

**ORHMA SUBMISSION TO
THE BEVERAGE ALCOHOL SYSTEM REVIEW**

Introduction

What is the Ontario Restaurant Hotel & Motel Association?

The Ontario Restaurant Hotel & Motel Association (ORHMA) is Canada's largest provincial non-profit industry association that represents the interests of Ontario's foodservice and accommodation sectors. The ORHMA is dedicated to fostering a positive business environment for Ontario's hospitality industry, while providing value-added services to its members.

These benefits include cost-saving initiatives, group-purchasing programs and educational services. The ORHMA's Government Relations Department represents the industry's interests to the Government of Ontario and City Halls across the province on issues such as taxation, business regulation, beverage alcohol, labour issues, public health, municipal bylaws and tourism.

Profile of Ontario's Hospitality Industry:

Ontario's hospitality industry is one of the most dynamic and competitive sectors of the provincial economy, generating \$18.32 billion in annual sales and 4.3% of provincial GDP. With more than 22,200 foodservice establishments and nearly 3,000 accommodation properties across the province, the hospitality industry directly employs over 411,000 Ontarians. This represents 7% of total employment. This is net of substantial indirect employment as a result of rounds of spending in the economy. The contribution made by this economic sector is felt in all regions of the province and affects the livelihood of many of Ontario's residents.

Foodservice Industry Highlights:

- \$16 billion in sales
- 22,200 units (63.1% owned and operated by small, independent operators)
- over 17,000 establishments licensed with the Alcohol & Gaming Commission Ontario
- 5.9% of total provincial employment (354,000 direct jobs)
- 17.4% of youth employment is in the foodservice sector (154,700 direct jobs)
- Foodservice industry employment accounts for approximately 46% of all persons employed in the entry-level segment of the Ontario economy
- Average pre-tax profit margins within the industry are 4.3% for the foodservice sector and 3.7% for the pub and tavern sector.
- The average full-service restaurant contributes more than \$173,200 in taxes annually to all three levels of government

- 17% of an operator's tax burden comes from property taxes

Accommodation Industry Highlights:

- \$2.3 billion in room sales annually
- 813 establishments with 30 rooms or more, 2100 with less than 30 rooms
- Direct employment is approximately 52,000
- Almost \$1.4 billion in employee wages and benefits
- The accommodation industry contributes over \$1.3 billion in taxes annually to all levels of government

ORHMA BEVERAGE ALCOHOL ISSUES: SUMMARY

1. **Wholesale Pricing Regime:** establish a true wholesale pricing regime for liquor sales licensees that would provide lower prices for beverage alcohol product.
2. **Gallonage fee:** eliminate the gallonage fee that liquor sales licensees must pay on purchase of beer, wine or spirits from the LCBO or its authorized agents.
3. **Value-Adds and Price Specials:** permit liquor sales licensees the same product rebates, discounts and specials available to the home consumer and put an end to licensees cross-subsidizing home consumers.
4. **Beer Pricing:** establish a transparent and accountable system for beer pricing in Ontario that fosters more brewer competition, greater selection and more purchasing options for the liquor licensee community. Permit licensees the opportunity to purchase their beer inventories using credit cards
5. **Greater Flexibility in Licensee Price Setting:** amending regulations under the *LLA* to permit licensees greater flexibility in setting prices for beverage alcohol in their establishments.
6. **All-Inclusive Travel Packages:** assist Ontario's declining tourism industry by permitting both the accommodation and foodservice sectors all-inclusive travel and dinner packages that include beverage alcohol which is common practice in other tourist destinations.
7. **Licensee Off-Premise Retail Sales:** allow liquor sales licensees to sell beer, wine and spirits at retail to customers for home consumption.
8. **Shared Distribution:** combine and co-ordinate the distribution functions of the LCBO and BRI to provide licensees a more efficient and cost-effective means of product selection and delivery. Establish a private, third-party bonded warehouse for distribution of beverage alcohol.
9. **LCBO Advertising:** LCBO in their advertising to promote consumption in licensed premises and not just in home settings.
10. **Separation of Powers in AGCO:** structural separation required between the tribunal role of the Board and staff functions.
11. **Hierarchy of Compliance Strategies:** greater emphasis on gaining compliance versus "zero tolerance" enforcement, through licensee education plus a staged hierarchy of sanctions, including fines.

12. False I.D. and Underage Drinking: authorize retailers and licensees to confiscate alleged false identification to be turned over to the police; establish and enforce minimum fines for a minor using false I.D.; and establish guidelines that clarify a licensee's protection under the LLA when practicing due diligence upon checking I.D.

1. Wholesale Pricing Regime

The *Liquor Licence Act* requires a licence issued by the AGCO to offer for sale, keep for sale or sell liquor in the province. Those issued a liquor sales licence for on-premises consumption can only purchase liquor (beer, wine and spirits) under their licence from a "government store" i.e. the LCBO or a person authorized to sell on its behalf. They must keep all receipts of their purchases on their premises for inspection. Any liquor brought onto the premises not purchased from a government store under their licence could result in severe sanction from the AGCO.

Licensees, then, have no recourse but to buy from two monopolies: either the publicly-owned and operated LCBO or the privately-owned and operated Brewers Retail Inc. (The Beer Store or TBS). TBS/BRI operates under the authority of the AGCO on regulatory issues such as retail store authorizations and the LCBO on commercial/regulatory issues like price changes (since transfer of certain responsibilities from the LCBO to the AGCO in July 2000). There is no other competition or source of product allowed (save direct delivery of draught beer from microbreweries and Ontario wine from wineries).

Other than a minor discount provided on LCBO purchases (5% on all products except Ontario wine which is 10%) and no discount from TBS/BRI, liquor licensees must pay full retail price on beer, wine and spirits – the same shelf price that the home consumer would pay. There is NO uniform wholesale price offered or given to liquor licensees even though, as a group, they are a significant client: 15% of LCBO and 35% of TBS/BRI sales. Licensees are not offered nor can they take advantage of any special discounts, rebates or in-case promotions given to home consumers from TBS/BRI e.g. a case of 28 for the price of 24 or special in-case promotions.

Embedded in the full retail price of beverage alcohol is a complex regime of fees, levies, mark-ups and taxes both Federal (e.g. Excise or Customs Duties and GST) and Provincial. (The LCBO calculates and collects its fees, levies and mark-ups on certain imported beers, wine and spirits while the AGCO collects beer levies on domestic beer at the manufacturer level.)

The federal and provincial governments, according to the LCBO *Annual Report*, take 54% of the revenue on beer sales (41% provincial and 13% federal), 60% on wine (50% provincial, 10% federal) and 81% on spirits (59% provincial and 22% federal). Beer is overwhelmingly the alcoholic beverage of choice in licensed premises. Canada, when compared to other countries, ranks third highest in the world in terms of the tax burden on beer at 52% on the retail price. The United States, in comparison, ranks 22nd at only 19% (Brewers Association of Canada).

Licensees, in addition to paying full retail price, must also pay another roughly 12% gallonage fee rendering the licensee purchase price more expensive than a consumer retail price (see gallonage issue below). On top of this tax is compounded another tax at time of resale: the special version of the Ontario Retail Sales Tax on beverage alcohol of 10%.

Additional licensing fees must be remitted to the AGCO to operate:

- \$1,055 licence application fee (if public notice is required in the majority of instances);
- \$925 fee if no public notice;

- and an up-front \$450 renewal fee after the initial two years.

Applicants may also have to pay for newspaper advertising if public notice is required, hire a professional engineer or architect to determine capacity plus server training fees.

Therefore, the tax burden that is contained in the licensee purchase price (which is basically the same as the price for the home consumer before even further licensee taxes are applied) is considerable. And prices charged licensees for beer from the private oligopoly TBS/BRI are basically uncontrolled by anyone except TBS/BRI. They will charge what the market will bear due to the lack of any competition.

