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# Guilty By a Nose: *The Queen v. Riesberry* and the Criminalization of Racehorse Doping in Canada

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# GUILTY BY A NOSE: *THE QUEEN v. RIESBERRY* AND THE CRIMINALIZATION OF RACEHORSE DOPING IN CANADA

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## I. INTRODUCTION

To use an often embraced horse racing term, the trial result in the prosecution of *The Queen v. Derek Riesberry*,[1] on allegations of doping and attempting to dope horses that he trained for Standardbred competitions, could best be described as an "upset."[2] Although the Crown never wins or loses a case,[3] at least on a philosophical level, the findings of fact in *Riesberry* would appear to have foreclosed any notion of an acquittal. Yet, the trial judge felt obliged to dismiss the charges at the conclusion of the first-ever case of

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1. Queen v. Riesberry: R. v. Riesberry [2015] 3 S.C.R. 1167 (Can.).

2. Although a disputed bit of lore, it is believed by some that the term upset took on special significance in the annals of horse racing when a horse named "Upset" defeated the heavily favoured "Man o' War" in 1919, at Saratoga racetrack. *See Sports Legend Revealed: Did the Term 'Upset' in Sports Derive From a Horse Named Upset Defeating Man o' War?, Sports Now*, L.A. TIMES (May 10, 2011), http://latimesblogs.latimes.com/sports_blog/2011/05/sports-legend-revealed-did-the-term-upset-in-sports-derive-from-a-horse-named-upset-defeating-man-o-.html.

3. *See* Boucher v. The Queen, [1955] S.C.R. 16, 23–24 (Can.), where Mr. Justice Rand made the following comment:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

racehorse doping prosecuted in a Canadian criminal court[4] (as opposed to before a regulatory body). A little over five years after the original police investigation concluded, the Supreme Court of Canada released its ground-breaking decision reversing the trial court's verdict and, on some counts, substituting convictions.[5] In doing so, the unanimous Court succinctly explained the concept of what constitutes committing a fraud on the betting public.

This article proceeds in four parts, detailing: (1) the *Riesberry* case as it made its way from the Ontario Superior Court of Justice to the Court of Appeal for Ontario and, ultimately, to the Supreme Court of Canada; (2) the Ontario Racing Commission ("ORC"), the regulatory body that typically oversees the conduct of Standardbred racing in the province of Ontario, and why prosecution options were not simply left to that tribunal in the case in question; (3) the use of secondary aides, including comparative law approaches, to assist in resolving cases of novel domestic concern; and (4) the particular ethical issues that historically pervade sporting events where animals and performance-enhancing ("PE") drugs coincide.

## II. PART I: UNDERSTANDING THE IMPORTANCE OF THE QUEEN V. RIESBERRY

In the trial before the Ontario Superior Court of Justice, the accused faced a six-count indictment which alleged that on or about the 28th day of September, 2010, he did, (1) by deceit, falsehood, or other fraudulent means, defraud the public of money of a value exceeding $5,000.00 to wit: money wagered on the outcome of a horse race; (2) with the intent to defraud members of the public, engage in the wagering of money on the outcome of a horse race, cheat while playing a game, by hypodermically administering a substance to a horse entered in a race; and (3) knowingly commit the offence of administering a drug to a horse that is entered in a race in such a manner that a certificate of positive analysis would be issued under section 165 of the *Pari-Mutuel Betting Supervision Regulations* ("PMBSR").[6] Counts four, five, and six involved attempt to commit the same offences as were reflected in

4. *See* Sarah Sacheli, *Trainer Found Guilty in Court for Horse Doping*, HARNESS LINK (Oct. 30, 2014), http://www.harnesslink.com/News/Trainer-found-guilty-in-court-for-horse-doping.

5. R. v. Riesberry, [2015] 3 S.C.R. 1167, para. 29–32 (Can.).

6. *See* Indictment, R. v. Riesberry, [2013] O.J. No. 6504 (Can. Ont.) ( CR-11-2450) (listing counts one, two, and three against Riesberry as offence of fraud exceeding $5,000.00, Criminal Code, R.S.C. 1985, c. C-46, sec. 380(1) (Can.), offence of cheating at play, Criminal Code, sec. 209, and offence of violating the PMBSR, Criminal Code, sec. 204(10)).

counts one, two, and three of the indictment, save for the assertion that the attempts occurred at a later date.[7] As the trial progressed, it became clear that the prosecution would not be able to prove that a certificate of positive analysis *would necessarily flow* from the *actus reus* (the injection and attempted injection scenarios). As such, the Crown invited acquittals on those two counts.[8] Thus, the only live considerations for the trial judge were the fraud and cheat at play allegations. For purposes of this article, the relevant evidentiary foundation of the case can be summarized as follows:

> The accused, Derek Riesberry, was a licensed Standardbred horse trainer. On September 28, 2010, he was captured on video injecting something into the trachea of a race horse named "Everyone's Fantasy" at the Windsor Raceway at approximately 7:37 p.m. About an hour later, Everyone's Fantasy ran in race six of the program and finished in sixth place;
>
> The video recording of the accused came by way of a judicially authorized covert surveillance camera that was placed in a horse stall at the Windsor Raceway;
>
> On November 7, 2010, the accused was arrested as he arrived at the Windsor Raceway while transporting a horse named "Good Long Life." The horse was scheduled to race that evening. A search of the accused's truck revealed two syringes each containing fluid. One syringe contained a combination of the drugs Epinephrine and Clenbuterol, and the other syringe contained the drug Clotol;
>
> Epinephrine is a powerful stimulant, which also occurs naturally as part of the body's adrenal system. Clenbuterol is a bronchodilator. There is no therapeutic reason that Epinephrine and Clenbuterol should be given to a horse that is not in distress. The horse "Good Long Life" was not in

7. *See* Indictment, *Riesberry*, [2013] O.J. No. 6504 (counts four, five, and six alleged attempts on November 7, 2010).

8. *See* Appellants Factum (re Fraud), R. v. Riesberry, [2015] 3 S.C.R. 1167, at para. 5 (No. 36179).

> distress as it appeared on the video. Additionally, there are no veterinary medicines that should be given by intratracheal injection to a horse;
>
> The PMBSR prohibit the presence of Epinephrine and Clenbuterol in racehorses at the time of racing. Clotol was not a prohibited drug at the time of racing; however, within raceway grounds, it could only be given to a horse by a licensed veterinarian;
>
> Bets totaling $12,746.40 were placed by members of the public on race six on September 28, 2010 when "Everyone's Fantasy" was entered to race, and the total payout was $9,480.20 for that race. Bets totaling $11,758.60 were placed by members of the public on race three on November 7, 2010, when "Good Long Life" was entered to race, and the total payout for that race was $8,691.17;
>
> Mr. Riesberry did not testify at trial;
>
> In addition to the federal PMBSR drug presence structures, the Ontario Rules of Standardbred Racing ("Rules") go further and prohibit licensees, other than official veterinarians, from possessing any syringe while racetrack grounds. This is to prevent the unauthorized drugging of horses. The trial judge found that the accused was a licensed horse trainer who was bound by the Rules and thus, was prohibited from possessing syringes at the Windsor Raceway;
>
> Horse racing and wagering thereupon are subject to an extensive regulatory scheme enabled by the Criminal Code ("Code") and complementary provincial legislation. Wagering on a horse race outside the regulated framework is a criminal offence. Breach of the regulations for horse racing constitutes a criminal offence.[9]

9. *Id.* at para. 10–15; *see* also Respondent's Factum (re Fraud), *Riesberry*, [2015], at para. 6–12, (No. 36179).

On the backdrop of the foregoing evidence, the trial judge made the following penultimate findings that were dispositive of the factual guilt of the accused:

> Clenbuterol and Epinephrine are also on a list of prohibited drugs as they can be performance-enhancing depending on when they are administered. They are prohibited if used to enhance the performance of a horse on race day;
>
> Clenbuterol is a bronchodilator. It opens up the small bronchi in the horse's lungs so that more oxygen gets into the blood more quickly and the whole system of the horse functions more efficiently. It therefore would have been, at the time, a performance enhancing drug;
>
> Epinephrine is a powerful stimulant. Tracheal injections cause the Epinephrine to pool and not be absorbed quickly. Once the horse exercises in the warm-up or the race starts, the "Fight or Flight" syndrome engages. Once that engagement starts, the Epinephrine enters the bloodstream quickly. It enhances the horse's performance but dissipates before testing can occur;
>
> Mr. Riesberry acted deceitfully in that he brought loaded syringes to the racetrack on September 28, 2010, and attempted to bring loaded syringes on November 7, 2010, onto racetrack property in contravention of the Rules;
>
> What Mr. Riesberry injected into the horse "Everyone's Fantasy" on September 28, 2010, was either Epinephrine, Clenbuterol, or a combination thereof, for performance-enhancing purposes and not for any therapeutic purpose;
>
> The possession of the syringe loaded with Epinephrine and Clenbuterol on November 7, 2010, was in anticipation of a performance-enhancing injection into the horse "Good Long Life" that was to race that evening;

> On both dates, the accused attempted to create an unfair advantage for the horses he had entered. These acts resulted in cheating.[10]

Despite Mr. Riesberry's obvious resort to deceit, falsehood, or other fraudulent means,[11] the trial court interpreted the laws of fraud and cheating at play so narrowly, as to find a reasonable doubt on whether its pith and substance engaged. Regarding fraud simpliciter, section 380(1) of the Code[12] explains that everyone will be guilty of fraud "who by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of the Act, defrauds the public or any person, whether ascertained or not, of any property, money, or valuable security or any service."[13] Similarly, cheating at play is referenced in section 209 of the Code,[14] which states "everyone who, with intent to defraud any person cheats while playing a game or in holding the stakes for a game or in betting is guilty of an indictable offence."[15] However, the added dimension to a criminal cheating at play allegation is that the cheating must be born of a "game." Section 197 of the Code[16] further explains that a game "means a game of chance or mixed chance and skill."[17] As such, the court must make a further finding. Games that involve pure skill are thus not contemplated under the more discerning cheating at play analysis. Furthermore, while cheating at play may indeed fall under the general umbrella that covers fraudulent conduct, the converse need not necessarily hold true given the particularized definition of what a game entails.

The reasonable doubt that lingered with the trial judge on the allegations of fraud and attempted fraud exceeding $5,000.00 can be traced to four, albeit erroneous, concerns that inured to the benefit of the beguiling horse trainer:

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10. R. v. Riesberry, [2013] O.J. No. 6504, para. 39 (Can. Ont. Sup. Ct. J.).

11. *See* Criminal Code, R.S.C. 1985, c C-46, § 380(1) (Can.) [hereinafter *Criminal Code*]. Note that there is no exhaustive definition of fraud to be found in the Code, nor could there be as the bounds of dishonest deprivation are arguably limitless.

12. *Id.*

13. *Id.*

14. *Id.* at § 209 ("Every one who, with intent to defraud any person, cheats while playing a game or in holding the stakes for a game or in betting is guilty of an indictable offence and liable to imprisonment for term not exceeding two years.").

15. *Id.*

16. *Id.* at § 197.

17. *Id.*

1. There was no evidence as to the amount that was bet on either race, or if there was, the amount did not exceed $5,000.00;
2. The Crown failed to prove deprivation perpetrated on the betting public or, assuming there had been a deprivation, such alleged deprivation was too remote;
3. The betting public did not participate in the race, it only wagered on the outcome of it;
4. A race is not a game in accordance with the definition in section 197 of the Code, as there is no element of chance in the horse race itself.[18]

The first issue was based on a finding of no evidence or, in the alternative, that the evidence of the quantum of the deprivation, or risk of deprivation, did not exceed the amounts alleged in the relevant counts (i.e. $5,000.00). It was not so much a finding of insufficiency as it was a finding of non-existence. The accuracy of the finding could very well constitute an error in law if it indicated a failure of the court to consider the whole of the trial evidence.[19] What made the trial court's judgment immediately suspect was the quantum issue, since it had been dealt with by way of an admission at the end of the case for the prosecution.[20] Those admissions should have rendered the quantum issue a foregone conclusion for the court, which also explains why neither counsel made any closing submissions on the point.[21] As will be

18. R. v. Riesberry, [2013] O.J. No. 6504 at para. 30–36.

19. *See* R. v. Morin, [1992] 3 S.C.R. 268 (Can.) (the Supreme Court of Canada emphasized

> [a] trial judge must consider all of the evidence in relation to the ultimate issue but unless the reasons demonstrate that this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was an error of law in this respect).

*Id.* at 296.

20. Trial Transcript, R. v. Riesberry, [2013] O.J. No. 6504, para 108–109 (Can. Ont. Sup. Ct. J.) (Nov. 23, 2012) (where the defence admitted evidence of Gordon Murray explaining the race earnings for the races in question by allowing trial exhibit 22A, a transcript of his preliminary inquiry testimony. Additionally, the corresponding printouts of the race earnings in question, that were referred to in the preliminary inquiry testimony of Gordon Murray, were made exhibit 22B at the trial.).

21. *See* Trial Transcript, R. v. Riesberry, [2013] O.J. No. 6504 (Can. Ont. Sup. Ct. J.) (May 22, 2013).

discussed in more detail in Part III of this article, in circumstances where counsel have overlooked an issue that remains live in the mind of the court, it is submitted that procedural fairness dictates that the court should seek out the input of the litigants.

The trial court's concerns regarding issues two and three turned on the concepts of deprivation and remoteness. Given that the Crown particularized[22] the indictment to allege that the betting public was the victim extant, it was therefore incumbent on the prosecution to establish a risk of deprivation resulting from the conduct of the accused. Clearly, the court was of the opinion that the betting public was too amorphous a group for consideration when it opined that "if anyone was deprived or at risk of deprivation by Mr. Riesberry's conduct, it was the other participants in the race, not the betting public."[23] Indeed, the court observed that "there has been no evidence advanced that any member of the betting public placed a bet because they either knew or did not know" of the impugned conduct.[24] Thus, it would appear that in being unable to find beyond a reasonable doubt that the betting public was at risk of deprivation by the accused's actions, the trial judge was arguably saying that the Crown's case lacked the necessary connective tissue to support the anatomy of a fraud. Essentially, the court assumed that a deceit-driven indictment, underpinned by proof of a personal nexus between fraudster and victim, was necessary. And even if a deprivation had been established, the court relied on *R. v. Vezina*[25] to support a fallback position that such an alleged deprivation would be too remote. Remoteness is inextricably tied to the concept of foreseeability. Thus, the trial judge had found that the betting public was so far removed from the actions of the horse trainer as to be beyond the realm of objective contemplation.

