

A LEGAL REVIEW OF ALCOHOL DELIVERY SERVICES IN ONTARIO

**Prepared for
Association to Reduce Alcohol Promotion in Ontario
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INTRODUCTION

In recent years, a number of concerns have been expressed about the availability of alcohol through various alcohol delivery systems. These concerns range from sales through the internet and mail, to the more traditional delivery services. It is feared that these services provide a source of alcohol for those under 19, those who are already intoxicated, and for the elderly, infirm or other vulnerable populations. Finally, the advertising and marketing practices of such services have also been a source of concern.

The purpose of this paper is to analyze the statutory framework within which alcohol delivery services currently operate in Ontario, to identify the potential statutory and civil liability associated with them, and to suggest how the above-mentioned concerns may be addressed and the current system improved.

The remainder of this paper is divided into six sections. In the first section, we examine the current statutory framework governing alcohol delivery systems in Ontario. The second section outlines the general provisions of the *Liquor Licence Act*¹ (*LLA*) that apply to alcohol delivery services. In section three, we review the legal principles governing the advertising and marketing of liquor in Ontario. Section four examines the enforcement of the *LLA* and the consequences of its violation. In section five, we consider the potential civil liability of individual delivery service operators. Finally, in section six, we identify the problems with the current system and the steps that may be taken to address these problems.

SECTION 1: THE CURRENT STATUTORY FRAMEWORK

a) Introduction

In Ontario, the manufacture, distribution, sale and consumption of liquor is governed by three statutes – the *LLA*, the *Liquor Control Act (LCA)*² and the *Alcohol and Gaming Regulation and Public Protection Act, 1996*³ (*AGA*). Although the Acts use “liquor” throughout, the term is defined broadly enough to encompass virtually all forms of beverage alcohol. For the purposes of this paper, we use the terms “liquor” and “alcohol” interchangeably. The *LLA* contains specific provisions governing liquor manufacturers, various types of licences for on-premise consumption, and special occasion permits. The *LLA* also contains general provisions, including: the age and place of consumption; the pricing, transporting and advertising of alcohol; the broad powers of police, liquor inspectors and the Board of the Alcohol and Gaming Commission of Ontario (*AGCO*), and the Registrar of Alcohol and Gaming (*Registrar*); and the penalties for, and licensing consequences of, violating the Act. In contrast, the *LCA* is more limited in scope, and largely addresses the “off-premise” sale of alcohol products at liquor, beer and wine stores, and the authority of the Liquor Control Board of Ontario (*LCBO*).

The three statutes form a complex and tangled web governing liquor in Ontario. The resulting framework often makes it impossible to tell on the face of the legislation whether the LCBO, the Board of the AGCO or the Registrar is empowered to act. The confusion stems from the fact that the *AGA* gave authority to administer the *LLA* to the AGCO⁴ and then provided that the specific powers of the Registrar and the Board of the AGCO would be dictated by regulation.⁵ Thus, one must examine the *AGA* regulations to discover whether the Board of the AGCO or the Registrar exercises a particular power.

The situation is further complicated because the *AGA* also authorized the Lieutenant Governor in Council to transfer powers under the *LCA* to the Board of the AGCO or the Registrar. Powers originally exercised by the LCBO under the *LCA* might now have been transferred to the AGCO, provided that the Lieutenant Governor in Council has effected the assignment. For example, under section 3(1)(b) of the *LCA*, it would appear that the LCBO “has power to control the sale, transportation and delivery of liquor.” However, the Lieutenant Governor has assigned this power to the Registrar in an *AGA* regulation.⁶

Finally, although the *LLA* sets out the formal requirements for a licence to deliver alcohol in section 10, the Act still authorizes the LCBO, under section 5(4), to exempt an individual from these requirements. However, the LCBO’s authority “to control the sale, transportation and delivery of liquor” under section 3(1)(b) of the *LCA* was transferred to the Registrar by regulation on July 3, 2001.

b) Licensing of Alcohol Delivery Services Under the *LLA*

Section 5 of the *LLA* contains broad prohibitions against offering to sell, selling, soliciting orders for, or delivering alcohol for a fee unless a person has a licence under the *LLA* or authority under the *LCA*. The term “sell” is defined broadly to mean “supply for remuneration, directly or indirectly, in any manner by which the cost is recovered from the person supplied, alone or in combination with others.”⁷ Thus, a taxi driver who delivered a case of beer to a customer would be in violation of two provisions of the *LLA*, unless he or she was licensed or exempted from the licence requirements. The driver would have breached subsections 5(1) and (3), which prohibit unauthorized sales and deliveries. Section 27 of the *LLA* creates a parallel prohibition against purchasing alcohol, “except from a government store or from a person authorized by licence to sell liquor.”