Individual beer manufacturers have only to register price changes with the LCBO that will go into effect in two weeks' time. There is no rationale that needs to be filed with the LCBO on increasing prices. The LCBO's role is only to act as registrant and ensure that the price does not drop below a Minimum Retail Price (\$23.70 for home consumer and \$21.77 for licensees, deposit in). Lakeport and Brick (Laker) are two manufacturers that can sell at retail for a "buck-a-beer" and still make profit (which calls into question the prices charged for the majors' brands). TBS/BRI and individual suppliers could provide a wholesale minimum price to licensees actually lower than that for the home consumer and spark competition for the licensee market. Why doesn't that happen?

Both TBS/BRI and the LCBO provide discount incentive programs to the LCBO agency store system (196 agency stores are established in existing businesses in locations where it would be unprofitable to open an LCBO retail store). TBS/BRI's Retail Partners Program offers an 11.5% discount (less bottle deposit and ORST/GST), a start-up grant of up to \$10,000 for new agents and up to \$2,500 for established operators plus merchandising, product listing and inventory management support. The LCBO offers a similar discount arrangement to agency stores. However, there is no discount or wholesale price provided to the biggest client of the LCBO and TBS/BRI – liquor licensees. Why?

We conjecture that the only reasons that a wholesale price is not provided to liquor sales licensees are to keep licensees' prices to patrons artificially high to appease the public health lobby and to gain the absolute maximum revenue for government and TBS/BRI.

Profit margins in the foodservice sector are thin - under 5% - and lower for pubs and taverns (3.7%). The hospitality sector has been hurting over the past several years with declining tourist spending, lower disposable income of Ontarians and rising costs of doing business. Factors beyond the control of hospitality operators like SARS, West Nile, 9/11 and attendant border delays, Mad Cow disease, the NHL strike and anti-smoking legislation not only negatively impact tourist arrivals from outside the country but constrain in-province tourism and local demand. The rising cost of living and higher government taxation take away discretionary household income and negatively affect domestic expenditures on travel, meals and consumption of beverages. Added to these factors are the ever-rising costs of operating and government policies that negatively impact our costs of production such as the increase in minimum wage, WSIB premiums, municipal property taxes, waste diversion costs, rising energy costs, new water regulation rules etc.

The end result is an even greater narrowing of profit margins as operators, while trying to hold the line on competitive pricing, are caught in the crunch between lower demand and higher costs of production. For example, tavern, bar and nightclub operators saw their sales plummet by 17.6% between 1999 and 2003 – a loss in sales of \$106,700 for the average operator. The trend continued through the 1st quarter of 2004 with another 7.4% drop. In another indicator of a tough business climate, pre-tax profit margins for bar, tavern and nightclub operators have shrunk from 6.5% operating revenue in 2001 to just 3.7% in 2002, the most recent year for which data are available (Canadian Restaurant and Foodservices Association, *News Bulletin*, November 25, 2004).

What would help considerably in the struggle to survive would be a true wholesale pricing regime for liquor licensees from both the LCBO and TBS/BRI at least similar to the discount programs offered to LCBO agency stores. A lower wholesale price could be passed on at the licensee's retail level increasing the demand for food and beverage experiences out of the home locally or at tourist destinations. Increased spending not only has a direct impact in sustaining and creating new jobs in its own sectors, but, through spin-off rounds of spending called the multiplier effect, creates amplified benefits throughout the economy, including greater government revenues.

So, despite the government getting lower immediate revenues from the hospitality sector, a true wholesale pricing regime will reap amplified benefits down the road plus revitalize the hospitality sector.

To the argument lower prices might cause increased consumption in licensed premises, this could be addressed by making server training mandatory for the entire licensee community (the majority of whom are already server trained, at any rate) or establishing a minimum agreed floor price under which a licensee could not sell. (Although there already exists a regulation that prohibits the holder of a licence from engaging in or permitting practices which may encourage patrons' immoderate consumption of liquor i.e. s. 20 (1) of Regulation 719).

RECOMMENDATION 1

The ORHMA recommends that the government implement a true wholesale pricing regime for liquor licensees that would result in revitalization of the foodservice industry and tourism, protect current jobs, create more jobs and ultimately increase government revenues. The amount of the discount should be at least equivalent to the discounts available to the LCBO's agency store system from TBS/BRI and the LCBO i.e. 11.5%.

2. Gallonage Fee

On Tuesday, January 18, 2005, Terry Mundell, President and CEO of the ORHMA appeared in Pre-Budget Hearings before the Standing Committee on Finance and Economic Affairs representing those issues vital to the hospitality industry. Among the issues presented to the Committee was the elimination of the gallonage fee imposed by the government on a liquor licensee's purchases of liquor. The Association's view, that has been repeated for at least the last decade-and-a-half, is that the fee is unfair as it's a tax on a tax and additional to fees paid to the regulator for administering the liquor licensing scheme.

Since the presentation, the Association received additional information that seriously brings into question the continued collection of the gallonage fee on the part of government.

To review, the gallonage fee, that has existed for decades in regulation and is now embodied in a Schedule of Fees within the Alcohol and Gaming Commission of Ontario, demands payment of \$2.64 per hectolitre of beer and 12% on the purchase price of wine and spirits from liquor sales licensees upon purchase from the Liquor Control Board of Ontario or its authorized agents. The LCBO collects the fee and transfers it to the AGCO where it is submitted straight into the government's Consolidated Revenue Fund. Licensees must also remit an additional provincial sales tax specific to liquor of 10% upon resale to patrons in licensed establishments.

In the mid-1990s, the former Liquor Licence Board of Ontario reviewed its administrative licensing fees. The fees were recalculated to reflect full recovery of the costs for licensing and regulating liquor sales licensees. The philosophy and structure of the liquor licensing fees continues to this day in the amalgamated AGCO. Never in recent memory was the gallonage fee meant to recoup any of the costs for licensing and enforcing or, simply stated, function as a user fee. It was and is a revenue generator, pure and simple.

In February of 2004, there was a ground-breaking court decision (*Kingstreet Investments Ltd. v. the Province of New Brunswick*). Mr. Justice David Russell of the Court of Queen's Bench of New Brunswick found the 5% User Fee imposed on liquor licensees' purchases of liquor from the government monopoly to be a tax *ultra vires* the province. The New Brunswick government wisely did not appeal the decision and hastily eliminated the User Fee *in toto*. Using the foundation of this decision and the precedents on which it is based as a litmus test, the ORHMA contends that Ontario's gallonage fee - directly comparable to New Brunswick's user fee - is clearly a tax *ultra vires* the Province. The fee is enforceable by law; levied by a public body; and its intent is to raise revenue for a public purpose versus recouping licensing and enforcement costs. It is a tax. However, it has not been passed by the Legislature, having been a regulation. Yet the government still insists on collecting the gallonage fee despite the precedents in New Brunswick and elsewhere.

Late in the 1990s, in response to the Eurig decision on probate fees and a challenge of the user fees collected by the Land Registry Office of the Ministry of Consumer and Business Services, an internal government review of all fees and levies was launched. The purpose was to identify any fees that could be construed as a tax and ensure fees represented their true cost of the service provided. Instead of eliminating the gallonage fee, the AGCO removed all its fees from regulation and placed them in an unpublished Schedule of Fees. This served at least two purposes: it shielded the gallonage fee from public scrutiny and made it easier to change fee rates without regulatory amendment.

In summary, the ORHMA recommends complete and immediate elimination of the gallonage fee imposed on the hospitality industry as being an illegal tax *ultra vires* the province.

RECOMMENDATION 2

The ORHMA recommends the immediate elimination of the gallonage fee *in toto* as an invalid tax *ultra vires* the province.

3. Value-Adds and Price Specials

Liquor licensees cannot take advantage of certain special discounts or other offers that are available from TBS/BRI or the LCBO to the home consumer, nor are they compensated by being given a lower licensee price. Examples might include a case of 28 bottles of beer for the price of 24 or “travelers” (small bottles of spirits attached to other products) called “Value-Adds”.

The LCBO does extend to licensees the same discounts offered to home consumers on Limited Time Offers (LTOs) or other special discounted items like product de-listings. The regular 5% LCBO discount for licensees still applies to these product specials. However, “Value-Adds” offered to the home consumer are not available to licensees.