Finally, and perhaps most remarkably, the trial court found as a matter of law that horse racing is a game of pure skill without any element of chance.[26] The prosecution's submissions on cheating at play included, *inter alia*, the following comments about what constitutes chance: "What pole position does the horse get? That's a matter of you know, picking names out of a hat. So if you have the inside pole as opposed to the outside pole you've got a better position."[27] Although not conceded by the defence at trial, counsel stated "I

22. *See* R. v. Elliot, [1976] 4 W.W.R. 285 (Can. B.C. C.A.).

23. *Riesberry*, [2013] O.J. No. 6504 at para. 22.

24. *Id.* at para. 20.

25. *See* R. v. Vezina, [1986] 1 S.C.R. 2 (Can. Q.A.C.).

26. *Riesberry*, [2013] O.J. No. 6504 at para. 30.

27. Trial Transcript Final Submissions, R. v. Riesberry, [2013] O.J. No. 6504, para. 22, line 11

don't take challenge with my friend's submissions on cheating, the ingredients of cheating."[28]

Despite the foregoing, when the court rendered its final judgment on August 15, 2013, approximately three months after hearing the submissions of counsel, it ruled that a horse race was a game of pure skill. That decision was based on the 1843 American decision of *Harless v. United States,*[29] emanating from the Supreme Court of Iowa. Even though the *Harless* decision was never put to either counsel for their comments, it made its way into the final judgment and was dispositively cited as "an accurate reflection of the law as set out in the definition sections of game in section 147 [sic] of the Criminal Code [of Canada.]"[30] The following passage from *Harless* was incorporated into the trial judge's decision:

> Penal statutes must not be construed to embrace cases not clearly within their provisions. The word "game" does not

(Can. Ont. Sup. Ct. J.) (May 22, 2013) (hereinafter *Final Submissions*). It is also important to note that the following evidence, legislation, and rules were before the trial judge. Respondent's Factum (re cheating at play), *Riesberry*, at para. 7–9 (No. 36179) (Aug. 5, 2015):

> 7. Standardbred horseracing has elements of both skill and chance. Uncontested evidence at trial showed that a systemic element of chance consists in the determination of the horse's starting position, called the post position ("position de depart"). Post positions are determined by a "random post position generator" or the Standardbred Canada computer system. The computer draws at random from among the horses entered in a given race to determine which horse starts in which post position. The more advantageous post positions are those closer to the inside rail of the track, since those post positions offer the shortest traveling distance around the track …
>
> 8. The random determination of post positions is legally mandated by the Rules of Standardbred Racing 2008 [The Rules] a regulation made by the Ontario Racing Commission under the authority of the Racing Commission Act, 2000. The Rules, specifically rules 17.09 and 17.10, require that entrants' post positions must be "drawn by lot" from among the entered and eligible horses that are selected to start the race.
>
> 9. Federal regulations require that after post positions are drawn, that information must be made available to the public, before bettors place their bets on a race . . .

28. *Final Submissions*, *supra* note 27, at para. 98, line 25.

29. Harless v. United States, 1 Morris 169 (Iowa 1843).

30. R. v. Riesberry, [2013] O.J. No. 6504, para. 32 (Can. Ont. Sup. Ct. J.). It is important to note that the Code at section 197 (which defines what constitutes a game) and section 209 (which prohibits cheating while playing a game), were enacted in 1985, over a century after *Harless* was announced. *See infra* note 153.

> embrace all uncertain events, nor does the expression "games of chance" embrace all games. As generally understood, games are of two kinds, games of chance and games of skill. Besides, there are trials of strength, trials of speed and various other uncertainties which are perhaps no games at all, certainly they are not games of chance. Among this class may be ranked a horserace. It is as much a game for two persons to strive which can raise the heaviest weight, or live the longest under water, as it is to test the speed of two horses.[31]

Despite the Code including the criteria of "chance or mixed chance and skill"[32] as the factual underpinning to find the existence of a "game," the trial court opted for a dated *ex juris* precedent to determine the issue. Thus, the parties were deprived of a conclusion not only based on the evidence, but also on the statutory regulatory scheme. An appeal was therefore all but inevitable.

### *A. The Court of Appeal for Ontario*

On October 28, 2014, the Court of Appeal for Ontario released its judgment and allowed the Crown's appeal of the acquittals entered at trial involving fraud and cheating at play. In doing so, it quickly accepted what had been undisputed at trial and on appeal; "that evidence was led at trial indicating that bets in excess of $5,000.00 were placed on both races."[33] The trial judge's statement to the contrary constituted an error of law given that it was clearly indicative "that he failed to consider the whole of the evidence."[34]

Of more significance were the court's observations that pertained to the risk of deprivation. Regarding what the betting public is entitled to assume about the sport of kings, the following was said:

> [I]t was established at trial that horse racing is a highly regulated industry and that the regulatory scheme includes a ban on the presence of the performance enhancing drugs utilized by the respondent in the body of a horse on race day. Given the regulatory scheme, bettors were entitled to bet on each race assuming that no horse in the race was affected by

31. *Riesberry*, [2013] O.J. No. 6504, at para. 31; *Harless*, at 172–73.

32. *Criminal Code*, at § 197.

33. R. v. Riesberry, [2014] O.J. No. 5094, para. 18 (Can. Ont. C.A.)

34. *Id.*

such drugs.[35]

In discussing deprivation, the regulatory body, and those licenced to participate in the regulated horse racing activities, the implications of the court's comments seem to suggest that the public as bettors drive the regulatory agenda:

> [W]here there is a failure to disclose material non-compliance with the regulatory scheme, it is no answer to say bettors may have relied on other factors in making their bets. Bettors were entitled to assume compliance with the regulatory scheme when weighing those other factors and coming to a final decision. Non-compliance with the regulatory scheme in a manner so as to affect the outcome of the race necessarily puts the bettors' economic interests at risk. Bettors are deprived of information about the race that they were entitled to know; they were also deprived of an honest race run in accordance with the rules.[36]

. . .

The Court of Appeal was adamant that on the facts, "bettors had their bets at risk."[37] Thus, any suggestion of remoteness was dismissed as misguided.[38] Indeed, it is difficult to see how a remoteness analysis could gain any traction given the exalted position that the betting public assumes overall in the sport.

The cheating at play charges were summarily reviewed by the court, perhaps because some of the comments that they made about the fraud charges had equal application to the concept of cheating. However, as was alluded to earlier in this article, the significant additional component to a cheating at play allegation is that there must be evidence that the swindling behaviour occurred while playing a game, that is, one that involves chance or mixed chance and skill. Games of pure skill are exempt from impugnation, at least under the section in question. The error of law was concisely stated in a single sentence: "In relying on an American decision that did not contemplate the possibility of

35. *Id.* at para. 20.
36. *Id.* at para. 22.
37. *Id.* at para. 23.
38. *Id.*

a game of mixed chance and skill to support his conclusion that horseracing is a game of pure skill, the trial judge erred in law."[39] Regarding any issue of remoteness, the court further pointed to the fact that section 209 of the Code speaks of defrauding "any person"[40] when cheating at play and, as such, "any person would clearly encompass any person betting on a race and not just those participating in a race."[41]

Under section 686(4)(b)(i) and (ii) of the Code:

> (4) If an appeal is from an acquittal or verdict that the appellant or respondent was unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal may
>
> (b) allow the appeal, set aside the verdict and
>
> (i) order a new trial, or
>
> (ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.[42]

In *Riesberry*, the Crown requested that the Court of Appeal "enter guilty verdicts on all charges, or, in the alternative, order a new trial."[43] In response to the requested remedies, the appellate court emphasized the differing tests that must be engaged. To order a new trial, "the Crown must demonstrate that the trial judge committed an error, and that the outcome of the trial might

39. *Id.* at para. 31.
40. *Criminal Code*, at § 380(1).
41. *Riesberry*, [2014] O.J. No. 5094, at para. 32.
42. *Criminal Code*, at § 686(4)(b)(i)–(ii).
43. *Riesberry*, [2014] O.J. No. 5094 at para. 32.

reasonably have been different if the error of law had not occurred."[44] However, in order for a guilty verdict to be substituted, the Crown must further prove that "the accused should have been found guilty but for the error in law."[45] Such a substitution is possible only where all necessary findings of fact have been made by the trial court for each element of the offence, "either implicitly or explicitly, or if the facts are not in issue."[46] The Court of Appeal had no problem substituting guilty verdicts for the fraud and attempted fraud charges, and remitting the matter back to the trial judge for a sentencing hearing. However, new trials were ordered on the cheat at play and attempt cheat at play allegations. Although the court recognized the existence of the Ontario Rules of Standardbred Racing which "require that starting post positions be drawn by lot from among the entered horses that are eligible and selected to start: rule 17.09 and 17.10,"[47] and that the evidence at trial "show[] that post position is determined by a computerized random post position generator and that certain post positions are more advantageous than others in that the advantageous positions provide shorter distances to travel,"[48] an actual finding at trial that this evidence imbued a horse race with an element of chance was missing from the trial record. That particular Rubicon had not been crossed as the trial judge had "made no reference to this evidence."[49] In order for a game to be one of mixed chance and skill, there must be a "systemic resort to chance, to determine outcomes, and not merely the unpredictables that may occasionally defeat skill."[50] Given that drawing lots for post position is a predictable procedure that precedes all Standardbred horse races in Ontario and is thus not subject to the vicissitudes that may impact other aspects of horse racing, it is attractive to submit that a finding of mixed chance and skill must be a fait accompli. Any other finding would torture not only reality, but also faith in judicial sagacity. Nevertheless, the Court of Appeal remained steadfast that the decision was the province of the trier of fact ab initio.

Although not argued at trial, an additional use of the evidence was articulated before the Court of Appeal as follows:

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44. *Id.* at para. 36 (citing R. v. Graveline, [2006] 1 S.C.R. 609, para. 14–16 (Can.)).

45. *Id.* at para. 37 (citing R. v. Cassidy, [1989] 2 S.C.R. 345, 354 (Can.).

46. *Id.*

47. *Id.* at para. 41.

48. *Id.*

49. *Id.* at para. 42.

50. *Id.* at para. 40 (citing Ross, Banks, & Dyson v. R., [1968] S.C.R. 786 (Can.).

> [T]he Crown argued that even if horse racing was a game of pure skill, the appellant's deceitful conduct in this case transformed the horse-races at issue into games of mixed chance and skill. For this argument the Crown relied on the Supreme Court's judgment in R v McGarey, [1974] SCR 278. There, the accused had secretly weighted some of the bottles in a game of bottle toss. The Supreme Court found that this type of cheating transformed the nature of the game in question from one of pure skill to one of mixed chance and skill.[51]

Similarly, on this submission the court recognized that "[w]hether a particular form of cheating transforms a game of pure skill into a game of mixed chance and skill is a highly factual inquiry for which the requisite factual findings have not been made."[52]

### *B. The Supreme Court of Canada*

An appeal as of right awaited *Riesberry* on his fraud and attempted fraud guilty verdicts that were substituted by the Court of Appeal for Ontario. Under section 691(2)(b) of the Code:

> (2) A person who is acquitted of an indictable offence other than by reason of a verdict of not criminally responsible on account of mental disorder and whose acquittal is set aside by the court of appeal may appeal to the Supreme Court of Canada.
>
> (b) on any question of law, if the Court of Appeal enters a verdict of guilty against the person.[53]

Additionally, leave to appeal was granted so that a challenge could be made on the questions of law that pertained to the new trials that were ordered on the cheating at play and attempted cheating at play counts.[54] Ultimately,

51. *Id.* at para. 44.

52. *Id.* at para. 45.

53. *Criminal Code*, at § 691(2)(b).

54. *Id.* at § 691(2)(c) (which allows for an appeal to the Supreme Court of Canada "on any question of law if leave to appeal is granted by the Supreme Court of Canada").

the Supreme Court of Canada rendered bench dismissals of the appeals on October 13, 2015,[55] with written reasons delivered on December 18, 2015.[56]

Starting with the cheating at play convictions, Justice Cromwell, writing for a unanimous seven-member panel, embarked upon a rather cursory examination of the appellant's arguments. Like the Court of Appeal for Ontario, he fixed his sights on the trial court's use of American jurisprudence in the circumstances as well as its failure to consider the evidence that was introduced by the Crown in support of its mixed chance and skill argument. Regarding the reliance on the *Harless* decision, Justice Cromwell, had this to say:

> It is somewhat unclear to what extent the trial judge relied on this authority as stating the law in Canada. However, to the extent that he did so, he made a legal error. The statute considered by the US court divided games into two categories, games of chance and games of skill. That case, therefore, did not address a point that must be addressed under the Criminal Code. That point is whether horse racing is a game of mixed chance and skill.[57]

As to the body of evidence regarding chance in horse racing that was patent on the trial record, the court demurely observed:

> Even if we were to accept that the trial judge was alive to this difference between the law as set out in *Harless* and Canadian law, he nonetheless erred by failing to consider evidence in the record upon which a trier of fact could find that there was systematic resort to chance which made the race a game of mixed chance and skill. I therefore conclude that the trial judge erred in law on this aspect of the case.[58]

With respect to the allegations relating to fraud, it would appear that the court's primary concern focused on whether the acts of the accused resulted in a risk of deprivation that was not too remote from the PE conduct in question.

55. Riesberry, [2015] 3 S.C.R. 1167.

56. *Id.* para. 29–32.

57. *Id.* at para. 11.

58. *Id.* at para. 12.

