

**HEARING BEFORE A PANEL  
OF THE BOARD OF THE  
ALBERTA GAMING AND LIQUOR COMMISSION**

**IN THE MATTER OF the Gaming and Liquor Act  
Revised Statutes of Alberta 2000, Chapter G-1  
current as of November 1, 2010  
and the Regulation**

and

**IN THE MATTER OF Horny Toad Saloon Inc.  
o/a Horny Toad Saloon  
7746 Elbow Drive SW  
Calgary, Alberta  
T2V 1K2**

**concerning alleged contraventions**

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<b>DATE OF HEARING:</b>	<b>November 19, 2014</b>
<b>HEARING PANEL:</b>	<b>Mr. W.J. Anhorn, QC, Panel Chair Ms. T.L. Lawrence, Panel Member</b>
<b>LICENSEE REPRESENTATIVES:</b>	<b>Ms. N., Director</b>
<b>COMPLIANCE AND SOCIAL RESPONSIBILITY:</b>	<b>Mr. H., Hearing Officer</b>

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**DECISION OF THE HEARING PANEL**

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**I. Jurisdiction and Preliminary Matters**

As a result of receiving an incident report dated October 8, 2014, the Compliance and Social Responsibility (CSR) Division of the Alberta Gaming and Liquor Commission (AGLC) imposed an administrative sanction under Section 91(2) of the *Gaming and Liquor Act*, without a hearing, on Horny Toad Saloon Inc. operating as Horny Toad Saloon, Calgary.

The Licensee subsequently applied for a hearing under Section 94(1) of the *Gaming and Liquor Act*. A Hearing Panel of the Board of the AGLC met to hear the following alleged violation:

**Section 75.1(b) *Gaming and Liquor Act*: Permitting a person apparently intoxicated by liquor or a drug to consume liquor in the licensed premises.**

The licensee and the Hearing Panel were provided with a hearing file containing the incident report dated October 8, 2014 and various documents pertaining to an alleged incident occurring on September 6, 2014. Ms. N. confirmed she received the incident report dated October 8, 2014 and Notice of Hearing dated October 30, 2014. The incident report was entered into

evidence by the CSR Division as Exhibit #1. Typed statements from J. M., C. C., J. G. and S. N. were entered into evidence by Ms. N. as Exhibit #2 through Exhibit #5.

Mr. H. presented the case on behalf of the CSR Division. Ms. N. represented Horny Toad Saloon Inc.

## **II. The Issue**

Did the licensee permit a person apparently intoxicated by liquor or a drug to consume liquor in the licensed premises?

## **III. Evidence**

### **Inspector G. – evidence lead by Mr. H.**

On September 6, 2014 Inspector G., together with Inspector C., conducted a routine operating check of the premises. The premises was not overly busy when the Inspectors arrived and there was no door control in effect. There were two service staff on duty.

The Inspectors conducted a walkthrough of the premises and their attention was immediately drawn to the service bar located on the west side of the premises, where a disheveled male was slouched over on a bar stool. Inspector G. observed the male patron in possession of a pint glass that was one third full with an amber colored liquid. The male patron was observed consuming from the glass on several occasions.

Inspectors G. and C. were greeted by server, C. C., who was known to Inspector G. from a previous visit. Ms. C. asked the Inspectors if she could get them anything, then returned to the service bar and pointed out the manager on duty, J. G., to the Inspectors. Inspector G. and Inspector C. seated themselves at a table located directly to the east of the service bar. They had an unobstructed view of the disheveled male and the service bar.

At 11:35 p.m. Inspector G. observed J. G. dispense draught beer from the Budweiser tap handle into a pint glass and serve it to the disheveled male. The male was observed by Inspector G. consuming the draft beer. During the Inspector's visit, the male was viewed by Inspector G. to be unsteady on his feet. The male weaved over to a table located directly behind his bar stool and joined a male and female patron, with his pint of draught beer. The male could be heard slurring his words, he had difficulty maintaining his balance and used the furniture to steady himself. The male was very friendly with the patrons, touching them frequently. In Inspector G.'s opinion, the male patron exhibited signs of intoxication.

At 11:48 p.m. the male patron moved unsteadily toward the entrance door of the premises. He stopped at a table located on the northwest side of the premises. The male stooped down to hug a male patron from behind. He used the male he was hugging to steady himself. The male patron then stumbled into the wall located on the west side of the premises, near the entrance.