Special discounts from TBS/BRI that apply to home consumers, unlike the LCBO, are not offered to licensees.

Every so often, a beer manufacturer will offer a special to the home consumer through the TBS/BRI that may include in-package promotions such as a small football, T-shirt or hockey memorabilia, a discounted price or greater volume for the same price e.g. 28 beer for the price of 24. (Although licensees are not necessarily interested in the in-package promotions *per se*, part of the issue is they are cross-subsidizing the consumer by having to pay a full price during such promotions.) During price/volume beer promotions, licensees are not being given a similar break, again cross-subsidizing the home consumer.

TBS/BRI has special packaging only for liquor licensees called “one-trippers”. “One-trippers” are taken from the warehouse facilities for delivery specifically to liquor licensees. Such packaging does not change when home consumer specials are being offered. A liquor licensee must buy product from a government store under his or her licence. If a licensee is caught with the special packaging for a home consumer, the licensee is then charged or given a Notice of Proposal (NOP) or both for not buying liquor under the liquor licence (as TBS/BRI does not make available the home consumer special to licensees).

Similarly, a liquor licensee may be charged or given administrative sanction for having an LCBO Value-Add on the licensed premises as product not purchased under the liquor licence.

S. 2 of the AGCO’s *Advertising Guidelines* under *Promotions* allows the offering of a Value-Add:

2. No person may offer a gift or the opportunity to receive a gift, which requires the purchase of liquor, except for a gift of a nominal value in relation to the regular purchase price of the product.

- *Within this section, a value-added item may have a nominal value of 20% of the retail value price of the beverage alcohol it is included with up to a maximum of \$5.00.*

Some might think offering a beer special or Value-Add to a licensee may be affected by s. 21 of Regulation 719 on a licensee accepting inducements:

21. The holder of a licence shall not directly or indirectly request, demand or receive any financial or material benefit from a manufacturer of liquor or a representative or an employee of the manufacturer.

However, an inducement can be argued as a manufacturer providing individual licensees or groups of licensees something not offered to all licensees as reflected in s. 5 of the *Advertising Guidelines* under *Prohibition Against Inducements By Manufacturers*:

5. (1) A manufacturer or liquor or an agent or employee of a manufacturer shall not directly or indirectly offer or give a financial or material inducement to a person who holds a licence or permit under the Act or to an agent or employee of the person for the purpose of increasing the sale or distribution of a brand of liquor.

(i) It is prohibited for a manufacturer to provide a licensee or permit holder with cash, cash rebates, liquor, product rebates, price discounts, or abuse the refunding for leaking kegs, etc.

Therefore, it is legal for a manufacturer through TBS/BRI or the LCBO to offer, and a licensee to accept, a beer special or Value-Add from the LCBO or TBS/BRI as long as it is offered to all licensees. Whether the licensee can then resell the portion of the special that is construed as a promotion of nominal value is a further question. Part of the answer hinges on interpretation of s. 31 (1) (b) of Regulation 719 as to whether the Value-Add or 4 extra bottles of beer in a case of 28 constitutes “liquor purchased” under the licence:

31. (1) The licence holder may keep for sale, sell and serve,

(b) only liquor that the licence holder has purchased from a government store; and

(c) only liquor that the licence holder purchased under the licence.

If these specials and value-adds were offered to licensees, an argument may be put forward that they constitute part of the price package unless a similar package were offered at the same time without the special at the same price. Hence, the liquor can be considered to be purchased under the licence and should be made available to licensees by TBS/BRI and the LCBO.

RECOMMENDATION 3

The ORHMA recommends that licensees be able to receive the same product rebates, discounts, and specials available to the home consumer from TBS/BRI and Value-Adds from the LCBO and put an end to liquor licensees cross-subsidizing home consumers.

4. Beer Pricing

As mentioned in item 1 above, beer prices charged to licensees and home consumers are, for all intents and purposes, unregulated in the province since 1996. Before this time beer prices had to be approved by Cabinet because of the beer oligopoly’s control of the beer market in the province. In 1996, the Minister of the day decided that beer pricing should be handed over to the LCBO. Manufacturers had to provide a rationale before a change in price would be permitted. This was replaced in 2000 with a simple registry system.

Since 2000, beer manufacturers have only to register price changes with the LCBO on a Monday that go into effect in two weeks’ time. Price changes are not permitted during the months of July, August and December. The LCBO’s role is only to act as registrant and ensure that the retail price does not drop below a Minimum Retail Price (\$23.70 for home consumer and \$21.77 for licensees, deposit in) and is uniform throughout the province. There is no transparency in the process as beer price changes are not published and arguably subject to the *FOI Act*.

In 2004 alone, the LCBO registered some 1,800 beer price changes. There is no control mechanism over potential price gouging by either of the two major beer manufacturers. It could be said that in the case of one manufacturer, the lucrative Ontario market is propping up company shareholder value as a result of bad investment decisions made elsewhere.

In economic theory, price collusion among members of an oligopoly is encouraged as it maximizes their collective benefit. Whether collusion exists in the Ontario beer market is open to question. But there is no watchdog to oversee and prevent this (except perhaps the Federal Competition Bureau which is reluctant to wade into a provincial domain).

Because the beer market in Ontario is run by a private oligopoly of Molson and Labatt's and because of the secrecy under which they operate as TBS/BRI, there needs to be an open, transparent and accountable system for beer pricing and other sales-related information about beer in the province. Price change information, at the minimum, should be a matter of public knowledge. Even further, there needs to be a strategy to end the domination of the major two producers and stimulate more competition in the beer market. There also needs to be a public audit of TBS/BRI to determine if they are living up to their claim as truly being a not-for-profit co-operative subject to their original mandate in 1927.

When Ontario came out of its own version of Prohibition in 1927, the government of the day was more concerned with the control of liquor with higher alcohol content such as wine and spirits. The control mechanism that resulted was a government-run monopoly patterned after the Quebec model called the LCBO (Quebec was first to end its version of Prohibition in 1919 and created the SAQ).

The government concurrently allowed establishment of the Brewers Warehouse Co-operative whereby the 80+ regional breweries could establish warehousing and distribution privileges in the province under the authority of the LCBO. The market could be said to have been competitive at that time. Due to consolidation of the beer market over the past 78 years, 90% of the beer market has ended up in the hands of two major breweries, effectively stifling competition. Their dominance has also extended to the other provinces as well. Added to the concern is that one of the manufacturers is now foreign-owned and the other headed in the direction of amalgamation with a major American brewing concern. Policy implications of a foreign-dominated beer market in Ontario must be questioned.

The deep pockets of the two major corporate brands in all aspects of marketing and sales in the province make it difficult for the 34 Ontario microbrewers to compete for market share. This leads to a shrinking of options in product selection and competitive pricing for liquor licensees.

Ontario is the most lucrative beer market in North America and is run by an oligopoly. The natural gas oligopoly is overseen by the Ontario Energy Board. For beer, some entity must be accountable for its market oversight, beer prices need to be regulated with an approval process where consumers and licensees can have input. Maybe it's time for the establishment of the Ontario Beer Board?

Unlike almost every other type of modern business transaction, licensees are denied payment of their beer purchases from TBS/BRI by credit card. The ORHMA recommends that TBS/BRI extend this method of payment to the licensee community.

RECOMMENDATION 4

The ORHMA recommends that, due to the private and foreign-controlled oligopoly operating the province's beer market, there be a return to the former policy of beer price control whereby beer manufacturers must provide rationale for any price increases. An accountable entity should be established to oversee regulation of the Ontario Beer market. The beer price process and approvals should be transparent i.e. made available to the public in a regular reporting form, in addition to other sales-related information. The approval process should receive input from consumers and licensees. Any government policies that can improve selection and return competition to the beer market should be encouraged. TBS/BRI should undergo a public audit to ensure that they are living up to the mandate given them in 1927 as a true co-operative.

The ORHMA further recommends that TBS/BRI allow licensees to use a credit card to purchase beer as is permitted for home consumers.