The question as fashioned by the appellant was whether the Crown had established "that anyone betting on the race had been induced to bet by, or would not have bet but for, his fraudulent conduct."[59] However, Justice Cromwell was quick to point out that "proof of fraud does not always depend on showing that the alleged victim *relied* on the fraudulent conduct or was *induced* by it to act to his or her detriment."[60]

Therefore, "what is required in all cases is proof that there is a sufficient causal connection between the fraudulent act and the victim's risk of deprivation."[61] While establishing inducement and reliance scenarios on the evidence may typically involve more orthodox examples of deceit and falsehood, it must be remembered that:

> Fraudulent conduct for the purposes of a fraud prosecution is not limited to deception, such as deception by misrepresentations of fact. Rather, fraud requires proof of "deceit, falsehood or *other fraudulent means*": s. 380(1). The term "other fraudulent means encompasses all other means that can properly be stigmatized as dishonest": R v Olan, [1978] 2 SCR 1175 at p 1180.[62]

It is respectfully submitted that a fundamental error at trial involved the court's preoccupation with the fact that "there has been no evidence advanced that any member of the betting public placed a bet because they either knew or did not know of the injection of "Everyone's Fantasy" on September 28, 2010 before the race."[63] Although superficially attractive, the idea that inducement necessarily produces a resultant deprivation is legally superfluous. Indeed, it is beyond argument that the best acts of subterfuge are those that go unnoticed. Most importantly for the development of racehorse doping jurisprudence in Canada, the Supreme Court sent the following message about such forms of conduct:

> There is a direct causal relationship between Mr. Riesberry's dishonest acts and the risk of financial deprivation to the

59. *Id.* at para. 21.
60. *Id.* at para. 22.
61. *Id.*
62. *Id.* at para. 23.
63. *Riesberry*, [2013] O.J. No. 6504, at para. 9–10.

> betting public. Simply put, a rigged race creates a risk of prejudice to the economic interests of bettors. Provided that a causal link exists, the absence of inducement or reliance is irrelevant.[64]

## III. PART II: THE REGULATORY SCHEME

### *A. The Important Benefits of Regulation*

Until the horse trainer Derek Riesberry was brought before the criminal courts, arguably as a "test case,"[65] Canadian authorities were content to leave the regulation and discipline of licensees to the various Racing Commissions around the country.[66] The reasons for maintaining the status quo were at least

64. *Riesberry,* [2015] 3 S.C.R. 1167, at para. 26.

65. *See* ALLAN MANSON, THE LAW OF SENTENCING 145 (2000) (where the author explains that

> Legislative provisions which have novel or ambiguous dimensions can generate good faith attempts to test their scope. With respect to non-violent crimes, an effort to create a test case for adjudicative purposes can result in a mitigated sentence. Of course, just being one of the first individuals prosecuted is not the same as an offence which was the product of a will to test the legislation. However, given the costs, rigours and uncertainties of protracted litigation, there can be a mitigating effect for an accused who tries to carry a case forward even if this decision arose after the charge.
>
> Despite the foregoing, affording a criminal prosecution "test case" status is not simply a matter of proclamation by counsel, although a joint submission in this regard would be helpful. Suffice it to say that a test case, whether it be criminal or civil in nature, requires a judicial determination of the issue. See generally: R. v. Stewart (No. 2) (1983), 45 O.R. (2d) 185 (Can. Ont. H.C.J.); R. v. Blair, [1993] O.J. No. 1950 (Can. Ont. Pr. Div.); R. v. Spindloe, [1998] S.J. No. 856 (Can. S.K. Pr. Ct.); R. v. M.A.F.A. Inc., [2000] O.J. No. 1773 (Can. Ont. Ct. J.); and, Price v. Panasonic Canada Inc., [2002] O.J. No. 5437 (Can. Ont. Sup. Ct. J.)).

66. RICHARD BROWN & MURRAY RANKIN, PERSUASION, PENALTIES AND PROSECUTION: ADMINISTRATIVE V. CRIMINAL SANCTIONS IN SECURING COMPLIANCE: SEVEN CASE STUDIES 342 (M.L. Friedland ed., 1990) (Considering a possible explanation for this phenomenon:

> Legal actors may be reluctant to stigmatize most regulatory offenders with criminal penalties because their offences are perceived to be morally ambiguous. This ambiguity distinguishes regulatory offences from conventional crimes that violate a well-established moral code. As already noted, many infractions cause no actual damage, and the absence of any injury may make the offender appear less blameworthy … The stigma associated with the criminal process may be seen as an unnecessary irritant in many cases and, therefore, as a reason for not prosecuting.).

threefold: (1) a readily available body of recognized expertise within the oversight tribunal; (2) relaxed evidentiary thresholds and a lesser overall standard of proof required to hold wrongdoers accountable; and (3) a voluntary compliance scheme whereby the granting of a licence afforded benefits, but also imposed obligations, on the licensees.

1. Expertise

Whereas courts, with a few exceptions, are generalist in nature, tribunals are much more focused and specialized seats of administrative justice. The recognition of regulatory body expertise often can be gleaned from a perusal of the legislation that typically drives its decisions.[67] Indeed, the interpretation and application of "home statutes,"[68] day in and day out, suggests a working knowledge that far exceeds the occasional user of the legislation in question.

Upon judicial review of administrative action, regardless of what reviewing standard has been used over the years,[69] the need for deference to the particular knowledge of the body being reviewed is consistently recognized, although "expertise must be understood as a relative, not an absolute concept."[70] Thus, as between a tribunal and a reviewing court, should there be a lack of relative expertise on the part of the tribunal, deference may be legitimately refused.[71] As explained by Justice Bastarache for the majority of the Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*:[72]

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67. As explained by Chief Justice McLachlin in Dr. Q v. College of Physicians & Surgeons of British Columbia, [2003] 1 S.C.R. 226, para. 29 (Can.):

> [A] statute may call for decision-makers to have expert qualifications, to have accumulated experience in a particular area, or to play a particular role in policy development . . . . Similarly, an administrative body might be so habitually called upon to make findings of fact in a distinct legislative context that it can be said to have gained a measure of relative institutional expertise.

68. *See* ATCO Power Ltd., v. Alberta Utilities Comm'n, [2015] A.B.C.A. 405, para. 8 (Can.).

69. *See generally* Lorne Sossin, *Empty Ritual, Mechanical Exercise or the Discipline of Deference? Revisiting the Standard of Review in Administrative Law*, 27 ADV. Q. 478 (2003); JOSEPH T. ROBERTSON ET AL., JUDICIAL DEFERENCE TO ADMINISTRATIVE TRIBUNALS IN CANADA: ITS HISTORY AND FUTURE 95–110 (2014).

70. Pushpanathan v. Canada (Minister of Citizenship & Immigr.), [1998] 1 S.C.R. 982, at para. 33 (Can.).

71. *Id.*

72. *Id.*

> Making an evaluation of relative expertise has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise.[73]

Reviewing courts in Canada have consistently given a wide berth to horse racing tribunals, particularly on issues involving the rules of racing and the integrity of the sport: areas uniquely familiar to the members of such bodies. Thus, in relative terms, "the expertise of this tribunal [the Alberta Horse Racing Industry Appeal Tribunal] is much greater than that of the reviewing court when an assessment of their knowledge in relation to horse racing in the province is concerned."[74] Indeed, in matters more equine-centric than conceptually legal in nature, it is submitted that such tribunals are, for all practical purposes, paramount entities. As explained by Chief Justice Jenkins of the Prince Edward Island Supreme Court – Trial Division:

> The Legislature has thereby [by the enactment of the Maritime Provinces Harness Racing Commission Act] created a body with expertise and entrusted it with very broad powers to govern the sport of harness racing. All of this appears consistent with the jurisprudence from other jurisdictions regarding the regulation of harness racing. There appears to be a consensus within the jurisprudence that there is a state interest in very rigid control of harness racing, which is rooted in objectives of protecting the health of the horses, protecting the state's substantial revenues derived from taxes on legalized pari-mutuel betting, and protecting patrons of the sport from being defrauded.[75]

From a practical perspective, it is important to point out that lawyers who

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73. *Id.*

74. Hennessy v. Horse Racing Alberta, [2006] A.J. No. 1613, para. 16 (Can. A.B. Ct. Q.B.). *See* Scott v. Ontario (Racing Comm'n), [2009] O.J. No. 2858, para. 28 (Can. Ont. Sup. Ct. J. Div. Ct.).

75. Chappell v. Maritime Provinces Harness Racing Comm'n, [2008] P.E.I.J. No. 26 (Can. P.E.I. Sup. Ct. Tr. Div.).

appear before a racing commission are typically well-briefed as a result of maintaining a practice that regularly involves race-horsing issues. To draw from the cowboy vernacular, such appearances would not be counsel's "first time at the rodeo." What that means is equine-related lexicon comes naturally, understanding investigative disclosure is more likely achieved by the lawyer in-house and without expert witness assistance, and resolution discussions are more easily engaged, with matters concluded more expeditiously and satisfactorily.[76]

### *B. Evidentiary Thresholds and the Overall Standard of Proof*

The rules of evidence that control a criminal case are often daunting in their detail and labyrinthine in their navigation.[77] Relatedly, the criminal standard of proof is one that requires the prosecution to prove guilt beyond a reasonable doubt. Although proof to an absolute certainty is not the measure, proof beyond a reasonable doubt is a very high and exacting standard.[78] It is a given that when the liberty of the subject hangs in the balance, a combination of reliable and highly persuasive evidence must be marshalled to tip the scales that otherwise maintain the presumption of innocence.[79] Such exacting

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76. *See* BROWN & RANKIN, *supra* note 66, at 325–53 (for a general discussion of the relative expertise of regulatory tribunals (environmental and occupation health & safety bodies) as compared to criminal courts).

77. R. v. Karaibrahimovic (2002), A.B.C.A. 102, para. 64 (Can.). Justice of Appeal, O'Leary, of the Alberta Court of Appeal colors the complexity of evidence as it relates to jurors, noting,

> I do not doubt that the average modern juror is better educated and has more worldly experience than his earlier counterpart. In my opinion that does not eliminate or reduce the need for juries to receive instructions on the evidence. Today's society is more complex, crime more sophisticated, scientific evidence more difficult to understand, and the rules of evidence more subtle.

78. *See* R. v. Lifchus, [1997] 3 S.C.R. 320, para. 25 (Can.) (where the Court states,

> Nor is it helpful to describe proof beyond a reasonable doubt simply as proof to a "moral certainty" . . . . Thus, if the standard of proof is explained as equivalent to "moral certainty" without more, jurors may think that they are entitled to convict if they feel "certain," even though the Crown has failed to prove its case beyond a reasonable doubt).

*See also* Woolmington v. D.P.P. (1936), [1935] A.C. 462, 481 (H.L.) (Wherein, the famous Lord Stanley commented, "Throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt.").

79. In Canada, the presumption of innocence is a constitutional imperative and an enshrined right. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B

standards, however, are not applicable to administrative proceedings, which "are civil, not criminal in nature."[80] As was explained by the ORC in an attempt to more precisely describe its adjudicative process:

> [T]he civil standard applies. However, the evidential burden remains as cogent, clear and convincing as it applies to the elements which must be proved – all to be assessed in context and that context includes the seriousness of the consequences. It would be patently and grievously wrong to act upon evidence which is unclear and unconvincing.[81]

Certainly, "[a] higher standard of justice is required when the right to continue one's profession or employment is at stake."[82] However, the fact remains that the Statutory Powers Procedure Act[83] ("SPPA") governs all administrative tribunals in the province of Ontario and, as such, the ORC "is not bound by the strict rules of evidence applicable in criminal trials."[84] Section 15(1)–(3) of the SPPA reads as follows:

> 15(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) Any oral testimony; and
>
> (b) Any document or other thing,
>
> relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

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to the Canada Act, 1982, c 11 (U.K.) at § 11(d), which reads, "Any person charged with an offence has the right (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

80. *Scott*, [2009] O.J. No. 2858 at para. 39.

81. Re Wallis, [2011] O.R.C.D. No. 39, para. 156 (Can. Ont. Rac. Com.).

82. Kane v. Bd. of Governors of U.B.C., [1980] 1 S.C.R. 1105, para. 2 (Can.).

83. Statutory Powers Procedure Act, R.S.O. 1990, c. S.22 (Can.) [hereinafter *SPPA*].

84. Polifroni (Re), [2012] O.R.C.D. No. 22, para. 19 (Can. Ont. Rac. Com.); *see* Ontario Racing Comm'n v. Hudon, [2008] O.J. No. 5313, para. 22–36 (Can. Ont. Sup. Ct. J. Div. Ct.) (describing the reviewing logic of the Ontario Divisional Court).

> (2) Nothing is admissible in evidence at a hearing,
>
> (a) That would be inadmissible in a court by reason of any privilege under the law of evidence; or
>
> (b) That is inadmissible by the statute under which the proceeding arises or any other statute.
>
> (3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.[85]

As a consequence of the foregoing relaxation of the admissibility of evidence and the standard of proof, it only stands to reason that the preferred prosecution forum would be the regulatory tribunal rather than a court of criminal jurisdiction. This, of course, assumes that the regulatory tribunal, in addition to being an expert in its field, is also effective in protecting the interests of horse racing and deterring those who would compromise the integrity of the sport. As will be discussed in due course, there is an argument to be made that regulatory sanctions may no longer be effective in deterring the most perfidious of regulatory scheme offenders.

### *C. Membership and its Associated Obligations*

Another reason why it has traditionally been preferable that horse racing misconduct, even if it may also constitute criminal behaviour, be dealt with by an oversight tribunal rather than by a criminal court is because of the significance of licensing membership in the horse racing industry. By applying for and obtaining a licence, the licensee gives "tacit consent to the reasonable enforcement of the rules."[86] In Ontario, the Racing Commission Act[87] established a Commission in order to govern, direct, and regulate horse

85. *SPPA*, *supra* note 83 at § 15(1)–(3).

86. Ozubko and Chabot v. Manitoba Horse Racing Comm'n, [1987] 1 W.W.R. 149, para. 27 (Man. C.A.).

87. Racing Commission Act, S.O. 2000, c. 20. On April 1, 2016, the Horse Racing License Act came into force, effectively repealing the Racing Commission Act. Under the new Act, horse racing is regulated by the Registrar of the Alcohol and Gaming Commission of Ontario.

racing provincially and make rules that apply to all Standardbred raceways and participants.[88] Specifically, the Ontario Rules of Standardbred Racing 2008[89] state that "[e]very person licensed by the commission is deemed to have agreed to abide by the conditions set out in the application . . . for the licence, the license itself, the Act, the rules and regulations thereunder."[90]

Along with the privileges of membership come related obligations, including an obligation to accept a reduced expectation of privacy. Whether the licensee be an owner, breeder, driver, trainer, groomer, or other associated person for the betterment of the sport, expectations of privacy for such individuals on Commission grounds (i.e. raceway property) pale in comparison to those of the general citizenry.[91] Such is the quid pro quo of the licensing compact. Such strictures are necessary in order to maintain the public's trust in the integrity of horse racing. To exemplify the point, the following non-exhaustive list of rules are highlighted:

> 1.04 Ignorance of the rules will not be accepted as an excuse for their violation;
>
> 6.29 Whenever reasonable grounds exist for a belief that any participant can give material evidence that would aid in the detection or exposure of any fraud or wrongdoing concerning racing, such participant shall, on the order of the judges or other authorized official, be compelled to testify by deposition, affidavit or to provide documentary disclosure. Failure of any participant to comply will result in immediate full suspension;
>
> 6.48.02 The entry of a horse to race in Ontario shall constitute permission for a person designated by the Director to collect or otherwise obtain a biological sample from or of

88. *Id.* at §§ 1, 6, 11.

