



Legal Briefs

by Murray Lott

Liquor Laws

In 2009, the LCLB issued 30 General Manager's Decisions ("Hearing Decisions") interpreting and enforcing the *Liquor Control and Licensing Act*. I'll look at three specific decisions and generally discuss the negative results experienced by almost all licensees who challenged a Notice of Enforcement Action ("Notice").

Probably the first thought a licensee has when they get a Notice is: How much is THIS going to cost me? The unfortunate answer is: "Probably what the inspector recommended." Of the 30 Hearing Office cases (66 Notices in all, including Waivers) there was a significant change in penalty in just two.

The concept of "Minimum Penalties" does not seem to be well understood. Many licensees appearing at enforcement hearings plead "guilty with explanation". They admitted the facts of the infraction, but argued that the penalty was excessive in the circumstances, or that the rules are unfair, or that a suspension would cause disproportionate hardship on the staff, compared to management. These arguments cannot succeed, as these examples show.

Decision EH08 - 139 (overcrowding): "I am also not persuaded that a monetary penalty would have the same impact as a suspension, in pursuance of the goal of voluntary compliance. In my view, the advice to patrons that liquor service is not available and the posting of notices at conspicuous places at the Licensee's premises, for patrons to observe, will have a far greater impact than the assessment of a monetary penalty." Ouch!

Decision EH08 - 139 (overcrowding): "The licensee submitted that the pub cannot operate successfully at the current capacity. The licensee is aware of the issue and is doing what it can to deal with it. Much time and money have been invested in increasing the capacity to that of similar establishments. A penalty will only serve to increase the costs."

If you haven't figured out yet that the LCLB is not worried about your economic interests, I suggest you wake up. "Minimum Penalties" mean just that; once an infraction is found, the Enforcement Hearing Adjudicator can go higher, but not lower. Also, an Enforcement Hearing is not the place to seek changes to your license.

In only one case (EH08 - 096, minor on the premises) was there a finding that no penalty was required. The decision offers a rare bright spot in the depressing list of negative Hearing Decisions:

"I have considered the following:

- The minor was not served and did not seek liquor service.
- The minor did not drink liquor in the licensed establishment.
- The minor was in the establishment for only a short time, and much of that time seems to have been spent hiding in the washroom.
- Although the bartender appears to have known the minor was in the premises, it is not clear that the on-duty manager (server) knew of the minor's presence before being told by the bartender moments prior to police involvement.

- The server took responsibility for the event and terminated her employment shortly thereafter."

In light of the above noted considerations, as well as short time that the establishment was operating, the low profile of the minor's presence, and the licensee's response to the contravention, I am not satisfied that the threshold has been passed."

Since the Adjudicator found that no penalty was required, the Minimum Penalties did not need to be applied. However, before you get too excited about this unique win for the licensee, consider this: the infraction occurred on the day after the license had been granted, effectively on the first day of business: "Welcome to the liquor industry, here you go!"

Faced with a crushing financial or closure penalty for a problem, which you don't think was that bad, or your fault, you may be tempted to fight. Based on the 30 decisions from this year, I suggest you ask yourself some hard questions first:

1. Do I have any hard evidence to counter that of the inspectors? In every reported case, the detailed evidence of inspectors with people counters and notepads was preferred over the general impressions or guesses of licensees or their staff. Do you really need your staff to be wasting their time going through this unpleasant and unfruitful process?
2. Do I fully understand the law and the system I am wading into? You know the old saying: "Don't bet on the other man's game." Or better: "Don't take a knife to a gun fight."
3. If the infraction is proven or admitted, is there any discretion to reduce the punishment below that recommended? Simply put, no.
4. What realistically can I hope to get out of it?

Based on the 2009 decisions, you are almost certainly going to lose, and the penalty recommended by the inspector is going to be imposed. The most the 30 licensees who fought their Notices got out of the experience was a lesson in what they had done wrong, and how they could improve. There is value in that. But there are cheaper ways of getting educated. The best may be to learn from the mistakes of others. All the cases can be found at the Liquor Control and Licensing Branch web site under "Enforcement Decision Search". Just type in a date range (01/01/09 - 12/31/09 for example) and click any infractions that could apply to you. Read about similar businesses and learn from the mistakes of others. Don't go into the hearing blind, you won't have a chance.

This gloomy picture of Enforcement Hearing Decisions is not intended as an indictment of the system. Far from being unfair, most of the Hearing Decisions are entirely predictable to anyone with a little familiarity of the Act and how the system works. My advice is: Get smart - or don't bother.

Murray Lott is the owner of Delta Law Office and senior partner at Central City Brewing Company. He practices in the areas of personal injury, estates, and liquor law.