5. Greater Flexibility in Licensee Price Setting

In the mid-1980s, the province flirted with "Happy Hour" i.e. allowing liquor licensees the ability to offer two-for-one drink specials. The then-Ontario Restaurant Association as well as public health and other stakeholder groups successfully lobbied government to put a stop the practice in 1986 due to the fierce competition that ensued among licensees based on price specials and public health/safety concerns.

The pricing policy replacing Happy Hour in 1986 specified:

9. (20) Except during hours when live entertainment is provided on the licensed premises and a higher price may be charged for liquor or a drink containing liquor, the price of liquor or a drink containing liquor shall be the same during all hours of operation of a licensed premises (Regulation 581).

The giving away of any free liquor was also stopped.

Because of a somewhat liberal interpretation of what constituted "live entertainment" and resultant price discounting, s. 9 (20) was replaced by a regulation that allowed no price flexibility at all:

20. (5) The licence holder shall ensure that the price of liquor or a drink containing liquor is the same during all hours of operation of the premises (Regulation 546/90 superseded by Regulation 719).

When the LLA was amended in 1990 along with its regulations, s. 20 (2) consolidated those types of banned pricing practices under "practices promoting immoderate consumption":

20. (1) The holder of a licence to sell liquor shall not engage in or permit practices which may tend to encourage patrons' immoderate consumption of liquor.

(2) Without restricting the generality of subsection (1), the licence holder shall not,

(a) offer servings of liquor free of charge;

- (b) offer servings of liquor for sale at a price less than the price regularly charged for the servings;
- (c) offer for sale at a fixed price an unlimited number of servings of liquor;
- (d) offer for sale servings of liquor in which the volume of liquor is increased without a proportionate increase in the price regularly charged for the serving or series of servings (Regulation 546/90 superseded by Regulation 719).

This regulation is still in effect.

Responding to licensees' complaints that an invariant price permitted no flexibility to at least recover the costs of entertainment, the then-Liquor Licence Board amended section 20 in 1991 to permit licensees to make a temporary increase in the price of liquor once a day. The temporary price would then have to return to the regular price at the start of the next operating day [s. 20.1]. A few licensees made their own interpretation of the new regulation concerning what was a regular price and discounted the price of alcoholic beverages on slow days. The Liquor Licence Board soon clarified the interpretation of the regulation that any price discounting was not allowed.

These regulations remain in effect to the present day. The only ability to change price is upward, otherwise the price must remain fixed. Flexibility in pricing such as price discounting, for all intents and purposes, is banned. (That being said, an LLBO-approved policy has allowed a price discount on larger-sized drinks since late 1996. See *Liquor Pricing: Calculating maximum discounting for larger portions, Licence Line, December 1996.*)

Liquor licensees would like the ability for greater price flexibility such as being able to change the price of drinks on certain days. Possible options could be the ability for licensees to be able to lower drink prices no more than, say, a certain percentage below the regular price charged or not below a floor price mutually agreed on with the regulator. Manitoba, Saskatchewan and New Brunswick, for example, have a minimum pricing regime for licensees that permits price flexibility above the minimum.

Flexibility in price done in a socially responsible way would give licensees more marketing options to attract patrons at slower times or, alternatively, to recoup higher costs during busier times.

RECOMMENDATION 5

The ORHMA recommends liquor licensees be given greater flexibility in setting prices in their licensed premises.

6. All-Inclusive Travel Packages

Many of the travel destinations in world markets provide all-inclusive travel packages that include beverage alcohol. The Ontario tourist market is at a disadvantage in not being able to offer a similar program. Although the AGCO's *Advertising Guidelines* and regulations allow licensees to include alcohol as part of a meal package (as long as the price for liquor is shown and patrons have the ability to order the package without liquor), beverage alcohol in all-inclusive travel packages is, for the most part, banned.

There are two exceptions to package offerings. The first is under s. 20 (4) of Regulation 719 that permits all-inclusive packages for certain premises:

20. (4) If the premises to which the licence applies is an airport lounge, a boat or a railway car, the licence holder may offer for sale at one price a package including the cost of a trip and of liquor.

The second exception is the ability for banquet halls to offer packages of food and beverage alcohol under s. 20. (2.1) of Regulation 719 (as of August 2002):

20. (2.1) Despite subsection (2), a licence holder may offer a package of food and liquor at a fixed price at an event if,

- (a) the licence holder and event organizer have entered into a written contract that sets out separately the price of the food component and the price of the liquor component of the package;*
- (b) the price of the food component is the fair market price and represents more than 50 per cent of the total price of the package;*
- (c) the event is only intended for the invited guests of the event organizer, is not advertised to the general public and is not open to the general public;*
- (d) attendees are not charged a fee for admission to the event or for liquor or food;*
- (e) the event organizer or the organizer's delegate remains on the premises at all times during the event;*
- (f) the time for which alcoholic drinks may be provided to attendees without charge to the attendee does not exceed eight hours;*
- (g) the licence holder, the employees and managers of the licence holder and the security personnel other than paid duty police officers acting as security personnel at the event have completed a server training course approved by the Board of the Commission; and*
- (h) the licence holder keeps all contracts relating to the event for at least one year after the event takes place and, on request, produces them to a person designated under section 43 of the Act or to a police officer.*

The Ontario hospitality industry is trying to recover from a series of disasters beyond its control such as SARS, West Nile, Mad Cow, the NHL strike, 9/11 and attendant border crossing delays, anti-smoking bylaws and impending legislation plus a strong Canadian dollar. These factors have put a damper on travel patterns into and out of Ontario. For example, tourist visits from the U.S. have plummeted 25% since 2001. Although projections indicate a slight rise in American tourism over the next four years, they still remain lower than 2001 figures. Similarly, intra-Ontario tourism by Ontarians, who represent 73% of the market, is also down as many natives are choosing to travel to destinations outside of the province.

Competing with other world travel destinations on price and product offering is paramount. Being able to offer an all-inclusive travel package that includes beverage alcohol would help Ontario's accommodation and foodservice sectors toward recovery and to compete, package-wise, with other world tourist markets.

RECOMMENDATION 6

The ORHMA recommends that the AGCO's *Advertising Guidelines, s. 20.1 and s. 20 (4) of Regulation 719* be expanded to permit Ontario's accommodation and foodservice sectors the ability to offer beverage alcohol as part of an all-inclusive travel package similar to many other world travel destinations.

7. Licensee Off-Premises Retail Sales

Much press coverage of late has promoted the concept of offering beer and wine for home consumption in corner stores. The ORHMA has a better alternative: retail sales of beer, wine and spirits for home consumption from the premises of liquor sales licensees. This might be an especially attractive option for both licensees and consumers in Northern Ontario and small communities.

The table below shows the top and bottom ten jurisdictions in all North America in retail outlets for beer, wine and/or spirits standardized by population. It sees Ontario second from the bottom at 1.4 outlets per 10,000 (1,573 outlets and 11.4 million population). The only jurisdiction lower than Ontario is Nova Scotia at 1.3. The highest is Newfoundland with 34 outlets (granted, these figures do not account for the size of the outlet or selection offered). This shows there is plenty of room to improve accessibility for Ontarians in the purchase of beverage alcohol. Even if all 17,000 Ontario liquor licensees were given off-sales privileges, the standardized figure would only put Ontario in tenth spot at 16.3 outlets. In contrast, the licensing of corner stores could introduce up to 8,000 to 10,000 new outlets with individuals untrained in selling alcoholic beverages and a poor track record for compliance with another regulated product - tobacco.