At 11:59 p.m. J. G. dispensed draught beer from the Budweiser tap handle and served it to the male patron. The male was viewed by Inspector G. consuming from the pint glass. At 12:09 a.m. the male joined the Inspectors by standing at their table. The Inspectors were seated in front of the service bar and were in direct sight of J. G. and C. C., who could clearly view the Inspectors' interaction with the male patron. During the male patron's conversation with the Inspectors, Inspector G. noted the male could not remember how long he had been at the premises; he believed approximately two hours. He could not remember how much he had to drink but stated a lot. He advised Inspector G. he attended the premises regularly, approximately every second day, and that he was "very drunk, totally drunk and that his brain is fucked". The male was slurring his words, used the bar table to steady himself and swayed on his feet. The male touched both Inspectors frequently and Inspector G. noted his eyes were glassy. The male attempted to place his pint glass on the table but spilled some on Inspector C..

Inspector G. approached J. G. and advised the male patron was intoxicated and should not have been permitted to consume the draught beer J. G. had served him. J. G. acknowledged the male was drunk but stated the male had only been there an

hour and 20 minutes and was only served three draught beer in that time. J. G. stated he cut the male patron off after he served him the third draught beer.

Inspector G. believes the manager and server should have noticed the signs of intoxication the male patron displayed and removed any alcohol from his possession. The server nor the manager ever mentioned to Inspector G. that the male patron suffered from a physical or mental impairment.

On August 23, 2014, approximately two weeks prior to the incident in question, Inspector G. attended the premises with another AGLC Inspector to conduct a routine operating check. An intoxicated male patron was also observed during this visit. C. C. was the server on duty at the time and she was asked by Inspector G. to remove the alcohol from the patron's possession, which she did. The intoxicated male was the same male noted by Inspector G. during the operating check on September 6, 2014. Inspector G. also spoke with J. G. during this visit and neither the server nor the manager advised Inspector G. that the male patron had a physical or mental impairment during the initial visit.

#### **Inspector G. – cross-examined by Ms. N.**

Inspector G. has visited the premises approximately three times in the past six months. She attended the premises on August 23, 2014 to conduct a routine operating check. Inspector G. observed the male patron for the first time during this visit and also asked C. C. for her ProServe Certificate.

The male patron was displaying signs of intoxication during Inspector G.'s visits to the premises on August 23, 2014 and September 6, 2014. Inspector G. is unable to say whether the patron has a physical or mental impairment; she is not a medical professional. Inspector G. is uncertain how long the male patron was at the premises however, J. G. advised the patron had been at the premises for an hour and 20 minutes on September 6, 2014.

#### **Inspector G. – questioned by the Panel**

The male patron did not appear to be well kept during Inspector G.'s visits to the premises on August 23 and September 6, 2014. The male patron approached the Inspectors' table on his own and that's when the Inspectors began asking him question. Neither Inspector G. nor Inspector C. identified themselves as AGLC Inspectors to the male patron.

#### **Inspector C. – evidence lead by Mr. H.**

Inspector C. conducted a routine operating check of the premises with Inspector G. on September 6, 2014. The male patron in question displayed obvious signs of intoxication and in Inspector C.'s opinion he should not have been sold or served liquor. Inspector C. could smell liquor on the male patron's breath. The conversation between the male patron and Inspectors C. and G. varied. The male patron asked the Inspectors the same questions and the Inspectors asked the male patron the same question over and over again.

The male patron advised Inspector C. he was a regular at the premises and was very drunk. The male was in possession of a pint glass when Inspector C. arrived at the premises and was served two additional draught beer by J. G.. Inspector C. observed the male patron consuming from all three pint glasses. In Inspector C.'s opinion, J. G. or C. C. should have removed the liquor from the patron's possession. Inspector C. was able to obtain a sample from one of the pint glasses served to the male patron and confirmed the sample contained alcohol.

#### **Inspector C. – cross-examined by Ms. N.**

Inspector C. observed the male patron in possession of three beer and further observed him consume from all three beer. In Inspector C.'s opinion, the male patron did not appear to be mentally disabled; he appeared to be intoxicated. AGLC Inspectors do not obtain the contact information for intoxicated patrons as part of their duties when conducting an operating check.

#### **Inspector C. – questioned by the Panel**

The male patron was in possession of one draft beer upon the Inspector's arrival at the premises. At 11:35 p.m. he was served a second draught beer and at 11:59 p.m. he was served a third draught beer. The male patron remained at the premises after the Inspectors departed but had advised the Inspectors he had been cut off and would not be served any more beer.

