

## Northwest Territories Liquor Licensing Board

**IN THE MATTER** of Sam's Monkey Tree Pub, Licensed Premises, and Licence # 2011-A-12

**AND IN THE MATTER** of the *Liquor Act* S.N.W.T. 2007, c.15 ("the Act") and the *Liquor Regulations*, R-069-2008 ("the Regulations");

**AND IN THE MATTER** a hearing before the Liquor Licensing Board;

### REGARDING:

**953785 NWT Ltd.**

Licence Holder

and

**Sam's Monkey Tree Pub**

Licensed Premises

The Liquor Licensing Board, having conducted a hearing on the 12<sup>th</sup> day of December 2011 in the City of Yellowknife, has found:

The Licence Holder has failed to comply with:

Count #1: Section 92 of the Act; "Except as may be permitted in the regulations, a licence holder shall not allow an intoxicated person to enter or remain in a licensed premises."

Count #2: Section 93 of the Act; "No person shall sell or serve liquor at a licensed premises to or for an intoxicated person."

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### ORDER

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**IT IS HEREBY ORDERED** pursuant to section 30 of the Act:

1. Regard  
ing Count #1, The Licence Holder shall pay a compliance penalty in the amount of five thousand dollars (\$5000) on or before January 13, 2012.
2. Regard  
ing Count #2, for failing to comply with section 93 of the *Act* (Count #2), Liquor Licence # 2011-A-12 shall be suspended for the period of January 14, 2012 at 10:00am until January 23, 2012 at 10:00am. The Licence Holder shall post on all entrances to the Licensed Premises, for the duration of the suspension, a notice provided by the Board.

Dated at the City of Yellowknife, this 5<sup>th</sup> day of January 2012.

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Colin Baile, Chairperson, on behalf of and with the concurrence of the other panel members.



## Northwest Territories Liquor Licensing Board

**IN THE MATTER** of Sam's Monkey Tree Pub, Licensed Premises, and Licence # 2011-A-12

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### REGARDING:

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Licensed Premises

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### Reasons for Decision

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**Liquor Licensing Board Case #:** 11-013

**Date of Inspection:** October 30, 2011

**Heard at** Yellowknife, NT on the 12<sup>th</sup> day of December, 2011

### Panel Board Members:

Colin Baile  
Wayne Smith  
Stanley Jones  
Albert Monchuk

### Appearances:

Sarah Kay – Counsel for the Government of the Northwest Territories (Enforcement)  
Steve Dinham – Representing the Licence Holder  
Harvey Bourgeois – Representing the Licence Holder

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**Preliminary Matters**

At the commencement of the hearing, witnesses were excluded until they had given their evidence.

**Enforcement Evidence**

Counsel for the Government of the Northwest Territories (“Enforcement”) submitted the following exhibits:

- 1. Copy of the Notice of Hearing and proof of service;
- 2. Copy of Liquor Licence # 2011-A-12;
- 3. 13 photographs of the Licensed Premises;
- 4. Copy of Inspection Report # 40802.

Counsel for Enforcement called two witnesses; they being:

- Liquor Inspector Kerry Nicholson; and
- Liquor Inspector Leonard Brotherston

**Summary**

The following is a summary of Enforcement’s evidence.

Inspector Brotherston testified:

- He and Inspector Nicholson attended at the Licensed Premises on October 30, 2011 at just before closing at 2 am.
- He observed three intoxicated patrons. The first patron was a male he observed spilling

his drink, staggering. The patron had glossy eyes. Inspector Nicholson was seen talking to the patron.

- The second patron observed was a female leaving the dance floor. She sat down on the floor for a few minutes. When she got up she was leaning on a male friend. She appeared tired. Inspector Nicholson spoke to her.
- A third patron was observed outside the dance area by the washrooms. This female patron was observed as having glossy eyes, holding onto her friend. She was observed going into the washroom and upon her return, she was overheard speaking with Inspector Nicholson. She did not disclose how much she had to drink, but did say she had been to the “wine gala” where she had had “*lots of wine*” prior to attending the Licensed Premises. She was laughing a lot and her head was bobbing back and forth. She appeared to be intoxicated.
- It would be normal to see some but not most patrons appearing tired at 2am.
- Formin g part of the Inspection Report are six items listed. One was not checked-off. That item was: “Conduct of Guests”.
- The three patrons were observed after the music was turned off.
- It is possible that the female patron observed sitting on the floor could have been tired from dancing in high-heel shoes.

Inspector Nicholson testified:

- He arrived at the licensed premises at 0154 hours and departed at 0225 hours. He entered through the side-smoking door.
- A head count was conducted and he determined there to be 100 people present.