TOP AND BOTTOM TEN JURISDICTIONS FOR ALL LIQUOR RETAIL OUTLETS WHEN STANDARDIZED BY POPULATION

10 Jurisdictions Highest	All Liquor Retail Outlets/10,000 population
Newfoundland	34.0
Iowa	31.9
Georgia	26.7
North Carolina	25.3
Vermont	24.1
Idaho	23.5
North Dakota	22.7
Washington	19.3
Alabama	17.5
Maine	15.6
10 Jurisdictions Lowest	
Kansas	2.6
Rhode Island	2.4
New Jersey	2.2
Kentucky	1.7
New Brunswick	1.7
Mississippi	1.6
Oklahoma	1.5
Prince Edward Island	1.4
Ontario	1.4
Nova Scotia	1.3

(Source: Number of off-Premise Sales Outlets from the NABCA Survey Book, 2002 Edition, then standardized by population)

Compelling reasons in favour of allowing liquor sales licensees the option of also selling beer, wine and spirits at retail for home consumption include:

- Unlike beer and wine in corner stores, do not have to re-invent the wheel and create a new licensing regime but simply dovetail onto the existing licensing framework (AGCO process and computer systems are already in place);
- The public interest component i.e. meeting the needs and wishes of the community, is already addressed with the existing liquor licence;
- Could simply create a new endorsement category to the liquor sales licence called an off-sales endorsement;
- One of the conditions to the endorsement would be a clean bill of health with the AGCO;
- Strong compliance ensured as liquor licensees have much to lose through the improper sale of beverage alcohol;
- Licensees have already been screened in terms of their appropriateness to hold a licence (regulator’s due diligence);
- The majority of licensees and staff are already server-trained (for those not trained, the *Smart Serve* program could be a condition of the endorsement);
- Licensees already know to check I.D. for minors and not to sell to inebriated persons;
- Would not add appreciably to AGCO inspections workload as would wine and beer in corner stores;
- The AGCO Board of Directors provides the hearings tribunal structure;
- Liquor licensees are already well experienced in the responsible sale of beverage alcohol unlike corner store operators;
- Delivery costs for beer and wine would not increase as liquor licensees can already get direct delivery from Ontario wineries, manufacturers’ agents and TBS/BRI;
- Part-way there, with the Take Home The Rest program, the caterer’s endorsement (using the endorsement to the liquor licence to sell and serve at another location off the licensed premises) and room service endorsement (sell and serve liquor to persons registered as guests in a facility that rents overnight accommodation adjacent to the premises to which the licence applies);
- Five provinces allow liquor licensees to sell off-premises for home consumption (see table below); and
- Would provide a much-needed shot in the arm to a financially-depressed hospitality sector and new cost-effective distribution method in Northern Ontario;
- Better service to local consumers and tourists especially in more remote areas of the province as agency stores tend to close early;
- Increase the revenue stream to government based on improved accessibility to at-home sales in a socially responsible way.

PROVINCES OFFERING ON/OFF-PREMISES SALE OF BEVERAGE ALCOHOL

Province	Beer	Wine	Spirits	Comment
Alberta	Yes	Yes	Yes	Only hotels
British Columbia	Yes	Yes	Yes	Cold beer, wine and spirits retail stores and beer from bars and hotels

Manitoba	Yes	No	No	Only hotels
Quebec	Yes	Yes	No	
Saskatchewan	Yes	Yes	No	Restaurants, hotels and brewpubs (beer); wine and beer only from taverns

(Source: NABCA Survey Book, 2002 Edition)

The ORHMA does **not** support the retail sale of beer and wine in corner stores for the following reasons:

- It promotes the concept of home consumption versus patronizing licensed premises for food and beverage consumption;
- Question of whether it is a socially responsible method of retail distribution giving those untrained and inexperienced in the sale of alcoholic beverages the opportunity to sell to the public (witness the poor track record of convenience stores failing to check I.D. and selling tobacco to minors);
- The illegal sale of beverage alcohol to minors and those inebriated will become an issue as the private profit motive will drive improper sales;
- Corner stores have comparatively little to lose as they could still carry on as a convenience store if they lose their ability to sell beverage alcohol;
- Distribution costs for alcoholic beverages for up to 10,000 new locations would rise substantially leading to a jump in retail prices for home consumers;
- Consumers will complain when the price for beer and wine jumps markedly due to the 27% mark-ups convenience stores commonly charge plus the substantially higher distribution costs from suppliers;
- Feverish competition will develop among all suppliers - both domestic and foreign – for a piece of the pie which will lead to greater problems with illegal manufacturer inducements and greater compliance costs;
- Licensing and inspections costs to the regulator will increase considerably as a new licensing scheme would have to be created, a plethora of new applications would need processing, an abundance of new locations require inspecting, a rise in hearings due to illegal sales activity and a constant pressure on policy resources;
- From experience in other jurisdictions, it becomes difficult to deny entry to supermarkets and grocery stores who will then try to kill the competition with loss leader sales and notoriously slim margins;
- Past experience in other jurisdictions sees grocery stores and convenience stores pressuring to have beer and wine on the shelves next to everyday items, “normalizing” the purchase of beverage alcohol and upsetting the health lobby;
- Greater policing costs and a higher crime rate result as convenience stores fall easy prey to thieves and robbers (witness the rise in armed robberies at convenience stores selling cigarettes);
- Many convenience stores (and grocery stores) are open 24 hours a day thereby applying policy pressure to make retail sales of beer and wine a 24/7 proposition.

The ORHMA does not, then, see the establishment of a corner store retail distribution method as making sense economically or from a social responsibility standpoint. It will lead to much higher retail prices for the consumer; considerably greater supplier costs for distribution; increased government expenditures for licensing, inspecting and hearings as well as constant pressure on public policy; more beer and wine reaching the hands of minors; plus a higher crime rate and policing costs due to more armed robberies and break-ins. As in many policy situations, the caveat is that once the door is opened, it becomes impossible to turn back

RECOMMENDATION 7

The ORHMA recommends that the government allow liquor sales licensees to sell beer, wine and spirits to consumers at retail for home consumption in addition to on-premises sale and service, as is done in five other provinces. The ORHMA disagrees strongly with the retail sale of beer and wine in corner stores as it does not make sense for Ontario economically or from a social responsibility standpoint.

8. Shared Distribution

Liquor licensees obtain beverage alcohol in the following ways:

- **The LCBO:** Certain imported beers not sold by TBS/BRI; imported and Ontario wines not offered through agents of the Consignment Program or direct delivery from Ontario wineries; and spirits not offered through Consignment;
- **TBS/BRI:** domestic and some imported beer;
- **Licensed Agents of Consignment:** imported beer, wine and spirits;
- **Direct delivery from microbreweries:** draught beer to licensees; and
- **Direct Delivery of Ontario wine:** Ontario wine from Ontario wineries.

TBS/BRI and licensed agents in the Consignment Program deliver product to licensees as do Ontario wineries (Ontario wines) and Ontario microbrewers (for draught beer). The LCBO does not deliver its products. This disparity results in a liquor licensee having to make his or her own arrangements concerning pick-up and delivery of LCBO products. The LCBO does not see warehouse delivery to licensees in its future plans. There is evidently already considerable to-ing and fro-ing of certain products between LCBO and TBS/BRI warehouses as well as between various LCBO warehouse facilities.

The ORHMA suggests that the LCBO and TBS/BRI could consolidate warehouse orders to licensees so that an entire order of beer, wine and spirits could be delivered to licensees in a single shipment and at the same time by TBS/BRI. Any savings as a result of more efficient distribution should be reflected in lower prices to licensees.

Further, the government should allow third-party, private bonded warehouse for the storage and distribution of certain product lines (including licensees) as is currently permitted to licensed agents of foreign manufacturers in British Columbia.

RECOMMENDATION 8

The ORHMA recommends that TBS/BRI and the LCBO combine and co-ordinate the distribution functions to provide liquor licensees with a more efficient and effective means of product selection and delivery. Any savings as a result of more efficient distribution should be reflected in lower prices to licensees. We further recommend that the government allow third-party, private bonded warehouses for distribution of beverage alcohol similar to licensed agents of foreign manufacturers in British Columbia.

9. LCBO Advertising

The LCBO spends a considerable amount of the taxpayers' money producing glossy publications such as its *Food and Drink* magazine, full-colour newspaper flyers, and ads in the broadcast media. The value-added to consumers of a monopoly having to advertise is an open question. Absent these publications and media broadcasts, would there be any noticeable effect on LCBO sales? The LCBO should have to establish a business case to determine what, if any return there is on their investment on advertising.

