage in the proceedings.

(24) There is history to Evans' request. Chair Sadinsky, in his pre-hearing memoranda, establishes that the issue of expert evidence on behalf of the Appellants has been in play for months. In October of this year, Evans brought a motion before Chair Sadinsky for similar relief. The Chair adjourned the motion to the Panel adjudicating the matter. Pace addressed the issue of allowing the Appellants to tender expert evidence at the stage of hearing in the Registrar's Hearing Brief, in advance of the motion before the Panel.

(25) Evans had indicated earlier that he might retain an expert to review and comment on McKenzie's report. Evans stated that he had communicated with Dr. Michael I. Lindinger, Ph.D. of The Neutraceutical Alliance (Spain), in regard to giving expert opinion evidence in relation to the testing for TCO2 done on the above horses. The Panel is provided with a letter from Dr. Lindinger of October 29, 2020, together with his curriculum vitae. At no

time did Dr. Lindinger provide an opinion, nor did he prepare a Report setting out his opinion, and conclusions.

(26) Pace argued that Dr. Lindinger, although highly educated (predominantly at Canadian Institutions), was not qualified to give evidence in relation to TCO2 testing, the Beckman Synchon EL-ISE machine, or the testing procedures of Racing Forensics Inc. Dr. Lindinger's materials do not mention TCO2 testing, knowledge of such testing, or any possible expertise in the area of TCO2 testing.

(27) At this motion, as aforementioned, Evans sought to retain Dr. Thomas Tobin, an individual who is well known to the HRAP. Dr. Tobin has been qualified as an expert before the HRAP and its predecessor, the ORC, many times. He has always been qualified as a Toxicologist/Pharmacologist. Evans stated that he had consulted Dr. Tobin over the previous weekend, and that Dr.Tobin was willing and able to provide expert and impartial evidence in relation to the TCO2 testing of the three horses at issue should the Panel grant Evan's request. Evans indicated that he presented Dr. Tobin, rather than Dr. Lindinger, in consideration to the concerns raised by Pace about Dr. Lindinger's expertise.

(28) The Panel, after considerable deliberation, denied the Appellants' motion.

(29) The Panel considered, among other facts and in no specific order, the following:

i. the hearing dates were established with the input of Appellants' counsel;

ii. this matter was marked by the Chair as peremptory, which perhaps not binding, is informative;

iii. no new information came to light during the course of the Registrar's case that, to be addressed, required the introduction of fresh evidence;

iv. the Appellants have failed to comply with the Rules in relation to the proffering of Expert Testimony;

v. the Appellants have been unwilling or unable to retain expert opinion to date despite their position that they “may” wish to do so;

vi. the Appellants have had opportunity well in advance and ample time to organize their case and retain appropriate experts; a moving party must provide the Panel with the necessary evidence to explain the reasons for the delay in compliance - the Appellant’s have entirely failed to do so;

vii. the Appellants have failed, not only to comply with the Rules as they relate to experts, but have made a conscious decision not to comply with the Rules in relation to document disclosure, disclosure of witness lists, and will say statements

viii. the Appellants have failed to comply in general with the organizational rules of this Tribunal, the Rules must mean something or what is the point in having them;

ix. the test for the admissibility of expert testimony is not met; Dr. Tobin is not an expert in TCO2 testing from a review of his quite extensive curriculum vitae; Dr. Tobin has never been qualified to provide expert testimony before this Tribunal (or any other) in relation to the Beckman Synchon EL-ISE machine or TCO2 testing;

x. the onus is on the Appellants to show that Dr. Tobin’s evidence would assist the Panel in making a decision;

xi. the Appellants have failed to outline what, if any, relevant evidence Dr. Tobin can lend or provide to this panel in relation to TCO2 testing;

xii. the Appellants seek an adjournment of the hearing for several months to allow Dr. Tobin to review the evidence of the Registrar, provide opinion and prepare a Report; the adjournment is prejudicial to the Registrar and the betting public;

xiii. the Appellants approach to this motion appears to be, at best, grasping at straws at a very late point in the process, at worst careless and high-handed;

(30) The Panel reviewed the law as it relates to the facts set out above:

Rules 9.5 and 9.6 - Expert Witnesses

9.5 A party who intends to rely on or refer to the evidence of an expert witness shall provide every other party with the following information in writing:

a) the name of the expert witness;

b) a signed statement from the expert, as prescribed by the HRAP, acknowledging his or her duty to:

i. provide opinion evidence that is fair, objective, and non-partisan;

ii. provide opinion evidence that is related to matters within his/her area of expertise; and

iii. provide such additional assistance as the HRAP may reasonably require to determine a matter or issue.

c) the qualifications of that expert witness, referring specifically to the education, training and experience relied upon to qualify the expert;

d) a written report signed by the expert that sets out the expert's conclusions and the basis for those conclusions on the issues to which the expert will provide evidence to the HRAP; and

e) where the expert report exceeds 12 pages, excluding photographs, a summary stating the facts and issues that are admitted and those that are in dispute, and the expert's findings and conclusions.