89. *See Rules of Standardbred Racing*, ONTARIO RACING COMMISSION, 2008 [hereinafter *Rules*]; *see also* Racing Commission Act, *supra* note 87, at § 11; *see* Ontario Harness Horse Ass'n. v. Ontario Racing Comm'n et al., [2002] O.J. No. 2409, para. 34–35, 48–56 (Can. Ont. C.A.) (QL).

90. *Rules*, *supra* note 89, at Rule 3.03.01.

91. *Ozubko*, at para. 3–6; *see Riesberry,* [2013] O.J. No. 6504 at para. 41 (In the search and seizure ruling released on December 31, 2012, the Court found that, "[a]s a licensee of the [Ontario Racing Commission], Mr. Riesberry agrees to a drastically reduced expectation of privacy while on Raceway grounds.").

that horse for purposes of testing . . .;

10.02 The Director shall have the right to enter upon the buildings, stables, rooms, vehicles or other places within the grounds of any Association for the purpose of examining, searching, inspecting and seizing the personal property and effects of any person in or upon such place;

10.03 Participants acting in any capacity at a race meeting approved by the Commission, by so participating, consent to the examination, search and inspection referred to in the rules, and to the seizure of any hypodermic syringe, hypodermic needle or any other device described in the rules, and all drugs and medicaments including those listed in 6.46.01 or any kind which might be in his or her possession. Any drugs, medicaments or other material or devices seized may be forwarded by the Commission to the official chemist for analysis;

36.06 ORC Representatives may conduct unannounced searches where there are reasonable grounds to believe a prohibited substance is present on ORC licensed premises in violation of the Rules of Racing or specific track rules. Prohibited substances include illicit drugs and prescribed medications possessed without a legally obtained prescription as set out in Rule 36.02;

36.07 Designated Licensees are subject to testing in the following situations:

> (c) drug testing which will take place on an unannounced basis throughout the racing season. Selection for testing will be handled through an independent selection system managed by the ORC's Program Administrator; (d) alcohol testing at any time that they are engaged in the business of racing at a licensed facility.[92]

92. *Rules*, *supra* note 89.

It is obvious that the Rules, as promulgated by the oversight legislation, make it far easier for a prosecutor to make out a prima facie case. Concerns about uncooperative licensee witnesses, unreasonable searches and seizures, and self-incrimination are largely rendered nugatory and accepted as being concessions made in the best interests of racing.

### *D. Deterrence in a Regulatory Environment*

It is submitted that if there is an Achilles heel to administrative proceedings, it is the limitations in the area of sanctions. Arguably, without a punitive bite, general deterrence efforts are illusory. As explained in *Scott v. Ontario Racing Commission*:[93]

> The ORC is not empowered to impose true penal consequences, rather it is an agent of the Crown established in order to "govern, direct, control and regulate horse racing in Ontario in any or all of its forms" (see section 5 of the Act). These proceedings are neither criminal nor quasi-criminal. In R v Wigglesworth, [1987] 2 SCR 541 at para 23, the Supreme Court of Canada many years ago considered the distinction, and concluded that penalties such as suspension and expulsion and fines imposed "for disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity" are not penal in the sense of criminal or quasi-criminal sanctions. Rather, they are matters of licensing.[94]

The language used by the ORC has on occasion reflected a frustration regarding the ineffectual nature of the penalty regime.[95] References to significant suspensions and triple-digit fines are mentioned, yet the tribunals concede in the same breath that "[d]oping continues."[96] Academic articles are similarly disposed to point out as almost a given that regulatory sanctions

93. [2009] O.J. No. 2858.

94. *Id.* at para. 39.

95. *See* Re Scott, [2007] O.R.C.D. No. 18, para. 75–84 (Can. Ont. Rac. Com.)

96. *Id.* at para. 89.

remain inadequate: "Often the penalties are not enough to deter trainers, veterinarians and owners from administering illegal drugs to their horses, largely because of the stiff competition and enormous investments of time and money in racehorses."[97]

At least in the United States, "[o]ne of the primary reasons for trainer suspensions is the use of performance-enhancing drugs."[98] Canadian racehorse trainers have experienced loss of privileges for similar reasons.[99] In any event, the messaging is clear that to whatever degree drugs have impacted Standardbred racing in Canada, it can only reduce public confidence in the sport each time it is uncovered. Although "the relative ease of identifying examples does not reveal the actual frequency of doping,"[100] the optics remain most destructive simply because in the ranks of the sport, "[n]o one wants a cheater."[101] Cheating is anathema to public confidence because the resulting spectacle renders otherwise noble pursuits illegitimate. On explaining why PE opponents emphasize that cheating is the failure to reach one's potential, Michael Shapiro points out that such perfidy brings about results that do "not come through our own normal development and effort, it is not natural, it has an external causal source, it challenges our existing identities, and it shreds our notions of merit."[102]

It is submitted that the decision to wade into the deep waters of the criminal justice system should not be taken lightly. However, the time is arguably ripe in Canada to regularly bring criminal charges against those horse racing licensees who continue to use the crutch of PE drugs. Not only would it potentially cause such licensees to take the "game" more seriously, it would also send an important message to the public that their confidence is respected. As explained by Kimberli Gasparon, "perhaps trainers would be less likely to

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97. Kimberli Gasparon, *The Dark Horse of Drug Abuse: Legal Issues of Administering Performance-Enhancing Drugs to Racehorses*, 16 VILL. SPORTS & ENT. L. J. 199, 200 (2009); *see* Amy L. (Williams) Kluesner, *And They're Off: Eliminating Drug Use in Thoroughbred Racing,* 3 HARV. J. SPORTS & ENT. L. 297, 302 (2012).

98. Kyle Cassidy, Comment, *Reining in the Use of Performance Enhancing Drugs in Horseracing: Why a Federal Regulation Is Needed,* 24 SETON HALL J. SPORTS & ENT. L.121, 123 (2014). The author went on to point out on the same page that "[i]n 2009, only one of the top ten trainers by earnings did not have at least one drug related suspension." *Id.*

99. Brief of the Crown Sentencing Authorities, Tabs 15–16, R. v. Riesberry, [2013] O.J. 6504 (Can. Sup. Ct. J.) (CR-11-2450).

100. Lisa Milot, *Ignorance, Harm, and the Regulation of Performance-Enhancing Substances*, 5 HARV. J. SPORTS & ENT. L. 91, 123 (2014).

101. *Re Scott*, [2007] O.R.C.D. No. 18, at para. 78.

102. Michael H. Shapiro, *The Technology of Perfection: Performance Enhancement and the Control of Attributes*, 65 S. CAL. L. REV. 11, 109 (1991).

dabble in prohibited drugs in order to avoid a criminal record."[103] Whether the same inability to deter the licensee bent on defrauding the betting public will be experienced in a criminal prosecution is open to debate.[104] After all, the stigma attached to a criminal record, as observed by Richard Brown and Murray Rankin,

> is perhaps the greatest strength of prosecution, as well as one of its greatest limitations. On the one hand, the stigma of conviction may lead legal actors to refrain from prosecuting employers who are thought not to warrant moral opprobrium. On the other hand, this stigma is almost certainly a potent deterrent. More important, the symbolic condemnation of offenders through the criminal process may alter public attitudes about environmental and health and safety offences and thereby enhance compliance with regulatory requirements. These benefits of the criminal process are more likely to be realized if prosecutions are brought under the Criminal Code rather than for regulatory offences, as is the present practice.[105]

Certainly, the concept of general deterrence has its detractors, whether the forum be regulatory, civil, or criminal.[106] However, thanks to the *Riesberry*

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103. Gasparon, *supra* note 97, at 216.

104. It is worth mentioning that the use of surveillance cameras in horseracing stalls, as utilized by the ORC, constitutes a variable factored into the deterrence assessment. In the words of Andrew von Hirsch, being watched by a CCTV "is like conducting one's activities in a space with a one-way mirror; while one may know that someone is watching behind the mirror, one does not necessarily know who they are or what they are looking for." Andrew von Hirsch, *The Ethics of Public Television Surveillance*, ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION 65 (Andrew von Hirsch, et. al. eds., 2000). While the use of CCTVs as instruments to facilitate the *Big-Brother* effect may give pause to horse racers thinking of using PE drugs, it does not do away with the use of PE. Put simply, deterrence is unlikely to begin or end in the stall. There are plenty of other places for horse racers to engage in such conduct.

105. BROWN & RANKIN, *supra* note 66, at 348.

106. *See generally* R. v. McLeod, [1992] S.J. No. 672 (Can. Ont. C.A.) (QL); *see* R. v. Clarke, [1998] O.J. No. 3521 (Can. Ont. Ct. J. Gen. Div.)(QL). When considering the tenor of deterrence as it affects the human condition, consider also the philosophy in JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT I 61 (James T. McHugh, ed., Prometheus Books 2009) (1830):

> Pain and pleasure are the great springs of human action. When a man perceives or supposes pain to be the consequence of an act, he is acted upon in such a manner as tends, with a certain force, to withdraw him, as it were, from the commission of that act. If the

prosecution, at least there now is Canadian precedent from which further criminal jurisprudence can be developed.

## IV. PART III: SAFEGUARDING THE PRINCIPLE OF NATURAL JUSTICE – THE TRIAL JUDES'S ROLE IN

### *A. The Courtroom*

The tenor of the *Riesberry* prosecution not only sent a message to licensees and the public alike on the ramifications of cheating, but it also generated lessons for advocates and judges in "test cases" where the law is less than certain. This is especially so where test cases provide insight into seldom employed provisions of the Code. A test case has been described as, among many things, "a lawsuit brought to determine an unsettled legal point in some matter of broad application" or "an action whose result determines liability in other actions," and even "a case setting a precedent for other cases."[107]

Following the culmination of its journey to the Supreme Court of Canada, the *Riesberry* matter returned to the trial court and a sentencing hearing was held on April 8, 2016, on the counts of fraud and attempted fraud over $5,000.00. The Crown advanced the argument that the sentence should be appropriately tailored having regard for the joint submission suggesting a fine, and the fact that the matter was effectively a test case. Notwithstanding these submissions, in his reasons for sentence, the trial judge remained hesitant to brand the matter before him as a test case and delivered the following comments:

> The Crown at the beginning of trial indicated that this was the first prosecution known to him of this type of conduct under the Criminal Code. Prior prosecutions had always been in

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apparent magnitude of that pain be greater than the apparent magnitude of the pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it. The mischief which would have ensued from the act, if performed, will also by that means be prevented.

107. R. v. Nayanookeesic, [2005] 3 CNLR 257, para. 37–38 (Can. Ont. Sup. Ct. J.). It is important to note that Justice Pierce, cautions the reader that "[a] novel case, therefore, is not necessarily a test case." *Id.* at para 43. While the *Riesberry* case is novel in the sense that it is the first of its kind to surface in Canada, it also raises important questions about whether horse racing constitutes a game for the purposes of cheating at play, whether the betting public, writ large, is put at risk of deprivation, and if so, whether such deprivation is too remote to satisfy the *actus reus* of the offence as it reads in the Code.

> front of the Ontario Racing Commission to his knowledge. In that sense, the matter may *loosely be termed a "test case."*[108]

Notwithstanding the court's reasons, the authors submit that the legal issues argued in *Riesberry* indeed evinced the trademark of a test case. As a result, issues of trial fairness take on a heightened significance. Specifically, on this point, lessons from *Riesberry* on the principles of natural justice and the concept of *audi alteram partem* emerge as underpinning themes. The unexpected use of *ex juris* case law in assessing whether a race is a game for the purposes of the Code is pivotal in this regard.

The trial judge's application of the *Harless* case, while permissible, particularly if viewed through the prism of the powers vested in a court of inherent jurisdiction,[109] causes tension when met with the principles of natural justice. In the discussion that follows, the importance of the principles of natural justice, in the context of allowing counsel to make submissions, serves as the locus of the authors' critique. At issue is to what extent the principles of fairness and natural justice are compromised when counsel is not afforded an opportunity to make submissions on a central feature in a case.

1. Natural Justice, Fairness, and the Right to Make Submissions

While the *Riesberry* case bears precedential hallmarks related to the intersection between dishonest sporting conduct and the criminal law, it also engenders debate on the parameters, if any, that accompany judicial discretion in determining novel questions of law. The consideration and application of *ex juris* jurisprudence, as evidenced by the use of the *Harless* decision from the United States, without the opportunity for counsel to make submissions on its applicability clearly violated basic principles of natural justice. Close examination of the trial court's reasoning suggests that it overreached when it conscripted the use of the case as a vessel of interpretation. The authors respectfully submit that the use of *Harless* to make an adjudicative finding on what constituted a "game," for Canadian criminal law purposes, set a dangerous precedent. Not only was it inapplicable when it came to determining the law of the land, its incorporation into the decision came *ex improvisio*.

The opportunity to make submissions before the court is inextricably

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108. Trial Transcript, Reasons for Sentence at para. 1, lines 26–32, para. 2, line 2, *Riesberry* (2016) (No. CR-11-2450) (emphasis added).