In their publications, the entire emphasis is on home entertaining. Being the LCBO's largest single customer, the hospitality industry feels the LCBO is using profits raised from licensee sales against us by promoting people to stay at home to the detriment of people patronizing restaurants, bars, taverns and other licensed premises. We would strongly urge the LCBO to feature the licensee community in pictures and articles in addition to its current sole emphasis on home entertaining.

RECOMMENDATION 9

The ORHMA recommends that the LCBO establish a business case to determine what, if any, return on investment there is in their advertising. The LCBO provide coverage of the hospitality industry in its advertising publications in addition to its sole emphasis on home entertaining.

10. Separation of Powers in the AGCO

The Alcohol and Gaming Commission of Ontario (AGCO) is a quasi-judicial agency operating in an arms-length relationship from government. It has the role of licensing and regulating the liquor and gaming industries in the province. Within the same agency are the roles of policy-making, rule-making, investigation, prosecution and adjudication.

In a manner similar to the concerns expressed in *The Report of the Fairness Committee to David A. Brown, Q.C.*, Chair of the Ontario Securities Commission by the Honorable Coulter A. Osborne, Q.C., the ORHMA maintains there is a perception of bias at the level of the AGCO Board's adjudicative function and the "perception of bias works to erode the credibility" of the AGCO.

From the ORHMA's perspective, many of the same concerns that are raised about the Ontario Securities Commission in the above report can also be applied to the AGCO by simply substituting "Commission" with "Board".

The pervasive and widely held perception is that a "fair hearing" before the Board cannot be obtained and is based on a number of factors:

- The various capacities in which the Board acts (policy-maker, investigator, prosecutor and adjudicator). The courts' acceptance of this structure in law has done nothing to dim this perception in fact.
- Considerations of institutional loyalty make it difficult for Board members in their adjudicative capacity to act dispassionately.
- The Board members' links with staff cannot be totally disregarded by Board members presiding at the hearing.
- The existence of what appears to be an aggressive enforcement policy authorized by the Board as a whole.
- The fact that the Board always appears to win creates in the minds of some respondents that "the cards are stacked against them".
- Enforcement...has become much more aggressive with what appears to be little accountability.
- Board members are much more protective of staff in their hearings than they were in the past.
- The home-court advantage.

Other concerns brought up in the above report and comparable to the AGCO also include:

- the leakage of unarticulated policy-setting roles from administrative to tribunal functions;
- a disconnect between the kinds of policy considered by the Board in its policy-setting capacity and those policy issues that arise from a hearing;
- Board members apply the public interest jurisdiction based on their experience as Board members without identifying the public interest standards in advance;
- Board members are poorly suited to participate in hearings;
- Board members who are part-time are not in a position to commit to the time requirements of a long hearing;
- The absence of involvement on the part of the Commission as a whole is of concern not only from a functional point of view but from the legal as well e.g. overseeing the management of the financial and other affairs of the Commission; and
- The issue of the constitutionality of the current structure.

For the above same reasons, the ORHMA has reached the same conclusion as Mr. Osborne did with the OSC concerning the function of the Board of Directors of the AGCO:

"We would strongly advise the Commission to take steps to separate its adjudicative function from the Commission".

RECOMMENDATION 10

The ORHMA recommends separating the adjudicative function of the Board of Directors of the AGCO from the balance of the Commission to prevent the apprehension or perception of bias and erosion of the credibility of the AGCO.

11. Hierarchy of Compliance Strategy

The moniker of the liquor inspections function in the AGCO is self-explanatory: Liquor Enforcement Section. It is a widely-held belief among the licensee community that the AGCO is too heavy-handed and uncompromising in its enforcement and sanctions role. The “zero tolerance” enforcement philosophy, leading to the issuance of Notices of Proposal (NOP) for even the most minor offences and harsh penalties for first offenders, leaves no middle ground for gaining licensee compliance through other means. Discretion has largely been stripped from the liquor inspectors’ role. The general philosophy, rather than being proactive, is purely reactive.

It’s gotten to the point that some liquor licensees are afraid of approaching the agency for any guidance for fear this may spark an inspection.

Anecdotally, ORHMA members complain that liquor inspectors are unapproachable, uncommunicative, unfriendly, heavy-handed, unwilling to offer guidance and lack uniformity in how they handle situations. The ORHMA would like to know how the AGCO measures the effectiveness of its liquor inspectors? Licensees have suggested working with the AGCO on a mutually agreed-upon “Code of Conduct” that would outline, for example, the top ten AGCO offences and how to prevent contravention. One province, for example, uses regular sit-down meetings between the hospitality association and the inspections department to good effect to iron out concerns and enhance communication.

In the former LLBO, new licensees and transferees had to take an educational seminar that outlined their obligations under the *Liquor Licence Act* and regulations before receiving their liquor licence. While the AGCO does a good job communicating with existing licensees through TIP sheets, the *Licence Line*, website and inquiry phone line, there is little in the way of formal education for new licensees. Consideration might be given on re-establishing educational seminars not only for new licensees and transferees but possibly also as a sanction option as well as republishing the *Licensee Handbook*. (The current *Smart Serve* program emphasizes responsible serving practices but cannot provide all the answers to licensees.)

In the former Liquor Licence Board of Ontario, the philosophical underpinning was to gain licensee compliance through a hierarchy of strategies (a combination of proactive and reactive). These included licensee education, verbal cautions, written warnings, FINOPS (Field-Initiated Notices of Proposal) and, lastly, formal hearings. The review process leading to the decision of whether or not to issue an NOP was not the domain of a single person but included staff representation from the inspections, licensing, legal and executive sections of the agency. The latter is fairer as it draws on the collective knowledge of a number of staff members. *Review Guidelines* reflected a hierarchy of possible actions with suggested penalties for each offence type that included cautions and warnings for first or minor offences up to NOP issuance for more serious first or repeated transgressions.

What is the most successful approach to gain licensee compliance with the law? This is rather difficult to gauge as the AGCO, to our knowledge, has never measured the cost-effectiveness of different kinds of compliance strategies versus hearings. Relying only on a “zero tolerance” enforcement philosophy, hearings and suspensions/conditions as the only option toward gaining compliance is very expensive for both the licensee and the AGCO, time-consuming and, as presently contrived, has resulted in a significant backlog in hearings (eight months currently). The significant backlog not only creates undue anxiety for licensees who have the matter hanging over their heads for eight months, but also unduly delays those licence applicants that require a public interest hearing before obtaining their liquor licence. (Although, in fairness, the AGCO does try to give priority to public interest hearings.)

The Ontario Licence Appeals Tribunal (LAT) trumpets on its website that it has one of the quickest turnarounds on decisions in the Tribunal community (3 months). It achieves its cost-effectiveness through alternatives to full hearings such as pre-hearing conferences, settlement conferences, greater use of teleconferencing in addition to an effective case management system. On the latter point, LAT sets critical success goals, identifies those key business activities that affect those goals, continually measures the results being achieved and makes constant improvements to increase effectiveness.

The AGCO might also want to incorporate LAT's methods to address the hearings backlog as well as introduce the levying of fines as an administrative sanction. Levying fines is an option that other provincial liquor regulators use to good effect and it makes sense for Ontario. For example, New Brunswick, Saskatchewan, Alberta and British Columbia all have fines as an alternative to licence suspensions. In Alberta, there is even delegation of authority from the Board to the head of liquor compliance to negotiate and impose sanctions. As a result, Alberta has very little reliance on hearings (about 10 on the books at any time)

In fact, the AGCO (and former LLBO) has imposed substantial fines against beer manufacturers on several occasions over the past 20 years as a penalty for breaches of trade practices such as licensee inducements. There is therefore a precedent in Ontario for levying fines within the liquor regulatory agency

Another issue that requires addressing is the severity of the sanctions imposed by the AGCO. For example, one licensee was recently handed a two-week licence suspension for serving a minor. It was his first offence. Such undue severity serves to put the law into disrepute, invites licensee bankruptcy and only adds to increased animosity toward the agency. (For example, the penalty in another unnamed province is a \$2,000 fine or an eight-day licence suspension for serving 1 to 2 minors on first offence.)