9.6 The disclosure required under Rule 9.5 shall be made:

a) by the party who filed the Notice of Appeal, at least 30 days before the hearing;

b) by any other party at least 20 days before the hearing; or

c) as ordered by the HRAP.

Application of Rules

2.1 The HRAP's Rules will be interpreted to:

a) promote the fair and efficient resolution of disputes;

b) allow parties to participate effectively in the process, whether they have a representative or are self-represented; and

c) ensure that procedure, orders and directions are proportional to the importance and complexity of the issues.

…..

6.2 The HRAP may order on its own initiative the extension or abridgment of any time period set out in these Rules.

(31) In Homes of Distinction (2002) Inc. v. Adili, [2019] O.J. No. 6957, the plaintiff sought to call an expert witness and required an abridgement of time under rule 53.03(4) of the *Rules of Civil Procedure*. In this matter, the motion was brought mid-trial and would have disrupted the orderly conclusion of the trial. Justice Lococo was concerned that the moving party did not provide any explanation for the lateness, and it was clear that the opposing parties and their experts could not readily response.

(32) Justice Lococo stated the following regarding the test to abridge the time for delivery of an expert report, and thus the foundation for receiving the evidence of that expert:

Applicable law

6 Turning now to the applicable law, the procedural requirements relating to the evidence of expert witnesses are set out in r. 53.03 of the *Rules of Civil Procedure*. Those requirements include deadlines for serving opposition parties with an expert report that sets out the substance of the witness' intended testimony. The court may extend or abridge the time for service on a motion under r. 53.03(4).

7 In particular, r. 53.01(1) requires a party who intends to call an expert witness to serve a report on every other party at least 90 days before the pre-trial conference. Under r. 53.03(2), parties who intend to call a responding expert witness are required to serve a responding expert report at least 60 days before the pre-trial conference. Those deadlines are significantly earlier in the process than they were in the procedural rules in place prior to 2010, when the 90-day and 60-day periods were measured from the trial's commencement rather than the pre-trial date. If a party fails to comply, r. 53.03(3) prohibits an expert witness from testifying with respect to an issue, except with the leave of the court, unless the substance of the witness' testimony is set out in an expert report served under that rule or in a supplemental report served at least 30 days before the trial's commencement.

8 Where the leave of the court is sought to permit an expert witness' testimony, r. 53.08 provided that leave "shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial." As indicated by the Court of Appeal in *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 (C.A.), at para. 81, the test in r. 53.08 is mandatory. To paraphrase the court in *Marchand*, "notwithstanding non-compliance with [the requirement for timely delivery of an expert report], a trial judge must grant leave unless to do so would cause prejudice that could not be overcome by an adjournment or costs."

9 When considering the issue of prejudice, the case law also indicates that the prejudice to the opposing party in admitting the disputed evidence must be weighed against the prejudice to the proffering party in excluding it. Relevant evidence should not be excluded on technical grounds unless the court is satisfied the prejudice in receiving the evidence exceeds the

prejudice in excluding it: see *Rolley v. MacDonnell*, 2018 ONSC 163, at para. 29.

10 By way of contrast, on a motion to extend or abridge the time for service of an expert report under r. 53.04(4), the court's authority is discretionary rather than mandatory. Rule 53.04(4) states that the time for service may be extended or abridged, without indicating the test for doing so. However, there is no dispute between the parties that the mandatory test in r. 53.08 applies in this case, since the leave motion is being brought during the trial to the trial judge, as contemplated by r. 53.03(3). In any case, even where a pre-trial motion is brought to extend the time for providing an expert report, previous authority suggests that the mandatory test in r. 53.08 should still be applied in order to avoid the possibility of inconsistent results, depending on the timing of the motion: see *Canadian Imperial Bank of Commerce v. Wicks* (2000), 2 C.P.C. (5th) 271 (Ont. S.C.), at paras. 8-10.

11 As noted during submissions, mandatory language similar to that in r. 53.08 also appears elsewhere in the *Rules of Civil Procedure*, for example, where a party seeks leave to amend a pleading under r. 26.01. In that context, the Court of Appeal has indicated that even though the test is cast in mandatory terms, the court has a residual right to deny leave where appropriate: see *Marks v. Ottawa (City)*, 2011 ONCA 248, 280 O.A.C. 251, at para. 19. On a leave motion under r. 53.08(3), the basis for that residual discretion would be found within the language of that rule, including the references to "prejudice", "undue delay", and "such terms as are just". As well, I agree with counsel for the City of Hamilton that when determining whether to exercise the court's residual discretion, it is appropriate to take into account the moving party's reason for seeking leave and whether a satisfactory explanation has been provided for the fact that the usual t timelines were not being followed: see *Shuster v. Dr. R. Kilislian Dentistry Professional Corp.*, 2017 ONSC 1941, at para. 26, citing *Castronovo v. Sunnybrook & Women's College Health Sciences Centre*, 2016 ONSC 6275, aff'd 2017 ONCA 212.

