



**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, R.S.B.C. 1996, c. 267

Licensee:	Cascadia Brands Inc. 1000 – 1200 West 73 Avenue Vancouver, BC
Case:	EH05-000
For the Licensee:	Robert J. C. Deane
For the Branch:	Laurie Soloway Sonya Okada
Enforcement Hearing Adjudicator:	M. G. Taylor
Date of Hearing:	August 3 and 4, 2005
Place of Hearing:	Vancouver, BC
Date of Decision:	November 8, 2005

INTRODUCTION

Cascadia Brands Inc. (“the licensee”) holds an Agent Licence No. 300355 issued by the Branch (“the branch”) pursuant to Section 52 of the *Act* to act as an Agent of a liquor manufacturer or importer, or to act as a liquor importer. The licensee has sales representatives in various communities around the province including Vancouver Island.

The branch conducted covert trade practices illicit liquor investigations from October 2004 to April 1, 2005. This enforcement action arose from that investigation.

ALLEGED CONTRAVENTIONS

By Notice of Enforcement Action (NOEA) dated April 15, 2005, the Liquor Control and Licensing Branch alleged that on February 21, 2005, the licensee contravened Section 45(1) of the *Liquor Control and Licensing Act* (“the Act”), by offering an illegal inducement. The branch’s recommended enforcement action is a \$15,000 monetary penalty.

In the alternative, the branch alleged that on February 21, 2005, the licensee contravened the terms and conditions of its licence, contrary to Section 12 of the *Liquor Control and Licensing Act*. The branch’s recommended enforcement action is a \$15,000 monetary penalty.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions, including those relating to the licensing of agents and regulating promotional activity, and related provision from the *Brewer, Distiller and Agent Licences: A Guide for Licensees in British Columbia*, are contained in Appendix A to this decision.

ISSUE(S)

1. Does the evidence establish that the representative of the licensee offered an inducement to the bar manager of the Executive House Hotel, contrary to Section 45(1) of the *Act*?
2. If yes, has the licensee established the defence of due diligence?
3. If no, is the branch's recommended penalty appropriate?

EXHIBITS

Exhibit No. 1	Branch's Book of Documents
Exhibit No. 2	Licensee's Document Binder
Exhibit No. 3	Draft Poster for the Executive House Hotel
Exhibit No. 4	Letter dated May 12, 2005 from the branch's Registrar, Enforcement Hearings

EVIDENCE AND SUBMISSIONS*Overview*

The branch's witnesses were the bar manager of the Executive House Hotel and the branch's trade practices investigator. The licensee's witnesses were a sales representative and the vice president of sales for South Vancouver Island.

The purport of the branch's evidence is twofold: Firstly, that the licensee's representative on Vancouver Island offered a value of \$20 per keg of beer purchased by the Executive House from the licensee that the bar manager could have taken in cash or in goods. Secondly, that the licensee's representative gave the same bar manager a \$50.00 gift certificate for a local restaurant as an incentive for her to carry the licensee's beer. The branch's knowledge of these alleged contraventions came to light during an inspection of the Executive House on February 21, 2005.

The purport of the licensee's evidence and submissions is fourfold: Firstly, that the sales representative did not offer cash, was not authorized to offer cash, and the licensee's office would not have honoured a cash commitment. The value of \$20 per keg was proposed initially for a charitable donation and, subsequently, for promotional goods; if the contract had continued, delivery of the promotional goods would have been administered in accordance with the branch's requirements for a buy-sell agreement. Secondly, the sales representative gave the bar manager a gift certificate at Christmas as a friendly gesture. Thirdly, the licensee had reasonable employee training and monitoring systems to substantiate the defence of due diligence. Fourthly, if it is found that the licensee did contravene as alleged, the recommended penalty is excessive and inappropriate.

Evidence and Submissions

The bar manager testified this licensee had never had a contract with the Executive House prior to December 2004. She had known the sales representative for years in various ways – he was a soccer coach, they lived on the same street, etc. She stated that she did not like to do business with friends, but one day in late December or early January, he came into the hotel when there was a beer tap available and they agreed that the licensee would supply three kegs of beer. She testified that she thought the sales representative was the owner of the licensee company and she believed that he had offered her \$60 in cash if the first three kegs sold, which she could not accept. She did not discuss this with the sales representative but he left price lists for her on which he circled the number '20', which she understood to mean \$20 per keg of beer sold.