- During a walk around the premises, he observed a male patron in his early 20's with a drink in his hand. He was observed staggering and bumping into chairs. He was acting "goofy"; walking up to people saying "cheers". Over the course of two minutes he was observed staggering and spilling his drink. The patron advised Inspector Nicholson that he had had seven 'rum on the rocks' prior to arriving at the Licensed Premises and three such drinks after his arrival. The patron's eyes were glazed and red; speech was a bit slurred; unsteady on his feet; a strong odour of liquor from his breath, and holding onto a chair to keep his balance. The patron was intoxicated.
- A female patron was observed falling on the dance floor. Broken beer-bottle glass was seen next to the patron on the dance floor. While in discussion with the patron, Inspector Nicholson noted her speech was a bit delayed and slurred. Her eyes were red and glazed. She was unsteady on her feet. The patron was intoxicated.
- Two female patrons were observed helping each other as they were walking towards the exit. One of the patrons stopped and grabbed a railing. She was swaying. In conversation, Inspector Nicholson noted the patron's speech was disjointed and was not making sense. Her speech was extremely slurred, broken and hard to understand. She exhibited involuntary eye flutter and her eyes were red. She was very unsteady on her feet. She informed her friend that she needed to go to the washroom and was observed staggering on her way to the washroom. She was gone for about four minutes. Inspector Nicholson observed the patron return from the washroom. She was using handholds on both sides of her in order to maintain her balance. The patron and her friend then unsteadily left the premises. Inspector Nicholson exited the premises and observed the patron being supported by her friend. When approached outside the premises, Inspector Nicholson asked the patron how much she had to drink. The patron advised "one or two bottles of wine".
- On cross examination, Inspector Nicholson advised that he was aware of pre ticket sales for the Halloween party at the Licensed Premises that night. Regarding the male patron, Inspector Nicholson did see him consume the drink he was holding. Inspector

Nicholson did not know when the patron began drinking prior to going to the Licensed Premises.

### **Licence Holder Evidence**

The Licence Holder submitted the following as exhibit #5:

- Copy of seven Certificates of Participation for a 'Alcohol Server Training Program;
- Copy of *Service Staff Policies & Procedures*;
- Copy of a newspaper ad;

The Licence Holder called two witnesses; they being:

- Stephe n Leyden, Doorman; and
- Harvey Bourgeois, part owner

### **Summary**

The following is a summary of the Licence Holder's evidence.

Mr. Leyden testified:

- He has been a Doorman employed at the Licensed Premises for almost four years. He has had similar part-time positions for 16 years.
- On the evening of October 29<sup>th</sup> and early morning of October 30<sup>th</sup>, 2011, there were 12 staff working at the Licensed Premises; three of which were Doormen. He arrived at 8pm.
- Nothin g out of the ordinary was observed that night. Greater care was taken that night as it was Halloween and people were in costume.

- The Liquor Inspectors did not point out anyone who needed assistance.
- He was stationed by the side door checking who was entering and exiting as well as watching the bar.
- He identifies intoxication generally by how people hold themselves, tone of voice, and volume of voice. When people touch, it generally grabs his attention as it may be a sign of intoxication or a fight is about to start.
- There were 3 doormen, 3 servers, 4 bartenders, and Mr. Bourgeois.

Mr. Bourgeois testified:

- He has been in the bar business since 1981 and at the Monkey Tree Pub since 1989. He holds 90% of the shares of 953785 NWT Ltd.
- Each of the employees working on October 29-30, 2011 had attended Server Training.
- All staff members are required to read the Service Staff Policies & Procedures manual. A copy of this document is available to staff at the bar.
- Staff will call a taxi for patrons. There is also a direct-line phone to a taxi company in the premises.
- He worked that night mainly at the front door checking patrons as well as walking the floor.
- There were 12 staff members working that night. 3 Doormen, 3 Servers, 1 side bar, 1 DJ, 2 bartenders, 1 back bar, and himself.
- There were fewer patrons in the Licensed Premises that night than were expected. Extra staff members were on with the expectation of more patrons.



- Halloween is the most stressful night in a bar. Hallow
- 80% of patrons that night were wearing costumes. 80%of
- Signs of intoxication that are watched for include staggering. If a patron cannot stand or is not coherent, they are cut off. Signs
- He did not see the female patron who fell on the floor. He did see the male patron leave with a friend. He also saw the other female patron in the parking lot. He did

## Analysis

We find the charges of non-compliance are made out.

The *Act* defines “intoxicated person” as:

**“intoxicated person” means an individual who appears to be under the influence of liquor, a drug, or another intoxicating substance;**

The Liquor Inspectors testified observing three patrons who appeared to be intoxicated. The observed signs of intoxication included:

For the first patron (male)

- Slurred speech; Slurred
- Staggering walk and bumping into chairs; Stagger
- Spilling his drink; Spilling
- Red and glazed eyes; Red

- g on a chair for support; Leanin
- admission of consuming seven drinks before arriving at the Licensed Premises and subsequently having three additional drinks. An

For the second patron (female)

- on the dance floor; Falling
- dy on her feet; Unstea
- delayed and slurred speech; Slightly
- and glazed eyes. Red

For the third patron (female)

- was extremely slurred, broken and hard to understand. Speech
- ntary eye flutter and red eyes. Involu
- was very unsteady on her feet and required support to stand and walk. She
- admission of consuming one or two bottles of wine. An

While we accept any one of these signs in isolation may not lead to a conclusion of intoxication, when considered collectively, we find little doubt that all three patrons were intoxicated as defined by the *Act*. The test for intoxication is not one of medical certainty, but rather is based

on subjective observation. We accept Inspector Nicholson has the experience and training to reasonably interpret behavioral and physiological signs of intoxication. All of the witnesses made reference to the need of assessing intoxication based on all available data and not a single descriptor. While the *Act* does not define “*under the influence*”, the Board is well familiar with common indicia of the consumption of liquor.

