



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING BRANCH
IN THE MATTER OF
A hearing pursuant to Section 20 of
The Liquor Control and Licensing Act RSBC c. 267**

Licensee:	The Shack Eatery and Watering Hole 3189 West Broadway Vancouver, BC V6K 2H2
Case:	EH09-065
For the Licensee	David Benson
For the Branch	Peter Mior
Enforcement Hearing Adjudicator	Sheldon M. Seigel
Date of Hearing	Written Submissions
Date of Decision	October 29, 2009

INTRODUCTION

The Shack Eatery and Watering Hole is located at 3189 West Broadway, in the City of Vancouver, British Columbia. The establishment liquor licence is Food Primary Licence No. 147041. The hours of liquor service are 12:00 noon until 2:00 a.m. Monday through Saturday, and 12:00 noon until 12:00 midnight on Sundays. The establishment has a licensed inner patron capacity of 57 and two patios with a patron capacity of 16 on the front patio, and 12 on the side patio. The licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication *Guide for Liquor Licensees in British Columbia*.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated July 24, 2009. The branch alleges that that on July 9, 2009, the Licensee contravened section 20(1)(d) of the *Liquor Control and Licensing Act* and section 11(1) of the *Liquor Control and Licensing Regulations* by operating the licensed establishment in a manner that was contrary to the primary purpose of the business as stated on the license. The Branch proposed a ten (10) day licence suspension (item 1, Schedule 4 of the *Regulation*).

The licensee admits that the contravention took place however, it disputes that the proposed ten day suspension of the licence is warranted or appropriate. The Branch and the Licensee agreed that the hearing would take place by way of written submissions.

ISSUES

1. Is a penalty warranted in light of the circumstances of the contravention?
2. If a penalty is warranted, what is the appropriate penalty?

SUBMISSIONS

The following documents were submitted for consideration:

1. The Registrar's August 25, 2009 letter summarizing the pre-hearing conference.
2. The Registrar's September 11, 2009 follow-up letter to the licensee.
3. The Branch's package of disclosure to the licensee dated September 17, 2009.
4. The Licensee's submission received on October 2, 2009 by way of email.

The Branch submitted the following:

It is contrary to the public interest for the Branch to allow restaurants to operate as bars. The current liquor licensing process requires public and local government input into licence applications for liquor-primary establishments but not for restaurants. Obtaining a liquor licence for a restaurant and then operating as a bar circumvents this process. Restaurants operating as bars tend to be associated with community complaints around noise, intoxication and other behavior contrary to community standards and the public interest. This contravention reflects a shift in the primary focus of a food-primary establishment from the service of food to the service of liquor.

The Licensee attended a food primary terms and conditions presentation on June 11, 2008, and signed an acknowledgment that he would abide by the terms and conditions of a food primary licence. On July 17, 2008, the food primary licence was transferred to the current Licensee.

On January 17, 2009, a contravention notice was issued for operating contrary to primary purpose. A compliance meeting was held on January 22, 2009, where the terms and conditions of a food primary were again discussed. The Licensee signed the compliance meeting document.

The Branch thereafter received information that The Shack Eatery and Watering Hole was operating contrary to their primary purpose. On June 19, 2009, a liquor inspector and a Branch regional manager were in the vicinity of West Broadway conducting routine night inspections, and came upon the establishment. The inspector took a quick walk through of the establishment, which appeared to be operating more like a bar than a restaurant. To confirm this, the regional manager decided to conduct a covert inspection of the establishment to observe if in fact they were operating contrary to their licence class.

On July 9, 2009, a covert operation was conducted at the establishment. Five inspectors visited the establishment. From across the street, three of them heard loud music coming from the establishment. The inspectors were present from 10:30 p.m. to approximately 11:40 p.m.

Observations of Inspector #1 and #2:

- The music was loud and conversation was difficult in the establishment.
- The servers were busy running liquor beverages to the tables.
- All tables held by patrons had highballs, pitchers and pint glasses of beer.

- One female server (white shirt and pink sweater) consumed a 'shot' (shooter) with a table of patrons.
- The server placed two menus on the table and asked what the inspectors would like to drink. At no time did the server request that they order food or ask what type of food they were ordering.
- There were no table settings or condiments on the tables.
- The server returned to their table when their glasses of beer were empty and asked if they wanted another.
- The kitchen staff was not busy.
- Patrons were walking with their drinks, laughing and speaking loudly. The overall atmosphere was that of a party.
- The only food observed in the establishment, for a period of one hour and twenty minutes, was one table of patrons sharing nachos, two tables each sharing a bowl of yam fries, a table of four sharing a plate of sliders (three small sized burgers), and a table of five or six patrons on the patio sharing a plate of chicken wings.
- Prior to exiting the establishment at 11:40 p.m., they observed that no food was being served but that liquor service was continuing.

Observations of inspectors #3 and #4:

- The atmosphere was very loud and not conducive to dining. The bartender provided a print-out of the sales details for the entire day. He said he was not able to provide details from 10:00 p.m. until the time of the inspectors' request.
- The kitchen counter was clean with the food preparation materials in bins, and the fryers were on. One male kitchen staff member was preparing two small pizzas and one plate of nachos. One of the inspectors went in to the kitchen dish-pit area and noted seven dishes that needed to be washed.