#### **Evidence of J. G. – evidence lead by Ms. N.**

J. G. is employed by the Horny Toad Saloon as a manager. On August 23, 2014 J. G. was not at the premises when the Inspectors arrived to conduct an operating check. He did speak with the Inspectors a few days later when they attended the premises to inform J. G. that C. C.'s ProServe had not been transferred properly from British Columbia and that she had observed a customer who was overly intoxicated and had been over served. J. G. advised the Inspectors he would hold a staff meeting to address the issue and that C. C.'s ProServe would be rectified as quickly as possible.

On September 6, 2014 the male patron in question arrived at the premises at approximately 10:44 p.m. J. G. watched him walk up to the bar and order a drink. The male patron had a speech impediment and appeared to be somewhat disheveled. J. G. did not smell alcohol on the patron's breath and did not witness him stumble or have difficulty maintaining his balance as he approached the bar. The male patron's eyes did not appear to be glassy or droopy; he seemed alert. J. G. served the patron his first drink and watched him as he walked around the premises mingling with the patrons. C. C. advised J. G. that the male patron comes into the premises from time to time and has two to three drinks while he socializes with the other patrons. The male patron did appear to make the other patrons a little uncomfortable due to his inability to speak clearly and interpret social cues.

J. G. was advised by C. C. the male patron's appearance was the same each time he attended the premises. He typically has two to three drinks and departs the premises. His behavior on September 6, 2014 was the same as his behavior every other time he attended the premises in the past. J. G. did not cut off the male patron or ban him from the bar because September 6, 2014 was his first interaction with the patron. He was unaware this was the same patron Inspector G. spoke to him about following the Inspector's visit on August 23, 2014. J. G. has banned other patrons from the bar or cut off liquor service, as required from time to time.

J. G. advised Inspectors G. and C. the male patron had a physical disability and speech impairment. J. G. does not believe the male patron was intoxicated. Quite a few handicapped persons attend the premises, as there are no stairs at the front entrance and the premises has a large, open main floor.

#### **J. G. – cross-examined by Mr. H.**

J. G. has been employed by the premises for approximately four years, full time, working day shifts. In his opinion, the male patron had an obvious speech impediment, even though J. G. had never met the patron prior to September 6, 2014. Ms. N. does not have her own staff training manual; she relies on AGLC manuals for the training of all employees. Staff are required to be familiar with the Licensee Handbook and have valid ProServe certification. Ms. N. holds approximately two meetings a month with the staff to review AGLC policies and procedures. J. G. is familiar with the signs of intoxication. The male patron in question did not specifically advise J. G. he had a medical condition.

#### **J. G. – questioned by the Panel**

The male patron was cut off on September 6, 2014 because the server believed two to three drinks seemed to be the patron's limit. The male patron's behavior also became more inappropriate the more he drank.

The statement of S. N. (Exhibit #5) has two receipts attached to it. Those receipts are for the alcohol the male patron in question purchased on September 6, 2014. J. G. retrieved copies of the receipts from the "system" in advance of the hearing in order to establish an accurate timeline. When the male patron was served his third beer around midnight, J. G. advised him he was cut off.

#### **IV. Summation**

**Mr. H.**

The AGLC takes the issues of intoxication very seriously and the topic is forefront in the media with respect to violence in and around licensed premises. The purpose of Section 75.1 of the *Gaming and Liquor Act* is to require licensees and their staff to act responsibly in deciding whether or not to sell, provide or allow consumption of liquor to a person in a licensed premises. An employee of the licensee should base their decision on obvious signs of impairment. The Inspectors' testimony as to the heightened level of intoxicated displayed by the male patron in question was quite clear. When a patron has difficulty maintaining their balance, is walking unsteadily, is walking into walls within the premises, is using tables and other patrons to steady themselves and has slurred or incoherent speech, that patron is certainly not worthy of being provided liquor service.

J. G. provided evidence that he advised the Inspectors the male patron had a physical disability and speech impairment, which is contradictory to the evidence provided by the Inspectors. The male patron spoke to the Inspectors directly and advised that he was drunk. The CSR Division believes that the elements of Section 75.1(b) of the *Gaming and Liquor Act* have been satisfied and sufficiently proven to confirm the administrative sanction.

Section 5.8 of the Licensee Handbook provides clear direction that intoxicated patrons are prohibited from being provided liquor service and includes the signs to look for such as staggering, unsteady walk, having poor coordination, slurred speech, bloodshot eyes and being messy in appearance. Many of these signs were present with the male patron and should have been observed by the licensee's staff.