She testified that she discussed a charity event with the sales representative, that they discussed the possibility of the licensee donating \$.25 per pint of beer,

and that she saw the poster the licensee proposed (Exhibit No. 3). However, the hotel proceeded with that event with a different manufacturer. The value of \$. 25 per pint is approximately \$20 per keg.

She stated that she gets promotional offers all the time and that all the manufacturers have promotional funds, documented in buy/sell agreements, to provide products (eg. shirts, hats) that she uses in her 'Freebee Friday' events for her patrons. She could not put together a Freebee Friday on the sale of three kegs beer. The minimum value required would come from the sale of 10 kegs of beer. She testified that if she had continued to sell the licensee's beer, she would have taken promotional items such as hats or t-shirts and they would have entered into a buy/sell agreement.

The bar manager also testified that they tapped the first of the three kegs on February 12, 2005, and on February 21 the branch conducted the inspection.

Concerning the gift certificate, she testified that she received it in a Christmas card that the sales representative left for her at the hotel. She did not have any discussion with him about it. She assumed he gave her the gift because it was Christmas and he wanted her to carry his product.

The sales representative recalled that the events occurred just before Christmas. He testified that the bar manger told him she had an extra tap coming up. They talked about the charitable work she was doing for the homeless and talked about the licensee donating \$. 25 per pint of beer sold. He arranged with the head office for a poster to be drafted and obtained the hotel's logo in an email from the bar manager. However, she then told him the hotel had decided to do that event with another licensee.

The bar manager told him about her Freebie Fridays which she could run for about \$20.00 per keg of promotional materials, if the volume of sales was high

enough. The sales representative testified that the \$20.00 was equivalent to \$.25 per pint and that the licensee could supply promotional products such as t-shirts. The sales representative stated that this would have been reflected in a buy-sell agreement except there was no ongoing contract for the Executive House to carry the licensee's product. Once the branch inspection occurred, there was no further discussion from the hotel of carrying the licensee's product.

The sales representative testified that he gave her the gift certificate in recognition of her difficult personal times, just as he gave an identical gift certificate at the same time to a former manager of another bar who had serious health problems. The gift certificate is dated December 23, 2004 (Exhibit No. 1, tab 3).

Concerning the third point, the defence of due diligence, the licensee pointed to evidence of the following:

- Cascadia provided copies of the Guide to its sales representatives;
 - When the August 2004 Guide was issued, Cascadia sent a management team to the information sessions offered by the branch;
 - Cascadia held a training meeting with its sales representatives on the requirements set out in the August 2004 Guide;
 - Cascadia holds annual national meeting, quarterly provincial meetings and monthly division meetings for the sales representatives at which issues arising from the *Act*, *Regulations* and Guide are addressed;
 - Approximately once every three months, a sales manager accompanies a sales representative for a full day to monitor performance and address issues;
 - Sales managers and the vice president of sales are available to answer questions from the sales representatives;
 - Cascadia has internal systems to ensure compliance with provincial *Regulations*, including head office approval for promotional materials, orders and invoices are directly between Cascadia and the account
-

holders, all prices are established by Cascadia, and the expense accounts of sales representatives are reviewed and approved by sales managers.

ANALYSIS AND DECISION

I have carefully reviewed the evidence and I have determined that there is insufficient evidence to conclude on a balance of probabilities that the sales representative made an unlawful inducement for the reasons that follow.

According to Section 45, it is a contravention for the sales representative to offer, or for the bar manager to agree to accept, money or gifts, directly or indirectly, for promoting or inducing the sale of a particular liquor. The penalties are at the highest end of the range of penalties provided in Schedule 4 of the *Regulation*.

Despite the wording of Section 45, there is legislative provision for some product promotion, provided it is documented in a buy/sell agreement (Section 50.1 of the *Regulation*). I find that the bar manager and the sales representative were clear in their testimonies that, if the contract had been extended, there would have been the requisite agreement.