109. *See infra* Part III(b) (exploring the significance of this label "court of inherent jurisdiction").

linked to natural justice as a foundational component of the adversarial system. Natural justice is considered "'fair play in action.' Nor is it a leaven to be associated only with judicial or quasi-judicial occasions."[110] The concept of natural justice is predicated on the duty to act both fairly and judicially. While both elements are distinct on their face, the Supreme Court of Canada has signaled a fusion of their functional underpinnings. In *Martineau v. Matsqui Institution,*[111] a decision involving the judicial review of administrative action, Chief Justice Dickson suggested there was a close nexus between fairness and the principles of natural justice, and provided the following insight:

> The fact that a decision-maker does not have a duty to act judicially, with observance of formal procedure which that characterization entails, does not mean that there may not be a duty to act fairly which involves importing something less than the full panoply of conventional natural justice rules. In general, courts ought not to seek to distinguish between the two concepts, for the drawing of a distinction between a duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldy conceptual framework . . . . *It is wrong, in my view, to regard natural justice and fairness as distinct and separate standards and to seek to define the procedural content of each.*[112]

While much of the jurisprudence emerging from the Supreme Court of Canada discusses natural justice in the context of administrative decision-making tribunals, the principles flowing from the concept apply equally to traditional judicial forums. Thus, if the principles of natural justice, rooted in fairness and the concept of *audi alteram partem,*[113] apply to

110. Nicholson v. Haldimand-Norfolk Regional Police Comm'rs, [1979] 1 S.C.R. 311, para. 1–33 (Can.).

111. [1980] 1 S.C.R. 602 (Can.) (QL).

112. *Id.* at 628–30 (emphasis added).

113. The common law principle of *audi alteram partem* refers to the duty to hear both sides of a case, and remains central to the concept of procedural fairness. The essence of the *audi alteram partem* rule is to give all parties a fair opportunity of answering the case for or against them. Natural justice generally requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed, so that they may be in a position: (1) to make representations on their own behalf; or (2) to appear at a hearing or inquiry (if one is to be held); and (3) to prepare their own case and answer the case they have to meet. Louis

administrative tribunals, then their force should weigh even stronger in a criminal court where liberty interests are always at stake. Referring to the principles of natural justice, Justice Lebel squared this issue perfectly, observing: "[a]s the maxim goes, the goal is not only that justice should be done but also that justice should be seen to be done."[114]

Appellate courts provide a breadth of insight on the principle of trial fairness. For example, in *R. v. Ranger,*[115] the Court of Appeal for Ontario remarked that "the trial judge's role will be circumscribed by the need to ensure trial fairness" and that the "trial judge's failure to notify counsel of his intention to charge the jury on this additional basis of liability undermined the appellant's ability to make full answer and defence."[116] Drawing on the spirit of natural justice in *R. v. Griffith*,[117] Justice of Appeal Rosenberg, rebuked a lower court decision for its decision to enter an acquittal without providing the parties an opportunity to make submissions.[118]

Courts have explored how the principle of fairness is interlaced with the opportunity for counsel to make submissions. Indeed, this very issue arose in *R. v. G.W.C.,*[119] where the Alberta Court of Appeal considered whether the trial court erred by not affording counsel an opportunity to make submissions after rejecting a joint position on sentence. Justice of Appeal Berger's, reasons capture the solicitude of the court:

> [T]he procedure followed by the sentencing judge in rejecting the joint submission in this case is a matter of concern. Once a sentencing judge concludes that he might not accede to a joint submission, fundamental fairness dictates that an opportunity be afforded to counsel to make further submissions in an attempt to address the sentencing judge's concerns before the sentence is imposed . . . As a result, they were afforded no opportunity to address that concern. Indeed, had the sentencing judge made his concern known to counsel in a timely fashion, the foundation upon which the joint

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Lebel, *Notes for an Address: Reflections on Natural Justice and Procedural Fairness in Canadian Administrative Law*, 26 CAN. J. ADMIN. L. & PRAC. 51, 53 (2013).

114. *Id.* at 51.

115. (2003) 67 O.R. (3d) 1 (Can. Ont. C.A.).

116. *Id.* at para. 133.

117. [2013] 116 O.R. (3d) 561 (Can. Ont. C.A.).

118. *Id.* at para. 33–36.

119. [2001] 5 W.W.R. 230 (Can. A.B. C.A.).

> submission rested might well have been laid. I do not suggest that any particular procedure is *de rigueur*; I say only that the principle of *audi alteram partem* should be followed.[120]

The *ratio decidendi* in *G.W.C.* is not exclusive to criminal law. Similar qualms were expressed by the Federal Court of Canada in *Lahnalampi v. Canada (Attorney General)*,[121] a case involving the judicial review of a grievance application heard by the Public Service Labour Relations Board. At issue was whether the adjudicator breached the principles of fairness by not allowing the grievers to make submissions on whether they were readily available for work. Justice Mosely explained the court's concern about an adjudicative body drawing factual conclusions absent hearing submissions from both parties:

> I agree with the applicants that the adjudicator contravened *audi alteram partem* by deciding the matter on the basis that the applicants were not "readily available" for overtime work. Contrary to the respondent's suggestion, the applicants did not undertake the risk of not making submissions on the meaning of "readily available" with full knowledge that it might lead to a negative decision. To the contrary, the applicants did not make such submissions because the adjudicator had caused them to believe that he would not be deciding that question.[122]

Justice Mosely commented further on *audi alteram partem*, suggesting a heightened awareness for the principle in matters involving novel issues that are ultimately driven by material facts in dispute:

> I reject the respondent's suggestion that *audi alteram partem* is relaxed to the point of permitting a decision-maker to decide issues that neither party addressed when these issues pertain to law or policy, as opposed to factual disputes . . . [A] *decision maker cannot raise novel issues of any sort without bringing them to the attention of the parties*.[123]

120. *Id.* at para. 26.

121. [2014] F.C. 1136 (Can.).

122. *Id.* at para. 42.

123. *Id.* at para. 49 (emphasis added).

It is not unreasonable to suggest that judges are beholden to a heightened sense of obligation to employ the principles of fairness and natural justice when "novel issues" are brought before the court. At its core, the *Lahnalampi* decision suggests that there are inherent dangers associated with drawing inaccurate conclusions on evidentiary matters that betray the factual record.[124]

Specifically, these decisions elevate the premium placed on submissions made by counsel during the course of a hearing. A closer glance at the treatment of joint submissions in Canadian courts is indicative of this premium. For example, in the seminal case of *R. v. Cerasuolo,*[125] the Court of Appeal for Ontario explained the high threshold to which courts must adhere prior to rejecting the joint submissions of counsel, urging judges to be deferential to them "unless [they are] contrary to the public interest and the sentence would bring the administration of justice into disrepute."[126] The rationale is to "foster confidence in an accused . . . that the joint submission he . . . obtained in return for a plea of guilty will be respected by the sentencing judge."[127] Joint submissions are but one of a myriad of examples where counsel's submissions carry significant weight, no doubt attributable to their roles as officers of the court.

The foregoing jurisprudence captures the essence of the principles of natural justice and fairness as they relate to the lawyer-judge dynamic at trial. The jurisprudence uniformly supports the proposition that counsel is entitled to make submissions. Whether or not the submissions will sway the question of the day is a matter for the trier of fact to decipher. However, at the heart of this proposition is the notion that the adversarial system cannot thrive if a judicial officer circumvents its fulcrum, inadvertently or otherwise.

One cannot help but wonder what drove the trial court to utilize an *ex juris* case to wield precedent on the meaning of a Canadian statute, absent any input from counsel.[128] The American case undergirded the court's understanding

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124. *Lahnalampi*, [2014] F.C. 1136; *see* R. v. Douglas, [2002] J.Q. No. 418, para. 18 (Can. Q.C. C.A.) (Where the Quebec Court of Appeal strongly criticized the rationale of the trial judge at the sentencing hearing. Without any evidence before the court, the judge found that the accused supplied a weapon used during the course of a robbery. Justice Fish poignantly remarked on the error of the trial judge, writing, "This was not a benign error. I fear, on the contrary, that it proved to be malignant – certainly in the sense of 'harmful', and probably in the sense of 'infectious' as well.").

125. [2001] O.J. No. 359 (Can. Ont. C.A.) (QL).

126. *Id*. at para. 8.

127. *Id.* To appreciate the impact of judicial unfairness in the context of jury trials, *see* R. v. Baltovich, [2004] O.J. No. 4880, para. 118, 127, 146–49 (Can. Ont. C.A.) (QL).

128. Justice Cromwell, expressed the same curiosity about this very point on behalf of the

that horseracing is a game of pure skill. However, the decision was made in an adversarial vacuum. Thus, the moral of this critique is that counsel must be kept apprised of judicial concerns regarding issues of law, particularly when they may be dispositive of a significant point in the litigation. Moreover, where foreign case law is utilized for the insight it offers,[129] its interpretation and value is often met with competing views. One may wonder whether a judge is vested with unfettered judicial discretion to use foreign case law when presiding in a court of inherent jurisdiction. The question, perhaps better put, is how the balance of such discretion should be exercised, if at all, in the absence of direct input from counsel.

3. Inherent Jurisdiction as Compared to Judicial Discretion: Does the Former Eclipse the Latter?

Judicial rationale is shielded by the armor of judicial independence, a constitutional convention that fares strong against outside scrutiny.[130] In many ways, the perfect storm may lurk on the horizon when judicial discretion combines with the powers of a court of inherent jurisdiction. The result can properly serve as a gateway to developments in the common law. However, the authors submit that the trial decision in *Riesberry* constituted no such

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Supreme Court of Canada, stating, "It is somewhat unclear to what extent the trial judge relied on this authority as stating the law in Canada. However, to the extent that he did so, he made legal error." *Riesberry* (2016) at para. 11.

129. *See generally* Brian Manarin, *Extraordinary Offenders in Our Midst: An Evaluation of an American Interpretive Solution and its Application to Section 745(b) of Canada's Criminal Code,* 22 TUL J. INT'L & COMP. L. 63 (2013). For a discussion on the Supreme Court of Canada's amenability to the use of foreign case law in its judgments as a matter of practice, *see* Rebecca Lefler, *A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia,* 11 S. CAL. INTERDISC. L.J. 165 (2001). For a view strongly against the practice, *see* Atkins v. Virginia, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting); *see also* Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting).

130. Ref re Remuneration of Judges of the Prov. Court of P.E.I., [1997] 3 S.C.R. 3, para. 109 (Can.).

> Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the Constitution Act, 1867. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located." To be clear, the authors do not take issue with judicial discretion as a necessary corollary to judicial independence, but are interested in the manner in which such discretion is exercised, and whether it is decipherable on the face of a judgment.

*Id.*

storm.

"Discretion" is an amorphous concept. Barry Hoffmaster writes that the Shorter Oxford English Dictionary defines the term as "the action of discerning or judging; judgment" and the "liberty or power of deciding, or of acting according to one's own judgment; uncontrolled power of disposal."[131] In law, discretion is defined as "the power to decide, within the limits allowed by positive rules of law, as to punishments, remedies, or costs, and generally to regulate matters of procedure and administration."[132] Such a definition is arguably as unwieldy as the judicial actions it serves to support, leaving a broad ambit of creative licence with a judicial officer.

Judicial behavior is no archetypal construct—it is submitted that it cannot be compartmentalized or understood in typologies. Supporting this proposition, Kent Greenwalt comments on the performance parameters that emerge from discretion in the judicial realm:

> [I]n ordinary discourse the existence of discretion turns on the range of performance that will be *deemed proper by those people to whom the person making decisions is responsible. It does not turn on the duty of the decision-maker conscientiously to reach the best decision he can under a standard that may theoretically provide an objectively "right" answer.*[133]

Greenwalt's position stands for the proposition that judges are alive to a silent audience to who they are responsible, ultimately surrendering to extrinsic forces transcending judicial objectivity. This begs the question: to who are judges responsible? When considering the literature on judicial discretion, one should give pause to whether the appointment versus election scheme in Canada and the United States, respectively, bears influence on the spectrum of discretion. While the difference alters the perception of political involvement at the judicial level in Canada,[134] the underlying similarity

131. Barry Hoffmaster, *Understanding Judicial Discretion*, 1 L. & PHIL. 21, 52 (1982).

132. *Id.*

133. *Id.* at 42 (emphasis added).

134. Note that Canadian judges are appointed by provincial, territorial, or federal governments. The appointment schemes vary depending on the ordinal ranking of courts. For example, provincial court judges are appointed by way of a self-driven application process sent to regional committees, while judges of the superior, territorial, appeal courts, and the Supreme Court of Canada are appointed by Canada's Attorney General. Off. of the Comm'r for Fed. Jud. Aff. Can., *Process for an*

between the judicial branches of both countries is their separation from the legislative process, which inevitably calls for the task of legislative interpretation.

Juxtaposed with Greenwalt, Justice Richard A. Posner turns to internal variants that influence how judges think. In studying what drives judicial thinking, he writes extensively on experience, akin to training, which can "inculcate values that can influence judicial behaviour."[135] He adds that "[i]ntuition plays a major role in judicial as in most decision making" and "is best understood as a capability for reaching down into a subconscious repository of knowledge acquired from one's education and particularly one's experiences."[136] As explained by Justice Posner, "intuition will enable a more accurate as well as a speedier decision than analytical reasoning would."[137] Aptly, he describes judges' decision-making methods as "'inevitably opaque' because they involve telescoped rather than step-by-step thinking."[138]

On Ronald Dworkin's account, judges are not elected and therefore are not responsible to the electorate as legislators are, which obviates their responsibility to the majority when they make law.[139] Unlike Justice Posner, and very much like Greenwalt, Dworkin is of the view that judges ought to be driven by public rather than private standards:

> The most important difference, for the present purpose, is that the judge has no authoritative manual exhaustively listing the standards against which he must make his decision. If the judge were free to adopt his personal preferences as legal standards, then indeed his decisions would be chosen. But he is not. *He is subject to the overriding principle that good reasons for judicial decision [sic] must be public standards rather than private prejudice. And he is subject to principles stipulating how such standards shall be established and what*

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*Application for Appointment*, http://www.fja-cmf.gc.ca/appointments-nominations/process-regime-eng.html#Provincial (last visited Dec. 14, 2017); *see* Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), § 96, *reprinted* in R.S.C. 1985, app II, no 5 (Can.); *see also* Judges Act, R.S.C. 1985, c J-1, § 3 (generally for eligibility requirements).

135. RICHARD A. POSNER, HOW JUDGES THINK 95 (2008).

136. *Id.* at 107.

137. *Id.* at 108.

138. *Id.* at 109.

139. Hoffmaster, *supra* note 131, at 24.

> *judicial use shall be made of them.*[140]

If, according to Dworkin, judges are subject to principles circumscribing how far their discretion can be exercised, then arguably, the trial court's interpretation of the word "game" in *Riesberry,* using inapplicable case law, abrogates the legal procedure by which adjudicative facts are normally adopted with respect to foreign case law.