The AGCO should undertake a study of the marginal deterrence of their own sanctions compared to those from other jurisdictions. (Marginal deterrence is a measure of the degree of deterrent or compliance effect by adding or subtracting incremental units of sanction.) Such a study would probably demonstrate that unduly harsh penalties have no increased marginal deterrent effect over lower penalties.

There is general agreement among the licensee community that there is no formal mechanism in place to address licensee grievances about the AGCO. Licensees feel their issues fall on deaf ears and go unresolved. The ORHMA recommends an impartial AGCO Ombudsman be appointed who would have the authority to deal with licensee complaints about the agency.

RECOMMENDATION 11

The ORHMA recommends that the AGCO adopt a general compliance model to replace the current “zero tolerance” enforcement philosophy that includes the following:

- **A more proactive stance for liquor inspections promulgated by greater reliance on licensee education and guidance;**
- **Develop standards of practice and behaviour for liquor inspectors that emphasize consistency, communication, education and guidance;**
- **Incorporate a hierarchy of sanctions in the Review Guidelines that makes greater use of cautions, written warnings or mandatory attendance at a licensee seminar;**

RECOMMENDATION 11 (cont'd)

- **Reestablish mandatory licensee seminars and the *Licensee Handbook* for new licensees, transferees and possibly as a sanction condition after a Board hearing;**
- **Add a regime of fines to the AGCO's Review Guidelines as a further sanction option for certain offences to replace licence suspensions;**
- **For certain offences, establish a more informal process other than hearings (like alternative dispute resolution, pre-hearing conferences, mediation or settlement conferences) that could incorporate fines as a penalty;**
- **The AGCO develop and use a case management system such as in the Licence Appeal Tribunal to help address the substantial hearings backlog;**
- **The AGCO undertake a comparative study on the marginal deterrence of their own sanctions and those of other jurisdictions;**
- **Initiate regular, round-table discussions between the Liquor Enforcement Branch of the AGCO and the ORHMA;**
- **Appoint an AGCO Ombudsman to address licensee grievances.**

12. False I.D. and Underage Drinking

The legal age to drink alcoholic beverages in Ontario has undergone some change since the lifting of Prohibition in 1927. The legal drinking age stood at 21 years until 1971 when it was dropped to 18. Because of evidence of drinking spilling over into high schools and a rise in impaired driving by young people, in 1978 the province took steps to raise the legal drinking age by one year to 19, where it stands to this day.

Major amendment to the *Liquor Licence Act (LLA)* and regulations in 1990 saw those under the legal drinking age being permitted into all licensed premises (unless there is a term and condition on the licence or the licensee has a house policy forbidding entry). Because of the mandatory light meals requirement and the primary business being the provision of food and liquor, it was reasoned that there should be no age restriction. The sections of the Act dealing with the onus on licensees to prevent the sale and service of beverage alcohol to minors were also strengthened at that time.

One of the major challenges that liquor licensees face is upholding their due diligence to prevent those under the legal age from drinking. This is especially true if a licensee operates the type of establishment that attracts young people. Just one lapse can result in substantial sanctions: being charged by the police as well as a minimum administrative penalty of a seven-day suspension (the only such administrative sanction specifically mentioned in the penalty section of the *LLA*). Recently, as part of the Stage 1 *LLA Review* package of amendments to the *LLA*, minimum fines for a licensee selling or serving liquor to a minor doubled to \$1,000.

Liquor licensees do not want to knowingly sell or serve minors. It is not just the penalties involved but these inexperienced drinkers present a high risk to themselves and others.

It seems a rite of passage through the ages for minors to try to obtain beverage alcohol, usually by borrowing I.D. from of-age persons or trying to manufacture their own fake I.D. This is spotted more easily. What makes it a real problem now is the proliferation of authentic-looking fraudulent I.D. available over the Internet, including provincial driver's licences. Such I.D. is not caught by licensees' scanners as all the information including the black swipe portion, is intact. There does not seem to be specific legislation whereby those who manufacture and distribute fake I.D. can be prosecuted, effectively stamping out the source. (Unless the offence is already captured under section 9 of the *Criminal Code of Canada*) The only offence that comes to mind is under the *Highway Traffic Act*, which makes possession of more than one driver's licence by a person against the law.

(In the U.S., the National Beer Wholesalers Association has been lobbying Congress to pass legislation addressing the issue of fake I.D. according to their website.)

Confounding the issue further, is those responsible for production and distribution of fake I.D. over the Internet may not even be in-country, making prosecution more difficult.

Although it is an offence under the *LLA* for a person to present as evidence of his or her age any documentation other than documentation that was lawfully issued to him or her [s. 30 (12)], those breaking the law are seldom charged. Police and liquor inspectors usually want a minor's co-operation as a witness in court or at a hearing and charging them might dissuade them from testifying. Even if charged, the penalty has little deterrent value being in the \$80 to \$100 range (or the judge may choose not to exact a fine). A minor can usually make up any fine through witness fees for testifying against the licensee. Police also look at the administrative costs and time to issue a POA ticket, compared to the penalty exacted, and feel it's too much bother. There is then little general or specific deterrence to dissuade minors from fraudulently obtaining drink: quite the opposite, there may be reward.

Demonstrating due diligence is sometimes a challenge for licensees especially when patrons are queued in long lines awaiting entry on a cold night while security staff simultaneously try to maintain order and check identification. Some patrons, once inside the establishment, may refuse to produce I.D. a second time.

Although there is a minimum fine for licensees for selling/serving to a minor (that fine has just been doubled), there is no concomitant and balancing minimum fine for minors obtaining drink on the basis of fraud. A minor could virtually destroy a licensee's enterprise with little or no consequence. (However, there was a case in Windsor several years ago where a licensee caught selling/serving to a minor sued the minor for loss of business during her licence suspension. The downside for a licensee suing a minor is the negative public optics and the difficulty in collecting any compensation.)

A second issue is the lack of jurisdiction for licensees to confiscate alleged fake I.D. from the person producing it. What usually happens is licensees end up with it in their possession through abandonment after the person producing it is challenged and threatened with calling the police. However, a licensee could technically be charged with theft if he or she confiscates the I.D. and won't return it. The legal ability for licensees to confiscate alleged fake I.D. to be turned over to the police should be incorporated in section 30 of the *LLA*.

Even though there is legal protection offered to a licensee who inadvertently sells/serves to a minor based on the minor producing fake I.D. [s. 30 (6)], through anecdotal feedback from licensees, it seems to be seldom heard about either at court or at AGCO hearings. The subsection in question states:

30 (6) A person who sells or supplies liquor to another person, permits another person to have or consume liquor in licensed premiseson the basis of documentation of a prescribed type is not in contravention of subsection (2), (4) or (4.1) if there is no apparent reason to doubt the authenticity of the documentation or that it was issued to the person producing it.

The five types of prescribed identification are found in Regulation 719 under s. 41 (5) and include:

- *A driver's licence issued by the province of Ontario with a photograph of the person to whom the licence was issued;*
- *A Canadian passport;*
- *A Canadian citizenship card with a photograph of the person to whom the card was issued;*
- *A Canadian armed forces card;*
- *A photo card issued by the Liquor Control Board of Ontario.*

Certain licensee members believe the failure of the legal protection to work as it should is a function of the lack of knowledge that the protection exists on the part of judges or Board members (or perhaps defence counsel?) and how it could be successfully invoked. This could be addressed through the AGCO publishing an article in its *Licence Line* and on its website outlining the protection offered a licensee as well as the points to prove for the section to be successfully invoked. Further, there is a reverse onus or burden of proof in that a licensee must prove due diligence i.e. guilty until proven otherwise. Perhaps the onus should be on the prosecution to prove a licensee didn't display due diligence.

A large flaw exists in s. 30(6) of the *Liquor Licence Act* and s 41 of Regulation 719 concerning a liquor licensee's **lack of legal protection for non-prescribed forms of I.D.** As described above, liquor licensees practicing due diligence are offered the legal protection of s. 30 (6) if a minor is inadvertently sold/served liquor on the basis of documentation of a prescribed type given in regulation 41 (5).