The issues are whether the sales representative made unlawful inducements for the first three kegs, or generally, in the form of the gift certificate.

I found the evidence of the bar manager to be credible and sincere. She was uncomfortable having to testify and indicated as much. Having weighed her evidence, I find that she believed she had been offered cash, which she would not accept. She did not discuss this offer with the sales representative and was not able to say how or when she would have received the cash. I also find that she believed that the sales representative had given her the gift certificate in hopes that she would promote his product and that she did not discuss this with him.

Further, I find that she was not clear about the chronology of their discussions, that she did not have direct discussions with him about the circled '20' notation on the price list or about the gift certificate, and that she did discuss the charitable event with him and saw the poster he had drafted. I find that she was mistaken about the sales representative's position within the licensee company and find that could have led her to a presumption that he was in a position to offer an inducement on behalf of the company.

After reviewing the evidence as a whole, I accept the sales representative's contention that the first discussion was about the charitable event and that he had the office draft a poster, using the logo from the hotel. It is obvious he was serious about that offer. I find as fact that the discussion of \$20 per keg occurred only after the charitable venture was discarded and that it was an equivalent amount. I find that these discussions occurred, and the notation of '20' on the price list was made, after the three kegs had been ordered.

I find that the bar manager's evidence about the \$20 and the gift certificate was vague. She made assumptions, possibly based on other experiences in the business. She did not confirm orally with the sales representative that she could receive cash, although she was convinced that was offered.

Overall, I find that the evidence concerning the \$20 per keg does not support a finding that the sales representative was unlawfully attempting to induce the sale of the licensee's product.

I have given weight to the evidence of both witnesses that they have known each other outside their respective employments for many years. The gift certificate clearly is dated December 23, 2004. I find as fact that the licensee already knew that a tap was coming available and that the order for the three kegs had been placed. The bar manager's view that the gift certificate was an inducement has some persuasion. However, given that the order was already made, that there

was no conversation between them about the gift certificate, and that the sales representative's evidence surrounding the gift certificate is undisputed, I accept the licensee's submission that the gift certificate was intended as a friendly gesture in recognition of other personal matters.

I find that the branch has not established on a balance of probabilities that the sales representative contravened as alleged. Given this finding, it is not necessary for me to consider the defence of due diligence.

ORDER

I find that the branch has not established the contravention of Section 45(1) or Section 12 of the *Liquor Control and Licensing Act* and I dismiss the case against the licensee.

Original signed by

M.G. Taylor
Enforcement Hearing Adjudicator

Date: November 8, 2005

cc: Vancouver Police Department – Liquor Coordinator

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Lee Murphy, Regional Manager

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Sonja Okada, Branch Advocate

APPENDIX A

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267**Licensee not to give or accept gifts for promoting liquor**

45 (1) A person must not offer or give or agree to offer or give and a licensee or the licensee's employee must not demand, accept or receive or agree to accept or receive money, gifts, reward or remuneration, directly or indirectly, for promoting, inducing or furthering the sale of a particular kind, class or brand of liquor.

(2) A licensee or the licensee's employee must not induce, further or promote the sale of a particular kind, class or brand of liquor.

(3) Subsection (2) does not apply in respect of liquor sold at a brew pub, winery, distillery, brewery or establishment referred to in section 18 (3) that is operated in accordance with the regulations.

(4) Subject to the regulations, the general manager may exempt a person from prohibitions and restrictions under subsections (1) and (2) in respect of an establishment, and may impose terms and conditions for the exemption

Excerpts from section 12:**Licences**

12 (1) The general manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.

(2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions

(a) that vary the terms and conditions to which the licence is subject under the regulations, or

(b) that are in addition to those referred to in paragraph (a).

Brewer, Distiller and Agent Licences: A Guide for Liquor Licensees in British Columbia

The guide imposes further terms and conditions, in addition to those found in the *Act* and *Regulations*. The following term and condition is found at page 11:

You may not, at any time:

- Offer or give money, gifts, rewards or remuneration to licensees who carry your products. You may not, for example, supply licensees with additional bottles of beer or spirits at either no cost or at a reduced cost.

Agents

52 (1) A person must not act as an agent unless the person holds a valid and subsisting agent's licence.