(33) In McEwen v. Ontario, [2017] O.J. No. 2817 the Court denied leave to serve an expert's report which did not comply with the Rules. The action was long outstanding and while the plaintiff served expert reports on damages, it required leave to late serve an expert report on standard of care – this was a wrongful arrest/police negligence matter. The trial was marked peremptory for both parties and if leave was granted, the defendants would have been prejudiced or the trial would have to be adjourned – with cascading effects on other matters awaiting trial. Justice Rady denied the motion and thus excluded the expert opinion evidence.

(34) In Shuster v. Dr. R. Kilislian Dentistry Professional Corp., [2017] O.J. No. 1581, this matter was being case managed and a timetable for exchange of expert reports was established by the Case Management Judge. The Plaintiff in two actions arsing from the sale of a dental practice sought to serve an expert report on damages well after the timeline set by the Case Management Judge. The evidence as to the retainer of this expert by Dr. K. was confusing or possibly misleading as to when the expert on the issue of damages was retained.

(35) Justice Diamond stated the following:

> **8** During the hearing of the motion, neither party took issue with the governing jurisprudence on a motion seeking leave to extend or vary a timetable. The case law relied upon by Dr. Kilislian is relatively clear: in the absence of prejudice caused by a delay in serving an expert report, the Court will generally avoid excluding expert evidence on technical grounds and grant leave to extend the deadline for service (albeit often with terms).
>
> **9** In the face of that jurisprudence, Dr. Shuster opposes this motion on the grounds that (a) the jurisprudence applies to cases where a moving party's failure to deliver an expert report in accordance with a court-ordered deadline arises from an error, inadvertent act or omission, and (b) on the record before me, Dr. Kilislian's failure to deliver her damages report by September 30, 2016 was not a result of an error, inadvertent act or

omission, but rather a conscious decision not to comply with the court-ordered deadline.

…..

21 There is no responsive evidence explaining why the Kilislian parties waited until after September 30, 2016 to determine that a damages report was necessary. This lack of evidence is made even worse by the contents of the cover letter enclosing the two expert reports delivered on September 30, 2016. In that letter, counsel for the Kilislian parties stated as follows (writer's emphasis in **bold**):

"Our client has also engaged an expert to provide a report on damages **which we had understood would be available by today. If we do not receive it in time, we will have to provide it to you next week**. Please note, however, that I will be out of the office on Monday and Tuesday for religious observance."

22 In his supporting affidavit filed on this motion, Curnew stated (again, writer's emphasis in **bold**):

"In **December 2016, we accepted that an expert report should be prepared** having re-evaluated our assumptions as set out above. **Thereafter,** I am advised and verily believe that **our counsel sought a report on damages from Ms. Jackie Joachim** who, I am advised and verily believe, was away for travel for several weeks."

23 The contents of the cover letter cannot be reconciled with Curnew's evidence. Curnew was clear that it was not until December, 2016 that the Kilislian parties decided that a damages report was necessary, and then sought a damages report from Ms. Joachim. Yet on September 30, 2016, the Kilislian parties represented through their counsel that Ms. Joachim had already been engaged to provide a damages report, and that Ms. Joachim's damages report was to be available on September 30, 2016 (or within a few days thereafter).

24 Ms. Joachim's damages report was either completed and ready for delivery by September 30, 2016, or it was not. The Kilislian parties have offered no explanation to try and reconcile their positions, which are not simply conflicting but appear to live in two different universes.

25 Compounding this irreconcilable evidence is the fact that in answering further undertakings, the Kilislian parties advised that they did not have any monthly gross revenue reports. Yet somehow, Ms. Joachim listed those monthly reports from October 2011 - February 2017 as part of the documents she had reviewed in arriving in her opinion.

Decision

26 As held by my colleague Justice Myers in *Castronovo v. Sunnybrook & Women's College Health Sciences Centre* 2016 ONSC 6275 (CanLII) appeal dismissed 2017 ONCA 212 (CanLII), to satisfy the relatively low threshold required to extend a deadline, a moving party must still submit the necessary evidence to explain the reasons for the delay in compliance.

27 The consent timetable was part of a court order. Orders must mean something, especially in proceedings where case management has been imposed.

28 On the record before me, the Kilislian parties have not explained their reasons for failing to comply with the September 30, 2016 deadline. On the contrary, Curnew's evidence seems to show that the Kilislian parties simply chose not to comply with the deadline until they unilaterally concluded that it was time for them to deliver a damages report. Such a position arguably borders on being cavalier, and in my view fails to satisfy the test for leave.

