

**Testimony of Daniel E. Livingston in Support Raised Bill No. 419
-- February 29, 2008 --**

Senator Handley, Representative Sawyers, and members of the Public Health Committee:

At the request of Senator Handley, I provide this written version of the oral testimony I provided at the hearing of February 29, 2008. As I noted that day, as counsel to Region 9A of the UAW, I had planned to attend the hearing, but not to testify. I felt compelled to add my voice in response to presentations from counsel opposing the legislation that I felt distorted both the legal analysis and the context of the bill before the committee.

Starting with the first speaker, Attorney Douglas Luckerman: He made two key points in arguing that the bill should be abandoned in favor of his hope for a voluntary smoking ban which he hoped would result from "government to government" discussions involving the State and the Tribes. First, he suggested that the bill was suspect because it was "solely designed to restrict the rights of two sovereigns." This is simply false. The bill is intended to give casino workers and patrons the same protection from second-hand smoke that workers and patrons of other alcohol serving establishments in this state possess. It would apply to casinos serving alcohol regardless of whether they happen to be on Tribal Land – and the committee will recall that building such casinos in Hartford and/or

Bridgeport has in the past, and may well in the future, been seriously debated by the Connecticut General Assembly. Certainly there would be no doubt that the legislature could extend the smoking ban to those casinos should they choose to sell alcohol. Thus the issue here is only whether the limited sovereignty possessed by Indian tribes means they can serve alcohol in casinos in violation of Connecticut law.

The second key point made by Attorney Luckerman is that state law can apply on Indian reservations only if permitted by either the settlement act that establishes the reservation or by tribal compact. While even in general this is an oversimplification of the law, in the context of legislation concerning alcohol, it is simply wrong. Under 18 U.S.C. § 1161 Congress allows alcohol to be sold on Indian reservations only if approved by both Tribal law, and by state statute. As the Supreme Court explained:

Our examination of § 1161 leads us to conclude that Congress authorized, rather than pre-empted, state regulation over Indian liquor transactions.

The legislative history of § 1161 indicates both that Congress intended to remove federal prohibition on the sale and use of alcohol imposed on Indians in 1832, and that *Congress* intended that state laws would apply of their own force to govern tribal liquor transactions as long as the tribe itself approved these transactions by enacting an ordinance.

Rice v. Rehner, 463 U.S. 713, 726 (1983). In general, Connecticut conditions its liquor licenses on a smoke-free environment, and assuming the General Assembly determines to apply that law to casinos, it would

apply "of its own force" to casinos operated by Indian tribes.

A third point was suggested by witnesses for both tribes, as well as by Attorney Luckerman. All three noted that Indian compacts have the force of federal law, and claimed that these compacts created an entitlement to a liquor permit without restrictions. This is misleading for two reasons. First, tribal compacts have the force of federal *regulation* because they come backed by the Department of the Interior. Federal regulation, of course, is a form of federal law, but it is subordinate to federal statutes which are Acts of Congress. So even if the tribal compacts created some entitlement to unrestricted sale of alcohol, that entitlement would be subordinate to the Congressional determination that alcohol could be sold on Indian Reservations only as permitted by state law. Federal statute trumps federal regulation, not the other way around.

The other problem with the theory that the tribal compacts at issue here create an unrestricted right to a liquor permit is that it is simply made up. The language of 14b of both compacts reads as follows:

Service of alcoholic beverages within any gaming facility shall be subject of the laws and regulations of the State applicable to sale or distribution of alcoholic beverages. The Tribal gaming operation shall be entitled to a hotel permit for the sale of liquor for gaming facilities which are contained in the same building as any hotel, or a café permit for the sale of liquor for gaming facilities which are not contained in the same building as any hotel, or such equivalent permits as may from time to time be available to similar enterprises operated pursuant to the laws of the State....

Read in an unbiased manner, 14b commits the tribes to seeking liquor permits applicable to hotels or cafes or similar establishment as may be created from time to time. It promises the State will grant such permits. It doesn't say in words, or in logic, that these permits will be free of restrictions that apply to other establishments selling alcohol.

Attorney Jackson King, speaking for the Mashantucket Pequots, suggested that the General Assembly should stay its hand and allow the tribe to enact a smoking ban. Of course, they've had over 4 years to do so since the General Assembly enacted the ban that applies to bars and restaurants. This request would have rung true in 2003, not 2007.

Which brings us to the final point. The current exemption for casinos which allows them to sell alcohol without honoring the smoking ban was created by the General Assembly. In light of the General Assembly's right to address problems one step at a time, it was perfectly free to do so. *Batte-Holmgren v. Commissioner of Public Health*, 914 A.2d 996 (Conn. 2007). (In my colloquy with Representative Olson, we inadvertently referred to this case as *Van Kruiningen v. Plan B*. *Van Kruiningen* is actually a district court case rejecting a claim of sovereign immunity by the Mohegan Sun casino because of the lack of tribal sovereignty over the sale of alcohol. 485 F.Supp.2d 92 (D. Conn. 2007)). However, as a result of that exemption, untold numbers of patrons and of course nearly 20,000

workers are having their health put at risk by second hand smoke. If Connecticut chooses to protect these patrons and workers by applying the same smoke free rules to the sale of alcohol to casinos that it does to similar establishments throughout the state, that's the General Assembly's call. In fact, it's the General Assembly's responsibility.