It is the opinion of the CSR Division that the evidence provided to the Panel by the Inspectors properly conveys the incidents of the evening in question. The licensee has not provided the Panel with any other reasonable explanation as to why the male patron was allowed to consume liquor. In the opinion of the CSR Division, simply stating that there may have been an unknown medical condition is not enough. The CSR Division believes that little or no weight should be given to the statements provided by the licensee's staff given the fact the employees are not present to provide the evidence in person and undergo proper cross-examination.

Section 121 of the *Gaming and Liquor Act* states "if an employee or an agent of a licensee contravenes a provision of this Act, the licensee is deemed also to have contravened the provision unless the licensee establishes on a balance of probabilities that the licensee took all reasonable steps to prevent the employee or agent from contravening the provision". The licensee and her staff did not act reasonably or do everything within their power and control to prevent the provision of the act from being contravened, particularly when the situation had been brought to their attention two weeks prior to this incident. The licensee does not have a formalized staff training program; simply relying on ProServe and asking the staff to review the Licensee Handbook is not adequate. The premises was not being operated with the care, concern and due diligence required of a licensee.

The CSR Division respectfully submitted that the original administrative sanction previously offered be upheld.

**Ms. N.**

The Inspectors attended the premises on two occasions and it is interesting that the same male patron was considered to be intoxicated by the Inspectors on both visits. The Inspectors were advised that a number of mentally and physically challenged patrons attend the premises on a regular basis. The male patron in question has not been back to the premises since the incident on September 6, 2014 or Ms. N. would have asked him to attend the hearing as witness. All staff of the premises feel the male patron is "not quite right". It is difficult for staff to determine if a patron suffers from an impairment or is, in fact, exhibiting signs of intoxication.

The Horny Toad Saloon follows all AGLC policies and procedures. Ms. N. only hires experienced waitresses and a manager is on duty every day. The Horny Toad Saloon is concerned with social responsibility and complying with AGLC policies and procedures.

The imposed penalty seems overly harsh given the premises has not had any incidents in over three years, which is when Ms. N. took over ownership of the premises.

## V. Finding

**The Panel finds there was no violation of Section 75.1(b) *Gaming and Liquor Act*: Permitting a person apparently intoxicated by liquor or a drug to consume liquor in the licensed premises.**

In civil cases the standard of proof is on a balance of probabilities. This means that the Panel will assess the oral, documentary and other evidence advanced by each party and decide which, on the central or key issue, is more likely or probable.

The central or key issue in the present case is whether or not the “disheveled” male patron on the date in question was “apparently intoxicated” such that he should not have been served alcohol by the licensee. The word “apparently” is an adjective meaning evidently or obviously based upon what is known or observed.

The evidence of the Inspectors, based upon their limited period of observation, was that the patron in question exhibited the usual or typical signs of intoxication; unsteady walk, slurred speech and glassy eyes. The penultimate issue is whether or not it was “apparent” to the licensee’s employees that the patron was intoxicated.

In response, the licensee’s evidence consisted of the following:

- the patron was a regular customer who typically would attend and consume two or three drinks and leave the premises;
- his disheveled appearance and behavior was typical;
- the patron arrived at 10:44 p.m. and ordered a drink and did not exhibit any signs of prior liquor consumption;
- the patron consumed three pints of beer over a two hour period;
- in the past, the patron had demonstrated unusual behavior suggesting a physical disability and speech impairment such that it was concluded that he is “not quite right”;
- a number of mentally and physically challenged patrons attend the premises on a regular basis; and
- the licensee has an unblemished record and takes seriously the matter of social responsibility and compliance with AGLC policies and procedures.

Should it have been obvious or evident to the responsible employee of the licensee that the male patron was intoxicated? The evidence of the licensee was persuasive and, notwithstanding the evidence of the Inspectors, was believed by the Panel. As such, the Panel was not convinced, on a balance of probabilities that the patron was “apparently intoxicated”.

The CSR Division has the burden of proof of establishing all of the constituent elements of the alleged violation. The standard of proof is on a balance of probabilities. If the party who bears the burden of proof fails to discharge that duty, then the case fails.

The Panel concludes that the licensee’s version of the facts in relation to the essential issue is slightly more plausible and as a result, the CSR Division has failed to discharge its evidentiary burden. Therefore, the allegation against the licensee is dismissed, without penalty.

Signed at St. Albert this 26<sup>th</sup> day of February, 2015.



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W.J. Anhorn, QC, Hearing Panel Chair