29 Accordingly, the Kilislian parties' motion for leave is dismissed.

Peremptory Orders

(36) In Conway (Re), [2016] O.J. No. 6267, Mr. Conway appealed a decision of the Ontario Review Board that ordered he continue being detained following a finding some thirty years earlier that he was not criminally responsible for a number of sexual assaults. When Mr. Conway sought an adjournment of his hearing, which had been marked “peremptory”, the Board denied the request and proceeded with the hearing – the Board refused to release Mr. Conway, but it also refused the request that he be moved to a new institution.

Justice Laskin, writing for the Court found that the Review Board erred when it refused Mr. Conway’s request of an adjournment, which had been marked as peremptory, on that basis along. When dealing with peremptory matters and a further request for an adjournment, the Court’s discretion should be guided in the following manner:

(c) Analysis

23 In deciding whether grant or refuse a request for an adjournment, the Board must take into the account the interests of the not criminally responsible (NCR) accused, the interests of the hospital, and its own statutory mandate to hold timely hearings. Because its decision is discretionary, it attracts significant deference from an appellate court. But an appellate court may justifiably interfere if the Board errs in principle, or exercises its discretion unreasonably. So, for example, an appellate court may intervene if the Board's denial of an adjournment deprives an NCR accused of a fair hearing and thus is contrary to the interests of justice: see *Khimji v. Dhanani* (2004), 69 O.R. (3d) 790 (C.A.), at para. 14.

24 In the case before us, the Board denied Mr. Conway's request for an adjournment to retain counsel for the sole reason that the hearing date had

been designated peremptory. Refusing an adjournment for that reason alone amounted to an error in principle. Although the dictionary definition of peremptory -- irreversible, binding, conclusive -- suggests that a hearing marked "peremptory" must proceed, our court, sensibly, has held otherwise. In *Igbinosun v. Law Society of Upper Canada*, 2009 ONCA 484, 96 O.R. (3d) 138, at para. 43, Weiler J.A. wrote:

> One of the purposes of making a hearing date peremptory is to further the public interest in the administration of justice by preventing delay and wasted costs. However, judicial discretion must still be exercised depending on the facts and circumstances of each case, as the overarching purpose of marking a date peremptory is to serve the interests of justice. [Footnotes omitted.]

25 In other words, peremptory in this context does not mean mandatory. It does not remove the Board's discretion. Although the peremptory designation will be an important consideration in the Board's decision, the Board must still exercise its discretion by taking into account other relevant considerations, especially any prejudice to the NCR accused from refusing an adjournment.

26 Without attempting a complete list, the following considerations ought to have had a bearing on the Board's decision whether to grant Mr. Conway's request for an adjournment:

* *Had there been previous adjournments and previous "peremptory" designations?* The hearing had already been adjourned twice before, but neither previous date had been marked peremptory.

* *What was the reason for Mr. Conway's adjournment request?* Mr. Conway sought an adjournment to retain counsel. Under s. 672.5(7) of the *Criminal Code*, he had the right to be represented by counsel at his annual review.

* *Was amicus an adequate substitute for Mr. Conway's own counsel?* As Mr. Conway did not have counsel, the Board, acting under s. 672.5(8) of

the *Criminal Code*, appointed *amicus* to act for him: see *R. v. LePage* (2006), 217 O.A.C. 82. The Board should have assessed whether *amicus* was an adequate substitute for Mr. Conway's own counsel.

* *Had Mr. Conway made attempts to retain counsel?* Mr. Conway had made some attempts, though not exhaustive attempts, to obtain counsel for the February 18, 2016 hearing. His counsel of choice, who had represented him on his appeal, was available in April, two months from the scheduled hearing date.

* *What were the consequences of the hearing for Mr. Conway and the potential prejudice to him?* Mr. Conway was potentially prejudiced by having to proceed without his own counsel. He was facing a possible significant change to his disposition, a transfer to another hospital; and he was facing the evidence of two doctors who would be trying to demonstrate the significant harm he had caused to members of the hospital's staff.

* *Would St. Joseph's be prejudiced by an adjournment?* The record did not establish that St. Joseph's would be prejudiced by an adjournment of a few months.

* *Was Mr. Conway trying to "manipulate the system"?* There was no evidence in the record that by seeking a third adjournment Mr. Conway was "trying to manipulate the system".