Normally, when a Canadian court relies on foreign law, the party adducing or asserting the law must provide expert evidence to prove it as a matter of fact.[141] Otherwise, judicial notice will only be taken of Canadian legislation, or more specifically, acts of Parliament.[142] At its essence:

> Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.[143]

Despite the foregoing, a Canadian court may also look to cases from foreign jurisdictions to draw assistance when engaged in an interpretive effort.

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140. Ronald Dworkin, *Judicial Discretion*, 60 J. PHIL. 624, 634–35 (1963) (emphasis added).

141. Xiao v. Canada (Minister of Citizenship and Immigration), [2009] 4 F.C.R. 510, at para. 24 (Can. Fed. Ct.).

142. *See* Canada Evidence Act, R.S.C. 1985, c C-5, § 17 [hereinafter *CEA*].

> Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the lieutenant governor in council of any province or colony that, or some portion of which, now forms or hereafter may form part of Canada, and all of the Acts of the legislature of any such province or colony, whether enacted before or after the passing of the Constitution Act, 1867.

> *Id. See also id.* at § 18 ("Judicial notice shall be taken of all Acts of Parliament, public or private, without being specially pleaded.").

143. R. v. Spence, [2005] S.C.J. No. 74, para. 53 (Can.) (QL).

Indeed, such an approach can be inspirational.[144]

The use of the *Harless* case on the definition of "game" was central to two of the counts on the indictment in *Riesberry*. Making the factual determination of a game, as defined for the purposes of the Code, would serve to underpin the actus reus of the offence. The authors express concern about why the post position of the horse, which is randomly computer generated, was not the subject of judicial notice given the contents of the Rules of Racing.[145] Presumably, this recognition would have resulted in a factual finding that horseracing is a game of mixed chance and skill.

Despite the contrary views espoused by the authors, one might properly argue that the trial judge's assessment of *Harless* was squarely within his bounds as a judge presiding over a court of inherent jurisdiction,[146] thus informing the title of this section. If inherent jurisdiction provides more discretionary latitude, then perhaps that latitude can be more broadly employed to allow for the consideration of foreign jurisprudence. Importantly, while judicial discretion and inherent jurisdiction resemble one another and overlap, they ought to be kept distinct.[147]

Historically, the development of "inherent jurisdiction" was spawned from two powers: (1) punishment for contempt of court and its process; and (2) regulating the practice of the court and preventing the abuse of its process, particularly by staying actions that were shown to be frivolous and

144. *See* United Food v. Kmart Canada Ltd., [1999] 2 S.C.R. 1083, para. 51–55 (Can.) (where the Supreme Court of Canada heard a labor dispute between a labor group and an employer. In considering whether a statutory definition of picketing violated the Canadian Charter of Rights and Freedoms, the Court adopted a line of thinking from American jurisprudence proffering the view that conventional picketing is distinguishable from many other forms of leafleting, and that the activity of leafleting can be carried out in a permissible manner that is innocuous and appropriate.); *see* R. v. Lyons, [1987] 2 S.C.R. 309, para. 77–85 (Can.) (where the Supreme Court of Canada utilized American case law to assess the rights that should be afforded to an accused in post-conviction proceedings as it relates to dangerous offender designations.).

145. *See Rules*, *supra* note 89, at ch. 2 (defining "post position" as being "the position assigned or drawn for a horse at the start of the race.").

146. Courts of inherent jurisdiction are not defined in the Canadian Constitution, but are referenced the Constitution Act, 1867, at § 96. The general jurisdiction of the High Court as a superior court of record is, broadly speaking, unrestricted and unlimited in all matters of substantive law, both civil and criminal, except insofar as that has been taken away in unequivocal terms by statutory enactment. It exercises the "full plenitude of judicial powers in all matters concerning the general administration of justice within its area." *The Inherent Jurisdiction of the Court*, CURRENT LEGAL PROBLEMS 1970, 23–24 (Lord Lloyd of Hampstead & George Shwarzenberger eds., Steven & Sons 1970) [hereinafter *Inherent Jurisdiction*].

147. *Inherent Jurisdiction*, *supra* note 146, at 25.

vexatious.[148] The juridical basis of this jurisdiction is therefore the authority to uphold, protect, and fulfill the function of administering justice according to law in a regular, orderly, and effective manner.

A crucial takeaway from this historical backdrop is that a court of inherent jurisdiction has full reign over procedural matters before it, which is part and parcel of the manner in which the administration of justice is employed. However, if the inherent function of the court may be defined as a "residual" source of power upon which to draw when necessary, and it is equitable to do so, and to "do justice between the parties and to secure a fair trial between them," then the necessary corollary must be that parties to a matter should always be permitted to make submissions on dispositive issues.[149] These very considerations ought to have, at the least, occupied the mind of the trial court prior to engaging the *Harless*-favored interpretation that emerged in *Riesberry*. Procedurally, such an opportunity not only bespeaks the right to make a full answer and defence[150] at its highest, but it embodies how justice should be delivered through the adversarial system.

## V. PART IV: ETHICAL ISSUES INVOLVING ANIMALS AND THEIR USE IN SPORTING EVENTS

In addition to the precedential legal value that the prosecution knew would arise from the *Riesberry* case, questions regarding the ethical treatment of animals remained relevant throughout the trial and at the sentencing hearing following the Supreme Court of Canada's decree.[151] Indeed, the misuse of race horses was, in part, the impetus to criminalize doping practices.[152] Two particular questions flowing from the theme of ethical treatment constitute the focus of the final part of this article, namely the definition of "cheating" and whether or not such an illegitimate means of gaining athletic accolades is any more or less aggravating when an animal is used as a conduit.[153]

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148. *Id.* at 25–26. The basis underpinning courts of inherent jurisdiction was that their powers were not derived by statute, but rather imbued in the very nature of the court. It is said that "such a power is intrinsic in a superior court; it is the very life-blood, its very essence, its immanent attribute." *Id.* at 27.

149. Forest Holdings Ltd. v. Bank of Nova Scotia, [1990] N.S.J. No. 230, para. 8 (Can. N.S. C.A.) (QL).

150. *Criminal Code*, at § 650(3); Constitution Act, 1982, at § 7.

151. Trial Transcript Reasons for Sentence, *Riesberry*, April 8, 2016, page 2, lines 12–20.

152. One of the co-authors herein, Brian Manarin, was the trial prosecutor in Riesberry. The impact that PE drugs have on race horses influenced his decision to bring the matter to trial.

153. Trial Transcript Reasons for Sentence, *supra* note 151, at page 2, lines 12–20 (where the trial court states: "A more egregious aggravating factor is the fact that the horse is defenceless at the hands

In this part, the authors consider the etymology of cheating as a precursor to the ethical inquiry into animal welfare. A discussion about the meaning of cheating as it relates to the use of PE drugs is considered. What follows is a historical snapshot of the views advanced by early philosophical thinkers who opined on the ordinal ranking of species and the treatment of animals. Against this backdrop, the implications of "doping" are contemplated by the authors through the lens of ethical debate.

### *A. Revisiting the Etymology of Cheating and its Effect on Sporting Generally*

What is the rationale to prohibit cheating? By what metric is cheating even measured? Is it an inherent calculus or one that can only be divided when juxtaposed against fixed rules? The answers to these questions will help the reader better understand why society generally places a premium on achievement through legitimate means. As well, the answers will emphasize why there continues to be a need to lay open for scrutiny sporting endeavours that involve animals.

In the first version of the Code in 1892,[154] cheating at play was found co-mingled among fraud-related offences, indicating that the purpose of the section was about ensuring honest dealings when gambling over money and things of material value.[155] Canadian legislative history reveals that cheating at play was given more of a stand-alone status in 1985 by virtue of the enactment of section 209 of the Code when Parliament sought to protect honesty in wagering that involved material value.[156] Notwithstanding the relocation of the provision in the gaming-related offences years later, section 209 still requires an "intent to defraud any person," which appears to be consistent with its historical evolution and Parliament's purpose in so enacting it.[157]

Indeed, the definition of cheating carries a similar undertone. Cheat as defined in Black's Law Dictionary, means "to defraud" or "to practice deception."[158] Uniquely, Black's classifies cheating as "the fraudulent obtaining of another's property by means of a false symbol or token, or by

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of an unscrupulous trainer . . . the human being . . . has the intellect to make the choice and assume the health risks attendant with their actions.").

154. *Criminal Code*, 1892, 55 & 56 Vict., c 164, §395.

155. *Riesberry*, [2013] O.J. No. 6504 at para. 41.

156. *Id.* at para. 39.

157. *Id.*

158. *Cheat*, BLACK'S LAW DICTIONARY (10th ed. 2014).

other illegal practices," and ultimately advises its readership to "see fraud" for further explanatory value.[159] It comes as no surprise then that the legislative backdrop of this provision is inherently tied to the fraud-related provisions. Even more so, the nexus between cheating and fraud squarely fits the reasoning underpinning Justice Cromwell's judgment for the Supreme Court of Canada in *Riesberry,* wherein he writes, "Mr. Riesberry knew that his dishonest conduct put bettors at risk of deprivation. That, after all, is what cheating is."[160]

The etymology of the word "cheat" as a form of fraud is not only reflected in the statutory wording of section 209, but it is also historically rooted in the acquisition of another's property, triggering questions about possessory rights.

The basic tenets of property law allow possessory rights to attach to inanimate objects, more often than not, carrying some form of monetary value. In the context of horse racing, a logical possessory component is linked to both ownership of the horse by the racing stakeholder and the monetary value that can be gained from the purse. Perhaps this logic explains why section 209 prohibits cheating in relation to both gaming and betting.[161] The game is the process through which the potentially deceitful behavior occurs (i.e. the means), and the necessary corollary to the race, namely the betting, is the avenue for financial gain. Considered wholly, the provision applies to multiple parties in a race, including those toiling on the racetrack and those who are betting on the performance of such participants.

In an effort to define cheating in the sporting context, Doriane Lambelet Coleman and James E. Coleman Jr. provide a glimpse into this intuitively simple, yet abstract concept. Their views embody competing stances on what constitutes cheating, suggesting that it need not always be deemed malignant:

> like obscenity, child maltreatment, and torture—*it [cheating] is at least in some respects in the eye of the beholder*. For example, even if steroids did not have definitive or potential adverse health effects, we would believe that taking them under any circumstances is cheating because they fundamentally alter the athlete's "natural" or "gifted" levels of physical and mental strength.[162]

159. *Cheating*, BLACK'S LAW DICTIONARY (10th ed. 2014).

160. *Riesberry,* [2015] 3 S.C.R. 1167 at para. 32.

161. *Criminal Code*, R.S.C. 1985, at § 380(1).

162. Doriane Lambelet Coleman & James E. Coleman Jr., *The Problem of Doping*, 57 DUKE L.J.

PE, according to Michael Shapiro, is said to be "inconsistent with a game or sport because it is viewed as a kind of cheating—not necessarily hidden or dishonest, but cheating nonetheless."[163] Despite the foregoing, Shapiro calls into question the orthodox discontentment with PE as a form of cheating:

> Of course, [performance enhancing] cannot be inconsistent with the general idea of contests. It is easy to imagine competitions in which the object is indeed to see who can best enhance performance in a technological *or* nontechnological way—as in muscle-building contests, with or without steroids. *If a sport entails not just competition against current opponents but the possibility and desirability of record-setting, it is not obvious why [performance enhancing] is always conceptually excluded.* . . . Does a musician "cheat" when the accuracy of her performance is improved by the use of beta-blockers to control the physical effects of anxiety? Here the idea of cheating is linked to the *compromise of identity and perhaps even more to unearned benefits: impairments are controlled by external means rather than by internal resources that constitute strength of character*.[164]

Two points emerge from Shapiro's inquiry, namely, (1) the possibility that cheating is not inconsistent with contests per se if the idea is to assess who can most enhance themselves in the contest; and (2) while cheating could be linked to the compromise of identity and unearned benefits that are impacted by otherwise uncontrollable extrinsic factors, it is not clear why we should not countenance it in the context of a competition. Standardbred horse racing is a contest involving drivers mounted on their sulkies pulled by their horses with the objective of ensuring that the horse runs the prescribed course in the quickest time possible. On Shapiro's account, PE may not be such a morally offensive concept if we define the game as a contest. But, is not every game a contest of sort? Surely, Shapiro did not mean to discount that proposition. Perhaps this explains why he qualifies his musings, asking whether cheaters can, or rather should, play the game. He reviews the idea that a game can be

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1743, 1753 (2008) (emphasis added).

163. Shapiro, *supra* note 102, at 61.

164. *Id.* at 61–62 (emphasis added).

defined in such a way as to contemplate cheating, and in doing so, the more interesting question emerges as to what the canonical rules, practices, understandings, and frameworks of the game include.[165] From this, one can deduce that Shapiro refers to the rules of the game as de facto arbiters in determining whether cheating has transpired. Along this line of logic, the prohibition on specific PE drugs in the Ontario Standardbred Rules constitute the framework, and thus, any violation of that framework to gain a material benefit at the expense of the betting public must constitute cheating.

Richard McLaren conducts a similar inquiry into the concept of cheating, linking it to a form of corruption as it relates to fair play. He writes that PE drugs engender corruptive practices that effectively "rob[] [the] sport of its essential feature of uncertainty of the outcome and accelerates its spin into the forum of entertainment, and thus it no longer is sport."[166] He cites corruption as a violator of sporting integrity, the latter being something that "must be present for the sports enthusiast to believe that the outcome of a sporting competition is genuine."[167] In his view, public confidence in the structural makeup of the sport is compromised once doping is discovered, and that confidence is not easily retrievable because "[d]oping unfairly enhances the performance of those who engage in such practices, and causes cynicism among the viewing public of the natural abilities of athletes."[168]

A brief historical account reveals that orthodox views on doping, as a form of corruption and a variety of fraud, were also at issue in the early days of horse racing. For example, by 1860 in the United States, racing was legalized in almost every state and by 1890, corruption and dishonesty ran so rampant on the racetrack that later years saw the decline in the number of racetracks in the country go from 314 to 25.[169] Eventually, state racing commissions were formed to enforce rules adopted to protect and safeguard the horse-racing industry, including trainers, jockeys, owners, horses, and spectators, and preserve the integrity and fairness of the sport.[170]

It is attractive to wonder whether the impugned status of American horse racing impacted, or was indeed paralleled in, neighbouring Canada. This possibility gains traction given that the first codification of the cheating at play

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165. *Id*. at 61.