A determination of intoxication need not be an objective determination of the state of sobriety but rather an observation of the apparent effect of alcohol.

During cross-examination, Mr. Bourgeois suggested two descriptors of intoxication are the inability to stand and incoherence. While we accept these are descriptors of intoxication, they are well beyond the threshold for which a License Holder should be monitoring.

We accept Inspector Nicholson’s evidence about the observed descriptors of intoxication. The three patrons in question were each clearly exhibiting multiple signs of intoxication.

The male patron was seen in possession of, and consuming a beverage that Inspector Nicholson took to be liquor. This was based both on direct observation and the admission of the patron to having consumed three rum drinks during his time at the Licensed Premises.

During his summation, Mr. Dinham spoke of the Licence Holder maintaining a good company image in the community. He spoke of being the only Licensed Premises in Yellowknife with a Code of Conduct for its employees. All employees present on the night in question had previously received server training. He also stated that “*we did use due diligence.*” He noted that due to the low light level, it was difficult to assess the level of intoxication of patrons. Behaviors were not noticed until the lights were turned up at 1:55 am; “*it was easier with full visual representation*”.

We find the Licence Holder failed in its due diligence. It is the responsibility of a Licence Holder to manage the environment of a Licensed Premises to the extent patrons can be monitored. The lighting level was so low as to make it difficult to determine if patrons appeared to be intoxicated. There were twelve staff members working. There were approximately 85 patrons in a Licensed Premises rated for 166. We find it unlikely three intoxicated patrons would have been overlooked.

Count #1: Section 92 of the *Act*; “Except as may be permitted in the regulations, a licence holder shall not allow an intoxicated person to enter or remain in a licensed premises.”

We find the three patrons in question were allowed to enter or remain in the Licensed Premises.

Count #2: Section 93 of the *Act*; “No person shall sell or serve liquor at a licensed premises to or for an intoxicated person.”

We find the male patron in question was served liquor. The Liquor Inspector observed the patron consume liquor while in the Licensed Premises.

**PENALTY**

**Summary of Enforcement’s Submissions**

- Disciplinary Hearing Record for Sam’s Monkey Tree Pub was entered. There is a previous contravention of section 92 of the *Act* in May 2011 resulting in a \$2000 compliance penalty and a one-day suspension of the Liquor License. There is an additional contravention of section 92 and section 93 of the *Act* in April 2011 resulting in a \$3000 compliance penalty and a three-day suspension of the Liquor License. There was a similar contravention in 2009. The
- Disciplinary Hearing Record is a major aggravating factor and should be given considerable weight. The
- establishment was well under capacity with a significant number of staff members working at the time. The
- Licence Holder is very experienced yet as in the past, he has fallen below the standard. The
- compliance penalty of \$5000 and a license suspension of not less than 5 days is recommended. A

**Summary of License Holder’s Submissions**

- patrons in question were not noticed until the lights were turned on. The
- time of the night (just before closing) and it being Halloween should be considered. The
- patrons were able to leave “*on their own power*”. The

- suspension will affect 43 employees.

### **Penalty Analysis**

#### Count #1 – Section 92 of the *Act*

This is the Licence Holder's third contravention of section 92 of the *Act* in nine months. There were ample staff members working however the light level set by the Licence Holder and the likely threshold of intoxication permitted, resulted in the Licence Holder failing to meet its responsibility in this regard. We considered both the public safety generally, and the Licence Holder's continuing disregard for its responsibility specifically.

#### Count #2 – Section 93 of the *Act*

This is the Licence Holder's second conviction under this section in nine months. The male patron in question showed clear signs of intoxication yet was served three drinks. This placed both the patron, and potentially others, at risk.

An order shall issue pursuant to section 30 of the *Act* that:

For failing to comply with section 92 of the *Act* (Count #1), the Licence Holder shall pay a compliance penalty in the amount of five thousand dollars (\$5000) on or before January 13, 2012.

For failing to comply with section 93 of the *Act* (Count #2), Liquor Licence # 2011-A-12 shall be suspended for the period of January 14, 2012 at 10:00am until January 23, 2012 at 10:00am. The Licence Holder shall post on all entrances to the Licensed Premises, for the duration of the suspension, a notice provided by the Board.

Dated at the City of Yellowknife, this 5<sup>th</sup> day of January 2012.

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Colin Baile, Chairperson, on behalf of and with the concurrence of the other panel members.