* *Would another adjournment affect the Board's statutory mandate to hold a timely annual review?* Under s. 672.81(1) of the *Criminal Code*, the Board is required to hold an annual review of an accused's disposition within 12 months of its previous disposition. As the Board's previous disposition for Mr. Conway was in November 2014, the February 18, 2016 hearing date was already 15 months after its previous disposition. However, both the *Criminal Code* and the Board's own rules enable the Board to grant adjournments. Under s. 672.81(1.1), where the accused is represented by counsel and the accused and the Attorney General consent, the Board has the power to

extend the time for holding a hearing to a maximum of 24 months. Under Rule 32 of its Rules, the Board can grant adjournments in furtherance of its power to control its own proceedings.

27 After balancing these considerations, the Board would have had to decide whether it should grant Mr. Conway's adjournment request. Had the Board exercised its discretion by taking into account these considerations, in this case this court would undoubtedly have had no basis to second guess its decision. As the Board considered only the "peremptory" designation, however, it would have been open to this court to set aside the Board's refusal of an adjournment. However, as I said at the outset, in practical terms, the Board's refusal is moot. For that reason I would not give effect to this ground of appeal.

(35) In Law Society of Upper Canada v. Igbinosun, (2009) 96 O.R. (3d) 138, the Ontario Court of Appeal affirmed the Divisional Court's decision which set aside both the findings and penalty imposed by Law Society of Ontario's Hearing and Appeal Tribunals. Although the Hearing dates were peremptory on both the Lawyer and Society, the Lawyer had recently retained counsel and counsel required a very brief adjournment, but was prepared to act. When the Hearing Panel refused the adjournment – based on it being peremptory, the counsel and Lawyer withdrew. Both the Divisional Court and the Court of Appeal held that the Hearing Panel had denied the Lawyer nature justice in dealing with issue of peremptory hearing and request for an adjournment:

[42] Molloy J. addressed the peremptory nature of the September 18 continuation date in her reasons, at paras. 63-64, and, in effect, concluded that the Hearing Panel either ought not to have made the September 18 date peremptory or should have been more flexible about adjourning it. She stated [at paras. 63-64]:

The September 18, 2006 hearing date was set without Mr. Igbinosun's input, at a time when the Hearing Panel knew Mr. Lawlor intended to get off the record. I accept there is some fault attributable to Mr. Igbinosun for not participating in the teleconference and/or providing dates when he [page151] would be available to continue with the hearing. However,

> at this point, Mr. Lawlor was still on the record and Mr. Igbinosun had not consented to his removal. He clearly had not yet retained other counsel to represent him. He had been represented by counsel throughout the process before the Society and in the criminal proceedings against him. The Hearing Panel ought to have recognized that Mr. Igbinosun would be faced with the difficult task over the summer months of finding and retaining a lawyer who was prepared to step into a hearing already half-completed with a fixed and peremptory continuation date of September 18, 2006.
>
> When Mr. Igbinosun did have an opportunity to address the issue [of the peremptory date of September 18] with the Panel on the occasion of Mr. Lawlor's removal from the record in July, 2006, and stated that he could not be ready to proceed for the September hearing date, he was advised he would have to bring a motion. The first date available to the Panel for that motion was only four days prior to the date set for the hearing. Again, this was not of Mr. Igbinosun's doing. He brought his motion at the earliest opportunity. The motion was denied.
>
> (Emphasis added)

[43] One of the purposes of making a hearing date peremptory is to further the public interest in the administration of justice by preventing delay and wasted costs. However, judicial discretion must still be exercised depending on the facts and circumstances of each case, as the overarching purpose of marking a date peremptory is to serve the interests of justice: Jourdain v. Ontario, [2008] O.J. No. 1868, 167 A.C.W.S. (3d) 498 (S.C.J.), at para. 12, referring to the decision of the English Court of Appeal in Hytec Information Systems Ltd. v. Coventry City Council, [1997] 1 W.L.R. 1666 (C.A.), at pp. 1674-75 W.L.R. Molloy J. held that the Hearing Tribunal did not take account of the particular circumstances of this case when it relied on the peremptory nature of the September 18, 2006 hearing date as a basis for dismissing Miguna's request, among others, for a 48-hour adjournment.

[44] I would add that the Hearing Panel made the hearing date of September 18 peremptory on the Law Society as well as Igbinosun. It gave

no reasons for doing so. The Hearing Panel inexplicably waited over three months, from March 3 to June 19, 2006 to hold a conference call to schedule the continuation of the hearing. In any event, if the Hearing Panel was concerned about Igbinosun bringing a further motion to stay the proceedings on account of undue delay, the Hearing Panel could have made it a condition of granting an adjournment of the peremptory date that the party seeking the adjournment could not include the period of the adjournment in any motion to stay the proceedings for undue delay, as it did when the October 24, 2005 peremptory date was finally adjourned.