166. Richard H. McLaren, *Corruption: Its Impact on Fair Play*, 19 MARQ. SPORTS L. REV. 15, 15 (2008).

167. *Id.*

168. *Id.* at 1516.

169. Cassidy, *supra* note 98, at 126.

170. *Id.*

provision in Canada occurred in the late Nineteenth Century.[171] Thus, while the *Riesberry* case was the first to be criminally prosecuted in Canada, it was not the first of its kind.

### *B. The Ethics of PE Drugs, also Known as "Doping"*

Without question, the science and technological growth of PE drugs pervade the world of sport now more than ever, emerging as a legitimate concern for organizations, associations, and leagues wishing to preserve the integrity of their respective sporting activities.

Doping is not a new phenomenon to the sporting world. Some data as far back as the Sixth Century BC, reveals that gladiators used stimulants when fighting in the Circus Maximus. In the Third Century BC, Greek athletes used stimulants at the earliest of Olympic Games. And, in the Middle Ages, competitors used stimulants while preparing for jousts.[172] A worldwide response to regulation eventually surfaced and, in 1928, "the first official ban on 'stimulating substances' was introduced by the International Amateur Athletic Federation."[173]

Inevitably, the opportunity cost of using PE drugs imposes a high jeopardy on any athletic career. Nevertheless, "[t]he enormous rewards for the winner [in competitive sporting], the effectiveness of the drugs, and the low rate of testing all combine to create a cheating 'game' that is irresistible to [many] athletes."[174] This reality inevitably contributes to factors, which cause some to succumb to the pressure to cheat.

Despite the ramifications of PE drugs on an athlete's reputation and integrity, even those at the vanguard of their chosen sport are not necessarily deterred from the perceived rewards of using PE drugs. Several examples from the world of sport have attracted global headlines. For example, in 2012, Lance Armstrong, the once heralded deity of professional cycling, made headlines for admitting that he used banned PE drugs, only after years of investigation by the United States Anti-Doping Agency.[175] Sometime during

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171. *Criminal Code*, R.S.C. 1892.

172. Neville Cox, *Victory with Honour or Victory at All Costs? Towards Principled Justifications for Anti-Doping Rules in Sport*, 22 DUBLIN U. L.J. 19, 20 n. 5 (2000).

173. Julian Savulescu et al., *Why We Should Allow Performance Enhancing Drugs in Sport*, 38 BR. J. SPORTS MED. 666 (2004).

174. *Id.*

175. William Fotheringham, *Timeline: Lance Armstrong's Journey from Deity to Disgrace,* THE GUARDIAN, Mar. 09, 2015, http://www.theguardian.com/sport/2015/mar/09/lance-armstrong-cycling-doping-scandal??.

the early millennium, Barry Bonds, a revered baseball player, was discovered to have used PE drugs, which contributed to his late-career home-run surge.[176] Reports from the New York Times revealed that his ingestion of prohibited substances was broad in range and included insulin, the human growth hormone[177], and trenbolone (a steroid also used to improve the muscle quality of beef cattle), to name a few.[178] In a similar vein, Ben Johnson, a superstar sprinter, was stripped of his Olympic Gold medal in 1988 in the 100-meter dash after testing positive for anabolic steroids.[179] Adding to the impugned roster of PE-induced athletes, Rashard Lewis, an all-star basketball forward, was suspended for ten games in 2009 in light of positive test results for PE drugs indicating elevated testosterone levels.[180] At last, for using the same drug that was injected into the noble creature in *Riesberry*, namely Clenbuterol, in 2014 the National Hockey League suspended forward, Carter Ashton.[181] The list undoubtedly goes on.

One cannot help but wonder what behavioural explanation underlies the zero-sum risk-taking approach of the above-mentioned athletes resulting in the denigration of their claims to fame, and inciting doubt in the merit of their achievements in the hearts of their fans. Such behavioural and ethical quandaries have occupied the minds of intellectuals such as Justice Richard Posner and Michael Sandel, both of whom provide some useful philosophical musings that prove enlightening in this context.

Sandel's view can be juxtaposed with that of Justice Posner. Sandel opposes the use of drug enhancement in athletic performance, viewing it at as a detractor from the athlete's achievement.[182] Sandel's philosophy suggests

176. Michiko Kakutani, *Barry Bonds and Baseball's Steroids Scandal*, N.Y. TIMES, Mar. 23, 2006, http://www.nytimes.com/2006/03/23/books/23kakubarry-bonds-and-baseballs-steroids-scandal.html?n=Top%2FFeatures%2FBooks.

177. *Id.* The human growth hormone (HgH) "causes bone and muscle development beyond that which would result from the expression of the athlete's own DNA; this drug effectively trumps that DNA." Coleman & Coleman Jr., *supra* note 162, at 1771.

178. Kakutani, *supra* note 176.

179. James H. Marsh, *Ben Johnson*, THE CANADIAN ENCYCLOPEDIA: HISTORICA CANADA (Mar. 24, 2008), http://www.thecanadianencyclopedia.ca/en/article/ben-johnson/. *See* Cox, *supra* note 172, at 19.

180. Michael S. Schmidt, *Rashard Lewis Suspended by N.B.A. for Doping Violation*, N.Y. TIMES, Aug. 6, 2009, http://www.nytimes.com/2009/08/07/sports/basketball/07nba.html.

181. The Canadian Press, *Maple Leafs Forward Carter Ashton Suspended for 20 Games for Violation of Drug Policy*, TORONTO STAR, Nov. 6, 2014, https://www.thestar.com/sports/leafs/2014/11/06/maple_leafs_forward_carter_ashton_suspended_20_games_for_violation_of_drug_policy.html.

182. Richard A. Posner, *In Defense of Prometheus: Some Ethical, Economic and Regulatory Issues of Sports Doping*, 57 DUKE L.J. 1725, 1726 (2008).

that athletes choose to enhance their natural capacity for selfish reasons and, in doing so, effectively alter the organic course of human nature. Justice Posner frames the issue differently, advancing the view that sports test biological potential, rendering the nub of the issue clear, to wit: whether the intervention disrupts or obscures hierarchy, including animal hierarchies, such as those in horse racing.[183]

On the issue of deterrence, Justice Posner argues, "[t]he combination of difficulty of detection with incentives to defect may make purely private sanctions for violating a doping ban an inadequate deterrent," adding that "[c]riminal or other public penalties may be necessary."[184] Deterrence, in his view, boils down to a simple mathematical theorem encapsulated by the formula $S > B/P$.[185] The "S" is the sanction that must exceed the value of the benefit "B" divided by the probability "P", that the violation will be detected.[186] In other words, the smaller P is, and the larger B is in relation to P, the less likely sanctions will deter. As submitted in Part II by the authors, this explains why the use of criminal sanctions may be a more attractive deterring feature in response to race horse doping.

Interestingly, some academics argue the contrary position, namely that PE drugs are not an imprecation on the integrity of sports. Savulescu, Foddy, and Clayton support the position that "human sport is different from animal sport because it is creative," citing the notion that "biological manipulation embodies the human spirit."[187] They succinctly summarize their position in stating that,

> *Performance enhancement is not against the spirit of sport; it*

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183. *Id.* at 1729.

184. *Id.* at 1736.

185. *Id.*

186. *Id.* Consider a juxtaposition embedded in the work of Gary L. Francione who offers that

> Most moral matters do not lend themselves to the certainty that we can have about mathematics. We cannot have mathematical certainty about our moral views—whatever they may be—concerning capital punishment, affirmative action, abortion or animal rights. We may have compelling arguments that support our moral views, but we cannot say that those views are indisputably true and certain in the way that "two plus two equals four" is indisputably true and certain.

GARY FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR YOUR DOG? xxxiv, xxxv (2000).

187. Savulescu et al., *supra* note 173, at 667.

> *is the spirit of sport.* To choose to be better is to be human. *Athletes should be given this choice.* Their welfare should be paramount. *But taking drugs is not necessarily cheating.* The legalization legalisation of drugs in sport may be fairer and safer.[188]

Facially, the argument looks attractive. It embodies the core of the human disposition, armed with free will and agency. In some ways, the argument is libertarian in nature, evoking the principle that one can do to oneself what one wishes, so long as it does not bring harm to others. The meaning of harm and its various gradients is, however, debatable, as it can range from the faith-based reliance of loyal fans whose attachment to a particular athlete can be shattered, to the act of providing PE drugs to athletes, which, more times than not, will negatively impact their health and career as well as the sport in question. Although "doping is anathema for clean athletes at all levels, known or suspected doping that disturbs the natural hierarchy at this most elite level is particularly abhorrent to spectators."[189]

Perhaps, the more intriguing debate is whether human sport is different from animal sport because it is "creative," thus warranting the use of PE drugs. The authors contend that a more accurate distinction between human and animal sport lies with the inability of animals to employ a decision-making matrix and choose to be "better" for themselves. To that extent, the choice to be better is appropriated by the person employing the animal as a form of property in furtherance of a financial interest. Thus, it stands to reason that we ought to turn our minds to the debate surrounding animal ethics to better understand the master-servant relationship that reflects horse racing.

### *C. The Animal Ethics of it All*

Our conception of the place of animals in the order of living things ignites a moral debate that is not new to ethical inquiries, finding early origins in Western philosophical thought. The dialogue surrounding animal ethics is developing dynamically around the world as issues surrounding humane treatment makes its way to the forefront of animal welfare.

Paola Cavalieri encapsulates the "waves" of Western thinking on the treatment of animals into three critical "moments" in time:

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188. *Id.* at 670 (emphasis added).

189. Coleman & Coleman, Jr., *supra* note 162, at 1764.

> The first moment saw a struggle within the Classical Greek world between the idea of an original bond among all conscious beings and a contrasting global plan of rationalization of human and nonhuman exploitation. The latter prevailed and the situation remained unaltered for the many centuries of Christianized Europe. Then, the scientific revolution of the seventeenth century generated a novel round of controversy by setting a new agenda for animals, one which required the removal of the only constraint left on their treatment – the prohibition of cruelty … In the last few decades, a third critical moment has arrived with a new turn of the screw in animal exploitation. The rapid process of industrialization and mechanization of farming practises has altered the traditional landscape, and has generated a new wave of debate, characterized by the fact that reactions have preceded attempts at rationalization, and that different voices have been raised against a new kind of exploitation.[190]

Some of the earliest debates on how animals ought to be used and treated find themselves in the voice of Pythagoras (580 BC), who once declared that it is "wicked as human bloodshed to draw the knife across the throat of the calf."[191] Followers of Pythagoras believed in a kinship between humans and other species, rooted in the idea that we are made from the same elements, permeated by the same breath, and animated by the same reincarnated souls.[192] Ultimately, the Pythagoreans rejected the killing of animals for food or religious sacrifice.[193]

In time, a more modern, Western ideology preoccupied the views of Greek thinker Theophrastus who noted that people who are born from the same ancestors are naturally kin, and that kinship is widely expanding, dovetailing with the view that animals are kin to humans because they have the same bodily organs, tissues, fluids, appetites, emotions, perceptions, and reason.[194]

Debates ruminating on questions concerning animal perception, emotions,

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190. PAOLA CAVALIERI, THE ANIMAL DEBATE: A REEXAMINATION, K IN DEFENSE OF ANIMALS: THE SECOND WAVE 54–55 (Peter Singer ed., 2006).

191. DAVID FRASER, UNDERSTANDING ANIMAL WELFARE: THE SCIENCE IN ITS CULTURAL CONTEXT 10 (2008).

192. *Id.*

193. *Id.*

194. *Id.* at 12.

and the ability to reason dominated philosophical thinking in the decades that followed. Closer scrutiny of evolutionary philosophical thinking around the world reveals a gradual progression in thought from a stark divide between rational and irrational beings, to a paradigm shift proffering sameness. Consider the following selections on the evolution, and sometimes regression, of critical thought pertaining to animal welfare, as observed by David Fraser:

> Aristotle (384 BC– 323 BC) . . . concluded that although humans and animals share many characteristics such as perception and emotion, humans alone have the capacity for logos or reason . . . However, thinkers of the Stoic school—a rival to the Pythagoreans—made it the basis for their ethical position on animals. The Stoics saw justice as rooted in the concept of mutual belonging. According to the Stoics, no such community of belonging can exist between rational and non-rational beings. Hence, what had been for Aristotle a purely factual conclusion about the mental powers of animals was used by the Stoics as the basis for the ethical conclusion that animals fall outside the sphere of human justice and moral concern;[195]
>
> Epicurus (341 BC–271 BC) viewed justice as a contract or agreement between different people to avoid causing harm to each other. Justice, because it requires a measure of agreement about what constitutes acceptable behavior, could not be applied to animals because animals lack the powers of reason needed to enter into such a contract;[196]
>
> Plutarch (46 AD–119 AD) repudiated the work of Aristotle. Using anecdotal stories to establish that animals could use reason, he noted, for example, that in Thrace, people use a fox to test whether it is safe to venture onto ice. The fox walks warily on the ice and listens carefully. If it hears running water, it deduces that the ice is not thick and returns to shore, but if there is no sound, then it proceeds ahead;[197]

195. *Id.*
196. *Id.*
197. *Id.* at 12–13.

> By the seventeenth century in France, philosophical musings on this topic regressed significantly. For example, Descartes' endeavour, however, was favoured by his ability to draw upon two different theoretical sources − classical metaphysics, with its rational, immortal souls for humans, and the new mechanistic view of nature as mere matter for animals. The resulting doctrine allowed investigators to perform vivisection in an even more ruthless manner;[198]

> Kant, in his *Lecture on Ethics*, framed the debate in a similar vein. His focus primarily hinged on the furtherance of humankind through animals as vessels for our duties to each other: "[b]ut so far as animals are concerned, we have no direct duties. Animals are not self-conscious and are merely as a means to an end. That end is man. We can ask, 'Why do animals exist? But to ask, 'Why does man exist?' is a meaningless question. Our duties towards animals are merely indirect duties towards humanity;"[199]

> By the time the debate made its way to England during the eighteenth and nineteenth centuries, cruelty to animals was commonplace. At the cusp of the Enlightenment, thinkers like Bentham advanced the idea that good acts are those engendering the greatest amount of good, applicable to both humans and animals that can experience happiness and suffering. As he so aptly put it, the question is not whether animals can reason, but rather, whether they can suffer;[200]

> In England, John Lawrence advocated for the rights of beasts in *Philosophical and Practical Treatise on Horses* and argued:

198. CAVALIERI, *supra* note 190, at 59 (defining "Vivisection" as the study of physiological processes by literally cutting living animals).