The Branch submits that a ten day liquor licence suspension is the minimum suspension for a first contravention and will give the licensee the opportunity to continue operating as a restaurant, focusing on the service of food while the liquor licence is suspended. This will, hopefully, cause the Licensee to ensure future compliance with the *Act* and *Regulations*.

The Licensee submitted the following:

The Shack has experienced a steady stream of inspections by liquor inspectors and Vancouver police both before and after receiving the contravention notice on July 7, 2009, and in virtually every occasion the Shack was deemed to be operating responsibly.

Since receiving the contravention notice of July 7, 2009, management has doubled their efforts to improve operations and comply with the rules of operation. All owners, management, and staff have been required to read the *Act* and become familiar with all of the rules and regulations. They now have a much better understanding of how the restaurant should be run.

The economy is poor and enduring a ten day suspension would be far more damaging than would a monetary penalty. The suspension would result in lost customers and would damage the Shack's reputation.

The Shack's ownership consists of two young families who have put everything they have into the business. The employees are students earning their way through school. Management and employees are both doing their best to operate the restaurant the best they can.

Instead of a ten day suspension, a \$7,500 monetary penalty would be preferable, payable over a period of three months, as the requirement to pay in one sum would put a considerable strain on the business.

ANALYSIS AND DECISION

The contravention has not been contested. I find that it did occur as alleged.

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulations* and/or the terms and conditions of the licence, I have the discretion to order one or more of the following enforcement actions:

- Impose a suspension of the liquor licence for a period of time
- Cancel a liquor licence
- Impose terms and conditions to a licence or rescind or amend existing terms and conditions
- Impose a monetary penalty
- Order a licensee to transfer a licence

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the *Regulations*.

For the contravention relating to July 9, 2009, the Branch recommended a ten day suspension.

The range of penalty for a first contravention of these provisions in accordance with Schedule 4 of the *Regulation* is ten (10) to fifteen (15) days suspension and/or a monetary penalty of \$7,500-\$10,000.

I accept that the Licensee has passed any number of casual and formal inspections by both the Branch and the police. The Branch proposed a penalty that is for a first contravention of this type. The *Regulation* anticipates this situation and directs a range of penalties for a first contravention. The fact that no prior contraventions have been found does not negate the possibility or appropriateness of a penalty as provided for by the *Regulation*.

The Licensee indicates that since the allegation it has doubled its efforts to comply with the rules and required its staff to read the *Act* and become more familiar with the way the restaurant should be run. While certainly positive steps, these actions should properly have been taken before the establishment found itself operating outside of the rules. As the Licensee has acknowledged its non-compliance, I can consider these post-contravention steps in deciding whether a penalty is appropriate and what that penalty should be.

I accept the Branch submissions with respect to the importance of an establishment operating within its primary purpose, particularly with respect to the public interest in the safe operation of the establishment and the pre-licence approval steps requiring public and governmental input.

I accept the Licensee's submission that the financial impact of a suspension, in terms of profits, would be more significant to the Licensee than a monetary penalty of \$7,500.

I accept that the Licensee is owned by two young families who have committed much to the success of the establishment, and that its employees are students. I find however, that this is not materially different from the situation of many other licensees. Furthermore, I find that it would be inappropriate to set a two-tiered penalty schedule, one tier for Licensees who are able to afford a penalty and another for those that are not.

The Branch correctly submitted that a ten day suspension is the minimum suspension indicated by the *Regulation*. The Branch did not specifically address whether the minimum suspension or the minimum monetary penalty is effectively the minimum penalty for this Licensee. The Licensee makes it clear that the minimum monetary penalty listed in the *Regulation* (\$7,500) is to it a lesser penalty than the minimum suspension. I find from the language of its submissions that the Branch did not intend to choose the minimum penalty but rather the appropriate penalty for this situation. The Branch says the suspension of the license would “allow the licensee the opportunity to continue operating as a restaurant, focusing on the service of food while the [liquor] license is suspended.” I find that in this situation, where the emphasis on food was lost to the sale of liquor, the Branch’s recommendation is quite appropriate.

I find that a ten day suspension is appropriate for this contravention.

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of the Food Primary Licence No. 147041 for a period of ten (10) days to commence at the close of business on Wednesday November 25, 2009, and to continue each succeeding business day until the suspension is completed.

"Business day" means a day on which the licensee's establishment would normally be open for business (section 67 of the *Regulations*). I direct that liquor licence No.147041 be held by the Branch or the Vancouver Police Department from the close of business on Wednesday November 25, 2009 until the licensee has demonstrated to the Branch's satisfaction that the licensed establishment has been closed for ten (10) days.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: October 29, 2009

cc: Vancouver Police Department

Liquor Control and Licensing Branch, Vancouver office
Attn: Donna Lister, Regional Manager

Liquor Control and Licensing Branch, Vancouver office
Attn: Peter Mior, Branch Advocate