

# Contract Brewing in Ontario – A Legal Perspective

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# Background of Speaker

- Gary Gillman is a partner of Gillman Professional Corporation, Barristers & Solicitors, a Toronto-area boutique law firm ([www.lawgill.com](http://www.lawgill.com))
- Gary practices corporate and commercial law in association with a 15-person firm
- Gary has followed craft brewing developments for many years and is an enthusiastic supporter

# What is Contract Brewing?

- Typically, a bricks-and-mortar brewery brews a beer for another business, which lacks its own brewing facility.
- It's a brewing for hire, rather than brewing and selling brewer's brand to the retailer
- Numerous variations exist as discussed further in the presentation.

# Background to Contract Brewing

- Some large breweries have always brewed beer under contract, for example, private label brand.
- Examples are President's Choice, the private label of Loblaw Companies, or the late Dave Nichol's beer brand.
- Pabst in the U.S., maker of "PBR" and many other labels, owns no production breweries. It hires breweries to make its products, generally Miller Coors, but also smaller breweries.
- Licensing of brands in different countries is a variation, sometimes brand owner is a brewer, or not.

# Contract Brewing and Small Brewers

- Many smaller breweries also contract brew. In the U.S., some have a lucrative business : e.g. Matt Brewing/Saratoga Springs in Utica, NY.
- Many Ontario craft breweries also do craft brewing
- The classic model is an entrepreneur with a branding and marketing concept, and possibly a recipe, has the beer brewed by a functioning brewery.

# Advantages Of Contract Brewing

- The main advantage to the non-brewery owner is saving on the capital cost to acquire land and equipment and erect a brewery
- Also, contract brewing lessens need for production staff and saves on operating costs.
- For brewery owner, contract brewing can take up some excess capacity, or help fund a planned expansion albeit with reduced margins

# Disadvantages Of Contract Brewing

- The disadvantages are mainly on the non-brewing party side
- Arrangement is time-limited
- There is never full control over all production details or the business as such.
- Non-brewer is at risk of a downturn in the financial fortunes of the brewer
- Consumer perception issue (debateable)

# Forms of Contract Brewing

## 1. Brewery owner produces beer to non-brewer's recipe.

- Beer is brewed and packaged with ingredients generally sourced by brewer and using brewer's staff.

## 2. Brewer "tenants" its brewery, therefore usually temporarily, to the non-brewer:

- Non-brewer brews the beer using brewer's plant and perhaps some of its labour, thus saving on capital investment and operating expenses, generally using non-brewer's ingredients.
- The tenant brewer owns the finished beer - no purchase from brewery owner. This arrangement is called in the U.S. "alternating brewing".

# Forms of Contract Brewing (cont'd)

## 3. Brewer produces and packages beer for non-brewer using latter's branding and any agreed advertising, but non-brewer does not take title.

- Brewery owner sells the beer through its distribution network, sometimes exclusively to customers sourced by the non-brewer.
- Non-brewer is paid a fee by brewer for supplying customers and the branding (license). As non-owner of the beer, contract brewer has no contractual relationship with customers and therefore, cannot claim any remuneration from them.

## 4. “Collaboration” brewing.

- Relatively recent concept, reflects the cooperative or fellowship nature of the brewing community.
- Two breweries, or one brewer and one non-brewer, cooperate to produce a beer at one or both of the parties' plants as may apply. The beer is marketed under one name as a joint effort.

# Licensing and Other Regulatory Compliance

- The beer business in Canada, indeed most parts of the world, is highly regulated by laws specific to the beverage alcohol sector.
  - In Ontario, the LCBO and the privately owned Beer Store network control the importation, warehousing, delivery and sale of beer, setting aside u-brew and brewpub sales.
  - **Brewers must hold a manufacturer's license issued by the Alcohol and Gaming Commission of Ontario (AGCO) and also must hold a federal excise license.**
  - The choice of a contract brewing model may be affected by applicable laws. Care must always be given to the regulatory issues when concluding any arrangement to brew beer for sale in Ontario.
  - At a minimum, under the classic model, the brewer will have to be duly licensed. Representations and warranties should be obtained in the contract re good standing and holding applicable licenses.

# Licensing and Other Regulatory Compliance (cont'd)

- The same applies no less to the taxes that must be paid upon, or subsequent to, the production of the beer.
- Similar care must be taken to ensure that compositional standards (federal in Canada) are met, as well as product labelling rules.
- Finally, products to be sold via the LCBO or Beer Store must be duly listed with these bodies in accordance with their rules and standards.

# Key Legal Issues

- **Identification of parties**
  - vital to correctly set out correct names and legal nature of parties
  - not doing so may affect legal recourses
  - may need to confirm legal existence/authority of parties and signers
- **Nature of the Agreement**
  - Manufacturing and Sale Agreement ?
  - License?
  - Joint Venture or Other?
  - Exclusivity rights (could affect brewer or non-brewer)
- **Term (Duration of the Agreement)**
  - vital to have correct term for deal and stated correctly in agreement.
  - renewal should also be addressed, per needs of parties
- **Duties of the Brewer**
  - brew the beer per the contract
  - ensure consistency of taste profile, carbonation volume and colour of beer
  - package/label
- **Duties of the Non-Brewer**
  - supply specs for the beer, maybe also labels or other packaging (special bottle)
  - take delivery at agreed time and pay for the beer.
  - engage carrier and ship (or not), all per contract

# Key Legal Issues (cont'd)

- **Compensation**
  - form depends on nature of contract (purchase price, royalty, services fee)
  - HST should be addressed
  - time of payment
  - security?
- **Representations and warranties**
  - brewer should covenant that it has all required operating permits and licenses
  - non-brewer should warrant that it owns the recipe being made or licensed
  - non-brewer also should warrant that no third party has any rights to the recipe or brand name
- **Confidentiality**
  - brewer should agree to respect confidentiality of the recipe
  - but this depends on the nature and distinctiveness of the recipe being brewed – if it is “generic”, no such promise should be given
  - perhaps brewer should agree not to market a similar beer for a certain period in a certain market
  - brewer should agree not to solicit non-brewers’ customers especially where brewer makes deliveries to such customers
  - Non-solicitation and non-competition
  - brewer should perhaps agree not to solicit non-brewers’ customers or for the kind of product being contract-brewed
    - e.g. brewer makes a wheat beer for a non-brewer and drop-ships it to the customers but has no wheat beer in its line.

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# Key Legal Issues (cont'd)

- **Default and remedies**
  - Important to set out what events constitute a breach of the agreement, and the consequences
  - Absent setting these out, e.g. insolvency/bankruptcy of brewer or its default under bank loan agreements may not entitle non-brewer to terminate deal early
- **Termination for other than cause**
  - Early termination rights or options may be vital for either side, otherwise full term is “locked-in”
- **Applicable law and venue**
  - Generally not an issue for all-Ontario parties
  - Issues may arise with proper law and venue when dealing with a party outside Ontario
- **Arbitration and Mediation**
  - Often included in contractual agreements but consider pros and cons
- **Assignment**
  - A well-prepared agreement addresses what happens if one side wishes to transfer the agreement
  - E.g., the brewing party may want the right if its shareholders sell their shares
- **Entire Agreement**
  - This apparently “boilerplate” clause can have real benefits
  - It prevents a “but you said that before we signed” problem
- **Time of the Essence**
  - Ditto for this clause which means a time period stated in the contract means what it says

**Questions?**