199. IMMANUEL KANT, LECTURES ON ETHICS 239 (Louis Infield trans., Harper & Row Publishers 1963).

200. FRASER, *supra* note 191, at 18–19.

> No human government, I believe has ever recognized the *jus animalium*, which surely ought to form a part of the jurisprudence on every system, founded on the principles of justice and humanity . . . . I therefore propose, that the Rights of Beasts be formally acknowledged by the state, and that a law be framed upon that principle, to guard and protect them from acts of flagrant and wanton cruelty, whether committed by their owners or others.[201]

In 1821, a wealthy land-owner from Ireland, Richard Martin, introduced his *Ill-Treatment of Horses Bill.* The bill was defeated on its first attempt, but succeeded on the second when re-introduced and drafted to include cattle and horses. Not surprisingly, it was met with laughter by some Members of Parliament when the proposal was announced;[202]

A spokesman for German continental philosophy in the years following the end of World War II, Martin Heidegger defended "primal ethics" that is "based on a non-invasive policy of allowing living and non-living things to be what they are".[203] Writing much to the chagrin of other thinkers, he stated "[o]nly man dies. The animal perishes . . . referring to a qualitative alterity of nonhumans";[204]

At the turn of the nineteenth century, "Henry Salt asked: 'Have the lower animals "rights"? In answering his own question, he responded: "undoubtedly − if men have." Peter Singer later accepted this proposition in the Twentieth

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201. JOHN LAWRENCE, TREATISE ON HORSES, AND ON THE MORAL DUTIES OF MAN 123 (2d ed. 1802).

202. FRASER, *supra* note 191, at 21.

203. CAVALIERI, *supra* note 190, at 61.

204. *Id.* at 61–62. Eventually, the narrative of Heidegger was countered by post-modern thinkers such as Jacques Derrida, who presented himself as a scholar of Heidegger. Derrida diverged from Heidegger's discourse on animality, imputing to Western philosophy a sacrificial structure that countenances ways to negate the other and the noncriminal putting to death of animals. Notwithstanding his dissonance, Derrida pointed directly to the human subject as central, and going so far as to declare vegetarianism not as the sparing of animals, but as a shorthand to good conscience. *Id.* at 62–63.

> Century. Citing Regan, Singer interprets Regan's work to mean that "animals are individuals with beliefs, desires, perception, memory, a sense of the future, an emotional life, preferences, the ability to initiate action in pursuit of goals, psychophysical identity over time, and an individual welfare in the sense that things can go well or badly for them."[205] He added that "[s]entient creatures are not receptacles for valuable experiences", citing a problem with dialogue about the inherent value of a sentient being existing only in a human being;[206]

While not nearly representative of the entire history of animal welfare, the above-discussed timeline unveils an important shift in human thought as it relates to the place of animals in the ordinal ranking of life forms. More importantly, it evinces an oscillating process of thinking that has prevailed since early Greek thought, a dialectic that swings between a pro-animal ideologue and its converse. The dialogue appears to be fixated on fluctuating variables: animals as they are in respect of, and in relation to, souls, morality, reason, and society as a social fabric. It appears that the positions proffered by animal ethicists are often influenced by the time period in which they write, the thinkers preceding them, and the frame of reference from which they considered animal welfare, be it mere consciousness, sentience, or otherwise.[207]

A common consideration for animal theorists is whether animals are sentient in nature, possessing a consciousness, and subjective experience of pain and suffering.[208] To be sentient, "means to be the sort of being who has subjective experiences of pain (and pleasure) and to have interests in not experiencing that pain (or in experiencing pleasure)" and thus notably "most of the animals that we use for food, experiments, entertainment, and clothing

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205. Peter Singer, *Animal Liberation or Animal Rights?*, 70 THE MONIST 3, 6 (1987).

206. *Id.* at 8. A similar point is echoed in Nelson Potter, *Kant on Duties to Animals*, 13 JAHRBUCH FÜR RECHT UND ETHIK 299, 306 (2005) wherein he states, "[t]he fact that animals are in no position to complain of bad treatment to a court is no more a reason for thinking they cannot have their rights against such treatment than it is reason for thinking an abused patient suffering from senile dementia could have no such rights."

207. FRASER, *supra* note 191, at 16–17 (For example, in and around the Glorious Revolution, brutality towards animals and humans was sufficiently commonplace in Britain to provoke surprised comment by visitors from continental Europe.).

208. FRANCIONE, *supra* note 186, at xxiii.

unquestionably have such subjective experiences."[209] Gary L. Francione maintains:

> To deny that animals are conscious of pain, or to assert that we cannot know whether animals feel pain, is as absurd as to deny that other humans are conscious of pain or to assert that we cannot know whether other humans feel pain. The neurological and physiological similarities between humans and nonhumans renders the fact of animal sentience non-controversial. Even mainstream science accepts that animals are sentient. For example, the U.S. Public Health Services states that "[u]nless the contrary is established, investigators should consider that procedures that cause pain or distress in human beings may cause pain or distress in other animals." And scientists use animals in pain experiments, which would, of course, be useless if animals did not experience pain, and in a way that is substantially similar to the way we feel pain.[210]

Francione also rejects the understanding of animals as the property of human beings. He argues that we are obligated to extend to animals only one right—the right not to be treated as the property of humans.[211] The reader will recall that the etymology of the word "cheat" is linked to fraudulently obtaining property. Property, as it pertains to horse racing, indubitably lies in the money that is lost or gained following a race.[212] The means facilitating the accrual of such profit lies in the use of the horse. Gains are contingent on the performance of the horse. That the horse is the property of a racing stakeholder is a presumptively troubling starting point, one which Francione seeks to deconstruct and debunk, particularly if we believe that animals are sentient creatures.

Comparatively, Francione's desire to jettison our understanding of animals as property is the most progressive of its kind in the face of other

209. *Id.* at xxxvii.

210. *Id.* at xxxvi–xxxvii.

211. *Id.* at xxxi.

212. Gasparon, *supra* note 97, at 201 (noting that "many owners and trainers view their racehorses as investments and will do anything to get ahead in the sport, including administering performance-enhancing drugs to their horses to gain a competitive advantage." This view serves as support for the notion that the horse itself is used simply as a means to generate profit.).

contemporary thinkers. For example, as Francione interprets the comments of Peter Singer in *Animal Liberation* endorses the view that while we ought to apply the principle of equal consideration to the interests of all sentient animals, we should not abolish the property status of animals insofar as we can still use animals for human purposes.[213] Similarly, Francione adds that in *The Case for Animal Rights,* Tom Regan believes that "we ought to abolish and not merely regulate animal exploitation."[214] The fundamental wrong, in Regan's view, is that "the system allows us to view animals as *our* resources, here for *us*—to be eaten, or surgically manipulated, or exploited for sport or money."[215] Notwithstanding this view, Regan does not extend the idea that animals have moral rights to all sentient creatures, but only those being "subjects of a life"[216] with a set of "beliefs and desires; perception, memory, and a sense of the future, including their own future; an emotional life together with feelings of pleasure and pain."[217]

It would appear that Francione's theory fits most agreeably with sentience. If animals are not the property of human beings and bear the ability to experience pain, then believing that animals are sentient is not so far-fetched.

The concept of animal sentience does not only occupy the academic whims of philosophical thinking. Indeed, the concern for animal sentience is much more vast. Recently, the concept of sentience made its way into legislative enactment in the province of Quebec. In 2015, the National Assembly enacted Bill C-54, an act to improve the legal situation of animals. The purpose of the Act is to establish rules for the protection of domestic and wild animals, mandating that an owner or custodian ensure that an animal receive care that is consistent with its biological needs.[218] The Act cites the condition of animals as a social concern, hinting at the rise in public interest for animal welfare. Particularly commendable in the general provisions of the Bill is section 898.1 which reads that:

> Animals are not things. *They are sentient beings* and have

213. FRANCIONE, *supra* note 186, at xxxii.

214. *Id.*

215. Tom Regan, *The Case for Animal Rights,* IN DEFENSE OF ANIMALS 13 (Peter Singer ed., 1985).

216. *Id.* at 6. (describing that each of us, as humans, are the experiencing "subject of a life," a "conscious creature having an individual welfare that has importance to us whatever our usefulness to others.").

217. FRANCIONE, *supra* note 186, at xxxii.

218. *See* Bill 54, *An Act to Improve the Legal Situation of Animals*, 1st Sess, 41st Leg, Quebec, 2015 (assented to Dec. 4, 2015), explanatory notes [hereinafter *The Act*].

> biological needs. In addition to the provisions of special Acts which protect animals, the provisions of this Code and any other Act concerning property nonetheless apply to animals.[219]

The Act also provisions for the appointment of specific persons, including, but not limited to, inspectors and veterinarians, with powers to enter dwelling houses, vehicles, or other enclosed places if there is a reasonable cause to believe that an animal is in distress, or their welfare or safety is compromised.[220] Sanctions are also prescribed for the contravention of the Act, which include fines of up to $12,500.00, and terms of imprisonment of up to eighteen months subject to the discretion of a sentencing judge.[221] The composition of the Act evinces the Legislature's intent to impose a concise, centralized regulatory regime as an alternative to existing regimes with a catchall spirit that captures a range of treatment in respect of animals. Whether the penalties prescribed, in accompaniment with the powers enumerated for inspectors tasked to protect the integrity of the animals, will serve to be sufficiently deterrent, only time will tell.

While the concern for animal welfare and the existence of animal sentience is not universal, it is posited that the human race should generally agree that the cruel treatment of animals ought not be tolerated. Problematically, as is obvious in the *Riesberry* case, some may simply view horse racing as a form of entertainment, a form of play that is predicated on capital gain more than on the welfare of the noble creature used in the competition. Nevertheless, society's understanding of animal welfare crystallizes distinctly when cruelty issues come to the fore. As explained by Andrew Cohen:

> [n]o one beyond the world of horse racing cares if industry insiders cheat each other. *But plenty of people beyond the world of horse racing cares if the animals at the heart of the sport are treated cruelly. Horse racing simply cannot survive if the general public believes racehorses are abused or neglected.*[222]

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219. *See The Act,* at Part I, § 898.1*; see also* § 898.1, cl. 17 (stating that "no person may be the owner or custodian of 15 or more equines without holding a permit issued for that purpose by the Minister") (emphasis added).

220. *The Act,* at § 898.1, cl. 35–41.

221. *The Act*, at § 898.1, cl. 65–67.

222. Andrew Cohen, *The Ugly Truth About Horse Racing*, THE ATLANTIC, Mar. 24, 2014,

Cohen's statement strikes an important chord. If we accept that animals do suffer and indeed possess some interest in averting suffering, then surely those outside of the horse racing realm do not countenance the cruel treatment of horses. Arguably, the injection of PE drugs, some of which may have adverse effects on a horse,[223] constitutes a form of animal battery. Thus, the combination of the fraudulent manipulation of the race, with the non-consensual abuse of the "athlete," must command a heavy sanction.

If we choose to operate on the presupposition that animals are sentient beings, there is no question that the injection of a PE drug is a misguided and abusive procedure. Until a universal agreement on the treatment of animals is reached, and we begin to conceptualize animals as sentient beings that are not merely the property of humans, the use of PE drugs in horse racing will likely remain commonplace.

## VI. CONCLUSION

The reader will have undoubtedly surmised by this point that the fate of Derek Riesberry not only provides Canadian jurisprudence with a chapter of added meaning for fraud as it pertains to organized sports, but it also incites broad-stroke ethical questions about the place of animals in the ordinal ranking of species. The lessons learned from the *Riesberry* case are underpinned by a cross-spectrum of legal areas including administrative law, jurisprudence, and legal ethics to name a few. Importantly, the Supreme Court of Canada's holding serves as an example of how test litigation on antiquated provisions in the Code is interpreted by modern courts, and whether interpretations are more likely to be subject to legal error where minimal jurisprudence exists.

When all was said and done, Mr. Riesberry received a total fine in the amount of $3,750.00 for the charges of fraud and attempted fraud over $5,000.00, with one year to pay.[224] The trial court, despite placing much greater emphasis on general deterrence than rehabilitation or specific deterrence, was heavily swayed by Mr. Riesberry's positive pre-sentence report, which described him as a man who has no substance abuse problems,

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http://www.theatlantic.com/entertainment/archive/2014/03/the-ugly-truth-about-horse-racing/284594/ (emphasis added).

223. For example, Bute (a.k.a. "Clenbuterol") is an anti-inflammatory drug that does not affect a horse's performance beyond relieving its pain. It is extremely common, but long-term usage may result in ulcers, which can result in a loss of weight, appetite, and gastrointestinal bleeding. An overdose can lead to kidney failure and death. Gasparon, *supra* note 97, at 207.

224. *Riesberry*, [2013] O.J. No. 6504 at para. 4–5.

maintains a positive relationship with his children, is gainfully employed, and has no intention of applying for a licence to train or own horses.[225] While Mr. Riesberry entered the criminal justice system clean of a criminal record, he is now branded with the "scarlet letter" of a cheat and carries a criminal conviction.[226] In many ways, Mr. Riesberry is the test case himself, representing the otherwise upstanding citizen that one least expects would someday meet the criminal courts.

Whether the stigma of a criminal record will serve to deter future racing licensees from violating certain of the governing Rules remains to be seen. Such questions surrounding deterrence are contingent on whether the Attorneys General sees fit to prosecute such matters. In Canada, the integrity of sporting endeavors, let alone those that involve animals, has not made its way to the top of crime-control agendas for past and present federal governments. Until the legal landscape changes, we can only hope that questions surrounding animal welfare remain topical and relevant for those who bet and those who drive the bet.

225. *Id.* at 3, lines 15–26.

226. Brian Cross, *Horse-Doping Trainer 'Branded with The Scarlet Letter of a Cheat', Prosecutor Says*, WINDSOR STAR, Apr. 11, 2016, http://windsorstar.com/news/local-news/horse-doping-trainer-branded-with-the-scarlet-letter-of-a-cheat-prosecutor-says.