[45] The Law Society submits that, at para. 65 of her reasons, Molloy J. impermissibly reanalyzed the question of whether the [page152] denial of an adjournment on September 18, 2006 was a denial of natural justice when she stated:

> Whatever may have been Mr. Igbinosun's conduct on prior occasions, it is clear from the Appeal Panel's own Reasons, as well as from the transcripts of the hearing before the Hearing Panel, that on September 18, 2006, Mr. Igbinosun was prepared to proceed and had a lawyer willing to represent him. His lawyer had two brief prior commitments, but was prepared to work around those and to proceed immediately, with short recesses to accommodate his previously scheduled court appearances. As the Appeal Panel found, on September 18, Mr. Igbinosun "demonstrated a clear intention to proceed" and his counsel was "flexible" in attempting to accommodate his previous commitments with this hearing date.

[46] As I have indicated, the Divisional Court rightly held that both the Appeal Panel and the Hearing Panel erred in principle and identified their errors. In the circumstances, Molloy J. was entitled to consider whether Igbinosun's counsel's request for a brief adjournment should have been granted. She concluded that the brief adjournment ought to have been granted and that the Hearing Panel's refusal to do so amounted to a denial of natural justice. I see no error in principle in this decision and it is entitled to deference.

[47] This is not a situation as in Wood, where the hearing tribunal was entitled to draw the inference that the applicant was attempting to delay the hearing by causing a breakdown in his relationship with his counsel, nor is it a situation as in Hazout, where the applicant displayed a complete lack of diligence in finding counsel. Although everyone on the June 19 conference call became aware that Lawlor would seek to remove himself from the record, Lawlor and Igbinosun's actions were compatible with there being a retainer problem which might resolve itself. I say this because, although Lawlor threatened to get off the record on May 23, 2006, Lawlor did not seek to remove himself prior to the June 19, 2006 conference call to make a scheduling date, Igbinosun asked Lawlor to represent him on the call, Lawlor agreed to the September 18 date and, later, Igbinosun opposed Lawlor's removal as counsel of record.

[48] Igbinosun's original request for an adjournment was made well in advance of the scheduled hearing date. The fact that his motion was heard only four days before the hearing date was not due to any fault on his part. Ignobisun had counsel with him on September 18 who would have proceeded had he been given a recess at 2:00 p.m. that day. Miguna is not clear as to what he would have done about his motion in Barrie the following day. However, at the latest, he was prepared to proceed on September 20. These were very serious allegations and the potential consequence of a finding of misconduct was a loss of Igbinosun's [page153] livelihood. The desirability of having the matter determined on its merits was great. Igbinosun had clearly expressed his desire to be represented by counsel and exercised that right in all the other proceedings. The Law Society's case had been presented. Igbinosun was expected to testify and he wanted counsel to assist him and to protect him from inappropriate cross-examination. As Molloy J. noted, there was no discernible prejudice to the Law Society or its witnesses in granting a brief adjournment. The Hearing Panel gave no indication that it would not have been able to accommodate Igbinosun's request to continue the hearing on September 20 or possibly earlier. The Hearing Panel was required to balance the public interest in having the hearing concluded expeditiously against the prejudice to Igbinosun of being forced to proceed at this point

without counsel, taking into consideration the context and circumstances of the case. It did not do so.

[49] In these circumstances, I would not interfere with Molloy J.'s conclusion that Igbinosun was denied natural justice when Miguna's request for a brief adjournment on September 18 was denied. I would hold that the Divisional Court did not err in setting aside the Appeal Panel's conclusion that the findings of professional misconduct against Igbinosun were not tainted by breaches of procedural fairness and natural justice.

The Admissibility of Expert Evidence

a. **R. v Mohan** [1994] 2 S.C.R. 9, [1994] S.C.J.No. 36(S.C.C.) – the Supreme Court of Canada, later reaffirmed in **R. v J. (J.-L.)** [2000] 2 S.C.R.600, set out the following criteria for the admissibility of expert evidence:

    i. The evidence is relevant to some issue in the case; - what is relevant is common sense – there is no legal concept of relevance- there must be a nexus between the content of the opinion and the material issue in dispute;

    ii. The evidence is necessary to assist the trier of fact; essentially this equates to evidence that is necessary because it is outside of the scope, knowledge or experience of the Panel

    iii. The evidence does not contravene an exclusionary rule; examples of excluded evidence may include hearsay, character evidence and/or certain audio or video taped evidence may be excluded; and

    iv. The witness is a properly qualified expert;

b. The party tendering the expert evidence has the evidential and legal burden to satisfy the “Mohan test” on a balance of probabilities; In other words, prior to the Panel admitting or receiving the evidence, we must be satisfied that each of these criteria, on a balance of probabilities is met; (an example – the opinion evidence is necessary to assist the Panel and the expert has the

necessary qualifications to give opinion evidence on the subject matter)- this is always determined on a case by case basis

c. The subsequent two decades following Mohan has seen significant development in the law of expert testimony. **White Burgess Langille Inman v Abbott and Haliburton Co.**, 2015 S.C.C. 23, [2015] 2 S.C.R. 182, is now considered the governing test for the admissibility of expert testimony. Expert Evidence is admissible when:

    i. The evidence is logically relevant;

    ii. The evidence must be necessary to assist the trier of fact;

    iii. The evidence must not be subject to any other exclusionary rule;

    iv. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfill the expert's duty to the court to provide evidence that is:

        a. Impartial

        b. Independent

        c. Unbiased

    v. The evidence must be reliable (not some unproven scientific theory or novel science)

    vi. A cost benefit analysis must be entertained – not so much the financial cost of a lengthy hearing but the abundance of evidence and the battle between experts – should it be allowed

    vii. It is the trier of facts job to weigh the evidence and arrive at a conclusion

    viii. An expert can speak on matters outside of their report as long as it is not prejudicial to the other side.

(36) Upon consideration of the facts and a review of the relevant case law, the Panel unanimously denied the introduction of further expert opinion evidence by Dr. Thomas Tobin.

The Panel's Reasons for Decision

(37) Over the course of the five (5) day hearing, the Panel was provided with both documentary as well as viva voce evidence. The Panel was taken through 250 pages or more of documentary material, much of it entered into evidence. The Panel heard expert testimony from Dr. Mackenzie of Racing Forensics Inc., as well as participant evidence from Ms. Choo and Ms. Tso. Racing Official Durand provided testimony on behalf of the Alcohol and Gaming Commission. The Appellants gave viva voce testimony. We also heard from Dr. Llewellyn, a character witness for Lalonde. Copley submitted several letters from friends as character witnesses.

(38) It is on the "balance of probabilities" that the Panel must base their decision.

(39) Racing Forensic Inc. is a private facility that is contracted by the Alcohol and Gaming Commission to conduct total carbon dioxide (TCO2) testing in the Province of Ontario, through equine plasma. The Panel was not persuaded that Racing Forensics Inc., as a private operator, has a bias in finding positive TCO2 overages, financially or otherwise.

(40) On October 7, 2019, Racing Forensics Inc. issued a Certificate of TCO2 Analysis , Certificate # 00303, relating to test card # 331927810. On October 22, 2019, Racing Forensics Inc. issued a Certificate of TCO2 Analysis, relating to test card # 451929315. Attached to both of these Certificates were Laboratory Reports, which, among other dates, listed the lot and expiry dates for the Controls or reagents used in testing. Both of these Laboratory Reports listed the expiry date for Control 2 as September 26, 2019.

(41) According to Evans, it was his client that noticed the expired Control 2 reagent and notified Racing Official Brad Capes who then notified Racing Forensics. Racing Forensics, once aware of the problem, audited the screening and confirmatory data generated by the Beckman Synchon EL-ISE,

and determined that the TCO2 analysis was accurate and that the Certificate of TCO2 Analysis was correct. It also noted that there had been a "bookkeeping error" in recording the date of expiry of the Control 2 substance.

(42) The Panel heard a great deal of evidence in respect of the process of compounding the Control 1 and 2 substances, and the manner in which the steps or the process are / are not recorded. Evans argued that there is no way of knowing whether an 'expired' Control 2 was used or not as there was nothing written down or noted by Racing Forensics Inc. The Panel does not agree. Again, the test is that of balance of probabilities.

(43) The Panel is persuaded by the evidence that Ms. Choo simply failed to manually change the lot number and expiry date on the template where she did change the Control 2 value. Had she not done so, the entire test would not pass the criteria and the tests would have had to be re-run four times. The expiry date on the Control 2 actually used was November 22, 2019. This testimony is supported by the maintenance log at Tab 4, Exhibit "A".

(44) The Panel was further persuaded by the evidence of Dr. McKenzie that had the incorrect Control substance been used, then the values would not have met criteria.

(45) First, Dr. McKenzie explained, that as required by the CPMA, both the control and the equine sample are run four times. The average of the four are used to record the TCO2 value. Dr. McKenzie advised the Panel that when he learned of the error on the face of the template, he personally audited all of the data to ensure that the results were correct. Dr. McKenzie told the Panel that the appropriate expected value was determined for Control 2 and properly input into the template that the Laboratory uses to record data. Dr. McKenzie emphasized that this was the most important factor. The lot number of the Control 2 as well as the expiry date were inadvertently not changed. Dr. McKenzie described this as a book-keeping error, assuring the Panel that the relevant information, that being the value for the Control 2, was accurate. Dr. McKenzie assured the Panel that the Panel could rely on the TCO2 test results identified by the three Certificates of TCO2.

(46) Evans argued that the Beckman is an outdated machine. Dr. McKenzie presented the Panel with an External Proficiency Study of October 23, 2019,

that compared the Beckman Synchon EL-ISE with results from the French Beckman DxC 600 when using similarly spiked samples with different calibration controls and different linearity standards. The Beckman EL-ISE is the instrument that generated the data upon which the international threshold for TCO2 is based. The results of the Beckman EL-ISE were statistically identical to the results of the Beckman DxC 600. Dr. McKenzie suggested that the Beckman remains the most precise instrument in the world for testing TCO2.