(2) An agent's licence may be obtained from the general manager on payment of the prescribed fee.

(3) A liquor manufacturer or agent must not give liquor to a person, except as provided in this Act and the regulations.

(4) An agent licensed under this Act must record all liquor coming into the agent's possession and its disposal, as specified by the general manager, and must make the record available for inspection on request of the general manager.

(5) An agent may deliver samples of the product of the manufacturer or importer the agent represents to potential customers, but an agent must not give a person more than the prescribed amount.

(6) An agent who contravenes this section commits an offence and, if convicted, must have his licence suspended by the general manager for a period not exceeding one year.

Liquor Control and Licensing Regulations, B.C. Reg. 244/2002

Promotional activity

50.1 (1) In this section:

“agent” means a person licensed to act as an agent under section 52 of the Act;

“buy-sell agreement” means a buy-sell agreement referred to in subsection (3) (d);

“promotional activity” means any activity that is prohibited or restricted under section 45 (1) or (2) of the Act and includes the provision of goods and services related to the operation of a licensed establishment, but does not include the provision of cash, credit or any other form of financial assistance;

“promotional item” means any item provided to a licensee as part of a promotional activity;

“trade practices terms and conditions” means the terms and conditions established by the general manager under subsection (2) (b).

(2) Subject to subsection (3), the general manager may

(a) exempt any liquor manufacturer, agent or licensee from one or more prohibitions and restrictions under section 45 (1) and (2) of the Act, and

(b) establish a set of terms and conditions respecting promotional activities that are to apply to the licence of any liquor manufacturer, agent or licensee for whom an exemption is granted under paragraph (a).

(3) If an exemption is granted under subsection (2) (a) in respect of promotional activities,

(a) the trade practices terms and conditions are added to and form part of the terms and conditions of the licence of the liquor manufacturer, agent or licensee to whom the exemption is granted,

(b) any promotional activity undertaken in reliance on the exemption must be consistent with

(i) the trade practices terms and conditions, and

(ii) all other terms and conditions imposed on the licence by the general manager under section 45 (4) of the Act,

(c) unless the terms and conditions to which the licence is subject under paragraph (b) of this subsection provide otherwise,

(i) any promotional item provided to a licensee must be provided to, or be for the principal benefit of, patrons of the licensee’s licensed establishments, and

(ii) liquor must not be provided as a promotional item,

(d) except for the provision of promotional items identified in the trade practices terms and conditions as being of nominal value, all promotional activity between a liquor manufacturer or agent and a licensee must be documented in a buy-sell agreement, in the form and with the content set out in the trade practices terms and conditions,

(e) a buy-sell agreement must not exclude, restrict or otherwise prohibit a licensee from carrying or selling the products of a competitor of a liquor manufacturer or agent,

(f) a licensee who has entered into a buy-sell agreement must

(i) subject to paragraph (h), retain a true copy of that agreement in the establishment to which the buy-sell agreement relates from the date the agreement is signed to the second anniversary of the date on which the agreement terminates, and

(ii) produce that agreement to the general manager immediately on request,

(g) a liquor manufacturer or agent who has entered into a buy-sell agreement must

(i) subject to paragraph (h), retain a true copy of that agreement from the date the agreement is signed to the second anniversary of the date on which the agreement terminates, and

(ii) produce that agreement to the general manager immediately on request,

(h) if a licensee who has entered into a buy-sell agreement with a liquor manufacturer or agent has more than one licensed establishment, a true copy of that buy-sell agreement must,

(i) for the purposes of paragraph (f) (i), be retained by the licensee at each of those licensed establishments for the period referred to in that paragraph, and

(ii) for the purposes of paragraph (g) (i), be retained by the liquor manufacturer or agent in the provincial office of the liquor manufacturer or agent for the period referred to in that paragraph, and

(i) despite any provision in a buy-sell agreement to the contrary, the parties to a buy-sell agreement must not engage in promotional activity that is not, or that ceases to be, authorized under one or more of

(i) the Act,

(ii) this regulation, and

(iii) the terms and conditions to which one or more of the licences of the parties are subject under paragraph (b)

[B.C. Reg. 437/2003, s. 1.]