However, there is no legal protection under the *LLA* for a licensee who inadvertently sells/serves liquor to a minor on the basis of documentation of a non-prescribed type. Young patrons from the United States frequenting Ontario's licensed premises - an especially frequent occurrence in communities such as Windsor, Niagara Falls or Sault Ste. Marie - will not have a form of I.D. prescribed by regulation. In that instance, licensees must ensure *the item of identification includes a photograph of the person, state his or her date of birth and must reasonably appear to have been issued by a government* [s. 41 (3), Regulation 719].

Therefore, the legal protection offered licensees under 30 (6) should be extended to include non-prescribed forms of I.D. covered under s. 41 (3) of Regulation 719.

This issue and the recommendations concerning minors and fake I.D. are not just isolated to the liquor licensee community but also affect the entire distribution system. Addressing this issue can serve to enhance social responsibility for all liquor retailers.

RECOMMENDATION 12

The ORHMA recommends:

- **The proper government authority be encouraged to pass legislation to create an offence to manufacture and distribute fake I.D.;**
- **Section 61 of the *Liquor Licence Act* be amended to create a sizeable minimum fine for minors fraudulently obtaining liquor through showing false I.D. to give the offence greater gravity and to provide general and specific deterrence;**
- **Police and liquor inspectors should have to charge minors who are illegally consuming on the basis of showing fraudulent I.D. if also charging licensees;**
- **The AGCO highlight the defence offered liquor licensees showing due diligence and who inadvertently serve a minor based on fraudulent I.D. [s. 30 (6)]. An article in the *Licence Line* and on the AGCO website should include the points that require proving upon a licensee invoking this defence;**
- **The onus or burden of proof currently found in the legal protection offered licensees under s. 30 (6) should be reversed to place the onus on the prosecution that a licensee didn't demonstrate due diligence on production of false I.D.**
- **The legal protection offered licensees under 30 (6) must be extended to include non-prescribed forms of I.D. covered under s. 41 (3) of Regulation 719.**

ORHMA SUMMARY OF RECOMMENDATIONS TO THE BEVERAGE ALCOHOL SYSTEM REVIEW

RECOMMENDATION 1: Wholesale Pricing Regime

The ORHMA recommends that the government implement a true wholesale pricing regime for liquor licensees that would result in revitalization of the foodservice industry and tourism, protect current jobs, create more jobs and ultimately increase government revenues. The amount of the discount should be at least equivalent to the discounts available to the LCBO's agency store system from TBS/BRI and the LCBO i.e. 11.5%.

RECOMMENDATION 2: Gallonage Fee

The ORHMA recommends the immediate elimination of the gallonage fee *in toto* as an invalid tax *ultra vires* the province.

RECOMMENDATION 3: Value Adds and Price Specials

The ORHMA recommends that licensees be able to receive the same product rebates, discounts, and specials available to the home consumer from TBS/BRI and Value-Adds from the LCBO and put an end to liquor licensees cross-subsidizing home consumers.

RECOMMENDATION 4: Beer Pricing

The ORHMA recommends that, due to the private and foreign-controlled oligopoly operating the province's beer market, there be a return to the former policy of beer price control whereby beer manufacturers must provide rationale for any price increases. An accountable entity should be established to oversee regulation of the Ontario beer market. The beer price process and approvals should be transparent i.e. made available to the public in a regular reporting form, in addition to other sales-related information. The approval process should receive input from consumers and licensees. Any government policies that can improve selection and return competition to the beer market should be encouraged. TBS/BRI should undergo a public audit to ensure that they are living up to the mandate given them in 1927 as a true co-operative.

The ORHMA further recommends that TBS/BRI allow licensees to use a credit card to purchase beer as is permitted for home consumers.

RECOMMENDATION 5: Greater Flexibility in Licensee Price Setting

The ORHMA recommends liquor licensees be given greater flexibility in setting prices in their licensed premises.

RECOMMENDATION 6: All-Inclusive Travel Packages

The ORHMA recommends that the AGCO's *Advertising Guidelines*, s. 20.1 and s. 20 (4) of Regulation 719 be expanded to permit Ontario's accommodation and foodservice sectors the ability to offer beverage alcohol as part of an all-inclusive travel package similar to many other world travel destinations.

RECOMMENDATION 7: Licensee Off-Premise Retail Sales

The ORHMA recommends that the government allow liquor sales licensees to sell beer, wine and spirits to consumers at retail for home consumption in addition to on-premises sale and service, as is done in five other provinces. The ORHMA disagrees strongly with the retail sale of beer and wine in corner stores as it does not make sense for Ontario economically or from a social responsibility standpoint.

RECOMMENDATION 8: Shared Distribution

The ORHMA recommends that TBS/BRI and the LCBO combine and co-ordinate the distribution functions to provide liquor licensees with a more efficient and effective means of product selection and delivery. Any savings as a result of more efficient distribution should be reflected in lower prices to licensees. We further recommend that the government allow third-party, private bonded warehouses for distribution of beverage alcohol similar to licensed agents of foreign manufacturers in British Columbia.

RECOMMENDATION 9: LCBO Advertising

The ORHMA recommends that the LCBO establish a business case to determine what, if any, return on investment there is in their advertising. The LCBO provide coverage of the hospitality industry in its advertising publications in addition to its sole emphasis on home entertaining.

RECOMMENDATION 10: Separation of Powers in the AGCO

The ORHMA recommends separating the adjudicative function of the Board of Directors of the AGCO from the balance of the Commission to prevent the apprehension or perception of bias and erosion of the credibility of the AGCO.

RECOMMENDATION 11: Hierarchy of Sanctions

The ORHMA recommends that the AGCO adopt a general compliance model to replace the current "zero tolerance" enforcement philosophy that includes the following:

- A more proactive stance for liquor inspections promulgated by greater reliance on licensee education and guidance;

- Develop standards of practice and behaviour for liquor inspectors that emphasize consistency, communication, education and guidance;
- Incorporate a hierarchy of sanctions in the Review Guidelines that makes greater use of cautions, written warnings or mandatory attendance at a licensee seminar;
- Reestablish mandatory licensee seminars and the *Licensee Handbook* for new licensees, transferees and possibly as a sanction condition after a Board hearing;
- Add a regime of fines to the AGCO's Review Guidelines as a further sanction option for certain offences to replace licence suspensions;
- For certain offences, establish a more informal process other than hearings (like alternative dispute resolution, pre-hearing conferences, mediation or settlement conferences) that could incorporate fines as a penalty;
- The AGCO develop and use a case management system such as in the Licence Appeal Tribunal to help address the substantial hearings backlog;
- The AGCO undertake a comparative study on the marginal deterrence of their own sanctions and those of other jurisdictions;
- Initiate regular, round-table discussions between the Liquor Enforcement Branch of the AGCO and the ORHMA;
- Appoint an AGCO Ombudsman to address licensee grievances.

RECOMMENDATION 12: False I.D. and Underage Drinking

The ORHMA recommends:

- The proper government authority be encouraged to pass legislation to make it an offence to manufacture and distribute fake I.D.;
- Section 61 of the *Liquor Licence Act* be amended to create a sizeable minimum fine for minors fraudulently obtaining liquor through showing false I.D. to give the offence greater gravity and to provide general and specific deterrence;
- Police and liquor inspectors should have to charge minors who are illegally consuming on the basis of showing fraudulent I.D. if also charging licensees;
- The AGCO highlight the defence offered liquor licensees showing due diligence and who inadvertently serve a minor based on fraudulent I.D. [s. 30 (6)]. An article in the *Licence Line* and on the AGCO website should include the points that require proving upon a licensee invoking this defence;
- The onus or burden of proof currently found in the legal protection offered licensees under s. 30 (6) should be reversed to place the onus on the prosecution that a licensee didn't demonstrate due diligence on production of false I.D.
- The legal protection offered licensees under 30 (6) must be extended to include non-prescribed forms of I.D. covered under s. 41 (3) of Regulation 719.