(47) Once confirmed, Racing Forensics Inc. wrote to both Lalonde and Copley to advise them of the error and to reassure them that this inadvertent error did not affect the outcome or results of their tests. Amended Reports were issued as is required by international standards. Attached to this correspondence was a copy of a portion of the log kept by Racing Forensics Inc. in relation to the Control 2.

(48) The Control 2 substance is not used to calibrate the Beckman Synchon EL-ISE, but rather to assess the veracity of the results against an international standard. The Controls, in other words, are used to confirm that the machine is working, not to set the expected value for the machine.

(49) Evans raised a number of concerns in relation to the production by Racing Forensics Inc. of the Control 1 and Control 2 solutions. Dr. McKenzie provided extensive evidence in respect of the compounding, or mixing of two stable carbon dioxide solutions (produced by Verichem), to create the Control substances. Dr. McKenzie gave evidence that these Control solutions have a shelf life (stability) of many years. The Panel was again persuaded by Dr. McKenzie's evidence.

(50) The Panel found convincing the testimony of AGCO witness, Tyler Durand, explaining the spike, then subsequent decline, in TCO2 positives in 2019. Mr. Durand explained that when he became Manager of Standardbred Racing at AGCO in 2019, racing officials were encouraged to use the Racing Forensics Inc.'s database to select high-risk horses for TCO2 testing as opposed to the previous random selection process. Trainers with higher TCO2 test horses were targeted more than before. Mr. Durand further posited that after a group of positives occurred in a short period of time in 2019, the message got out in

the industry that better techniques were being used to catch violators; hence, they have had barely any since.

(51) Evans argued that the failure of Racing Forensics Inc. to deliver their operating manual as part of their disclosure was concerning. Again, Racing Forensics Inc. is a private company. The Registrar asked Racing Forensics Inc. to produce their manual and they refused. Had Evans brought the appropriate motion before the Panel compelling Racing Forensics Inc. to disclose their operating manual, giving an explanation as to the necessity of production, the HRAP may well have been able to compel Racing Forensics Inc. to do so. This was not done. Rather a motion was brought compelling the Registrar to produce the Manual. In any event, Evans was unable to enlighten the Panel at the hearing as to the necessity of its production.

(52) Evans raised reasonable concerns about the handling of Verichem products in contravention of the instructions by the manufacturer. These concerns, unfortunately, were largely not put to the witnesses and therefore the witnesses for Racing Forensics were not able to answer. The Panel relies on the fact that Racing Forensics Inc. is an accredited organization with the Standards Council of Canada to perform confirmatory analysis for TCO2 in equine plasma. The Panel thereby is persuaded, without any other evidence, that the practices of Racing Forensics are acceptable.

(53) Evans also suggested that there was some impropriety with the negotiation process that racing officials have now put into place. There is a relatively new practice in the industry to attempt to settle matters before the parties take the decision to appeal. The Panel finds this suggestion disingenuous, and is unanimous in their view that such a settlement process is not only without prejudice but often worthwhile in defraying unnecessary appeal process.

Penalty

(54) The Panel is then asked to consider a reduction in penalty. In order to consider penalty, attention is paid to the following mitigating, as well as aggravating, considerations:

i. The licensing record of the trainer and past circumstances;
ii. Environmental and other factors at the time of the overage;
iii. The efforts taken by the trainer to mitigate against TCO2 overages;

iv. The severity of the overage;
v. The mandatory guideline penalties developed by the racing industry;
vi. The concerns raised by the horse industry in relation to TCO2 overages and mandatory penalties;

(55) The Panel did not hear any evidence from the Appellants in respect of steps taken to prevent TCO2 overages, nor did the Panel hear evidence from the Appellants in relation to steps taken to prevent further overages once their overages were detected;

(56) The penalties imposed were squarely within the Penalty Guidelines, consistent with the Trainers' past record. Very little evidence was tendered by the Appellants to dispose the application of these Guidelines;

(57) The Penalty Guidelines were developed as a direct result of requests by the racing industry and calls for harsher penalties relating to TCO2 overages. Racing Official Durand, in oral testimony, stated that the horses selected for TCO2 were not randomly selected but selected on the basis of a risk-based, evidence-based process. The Panel interpreted this to mean that the TCO2 levels in the three above horses often bordered on overage levels and therefore these horses were chosen for testing.

(58) For all of the above reasons, the Panel, on a balance of probabilities, finds in favour of the Registrar and dismisses the Appeal of the Appellants', both in terms of the validity of the TCO2 testing and the penalties imposed.