Under section 10(1), any person may apply to the Registrar for a licence to deliver alcohol.⁸ An applicant is entitled to be issued a licence, unless disentitled under section 6(2)(a) to (g), or prohibited under section 10(5) of the *LLA*. The criteria for disqualification include situations in which: the applicant cannot reasonably be expected to act in a financially responsible manner; there are reasonable grounds to believe the applicant will not conduct business in accordance with the law, and with integrity and honesty; the applicant or his or her employee or agent made a false statement in the application; the applicant is acting in a manner which, if he or she were licensed, would contravene the Act or regulations; and the applicant’s premises, accommodation, equipment, and facilities are not in compliance with the Act and regulations.

Section 10(5) of the *LLA* is designed to prevent delivery services from promoting the products of particular manufacturers. It prohibits the issuance of a delivery licence to a manufacturer, or to a person who has an agreement to sell or deliver the liquor of any manufacturer. Similarly, a delivery licence cannot be issued to a person who has a financial interest in, or will otherwise likely promote, the sale and delivery of a particular manufacturer's liquor.

The Registrar is required to issue a delivery licence to any person whose application has been approved in accordance with the *LLA*, who complies with the *LLA* and its regulations, and who pays the required fee, which is currently \$1,000.⁹ A delivery licence is subject to any conditions prescribed by the regulations and may be subject to additional conditions consented to by the applicant or imposed by the Board of the AGCO. Subject to certain procedural requirements, the Board of the AGCO may add to, alter or remove the non-regulatory conditions. Again, subject to certain procedural requirements, the Board of the AGCO may also revoke, suspend or refuse to renew an alcohol delivery licence for any reason that would have disentitled an applicant to a licence, or if the licensee contravened the *LLA*, the regulations or a condition of the licence.¹⁰

Since the exemptions under section 5(4) of the *LLA* have not been repealed, there remain two distinct systems for establishing a delivery service – a licensing system under section 10 of the *LLA* and an authorization system under section 5(4) of the *LLA*. However, as explained, both of these systems now appear to fall under the authority of the Registrar.

c) Delivery Under an *LLA* Licence

A person who has obtained a licence to deliver liquor from the Registrar is subject to several mandatory conditions.¹¹ After receiving an order from another person who is legally entitled to purchase liquor, the licence holder must purchase liquor from either an LCBO or a Brewers Retail store as agent for that person.¹² The order must be recorded on a form indicating the name and address of the licence holder, the name and address of the customer, the kinds and quantities of liquor to be purchased and the address where the liquor is to be delivered.¹³ The delivery must be made to the address on the order form. The licence holder must obtain from the customer or from another resident who is at least 19 a receipt stating the customer's name and address, the date of delivery, the kinds and quantities of liquor delivered, the price of the liquor, the delivery fee and the name of the person making the delivery.¹⁴ The delivery is not complete unless the licence holder obtains the signed receipt.¹⁵ The licence holder must retain copies of the order form and signed receipt for at least one year.¹⁶ Finally, the licence holder must charge the minimum fee as set in *Reg. 718*.¹⁷

"A person who has obtained a licence to deliver liquor from the Registrar is subject to several mandatory conditions."

Delivery of the liquor must occur on the same day that the order is placed and no later than one hour after the closing of the store from which the liquor was purchased.¹⁸ The licence holder is required to inspect one of the following forms of identification for a customer who appears to be under 19: an Ontario photo-identification driver's licence; a Canadian passport; a Canadian citizenship card with a photograph; a Canadian armed

forces identification card; an AGCO proof-of-age card; an LCBO proof-of-age card; or any other government-issued, photo-identification that lists the date of birth.¹⁹

The licence holder must carry on business under the name on the licence. The Registrar may authorize the licensee to use another name provided that it would not mislead the public as to the licensee's obligations.²⁰ Presumably, this would preclude a delivery service calling itself "No ID Required" or "Booze for Kids." Liquor cannot be delivered to a patient in an alcohol abuse treatment centre.²¹ Finally, the licence holder cannot contract out the delivery of liquor, unless the contractee has obtained a licence transfer from the Registrar and the contractor has filed a signed authorization with the Registrar.²²

SECTION 2: GENERAL PROVISIONS UNDER THE *LLA*

Any person providing liquor to another person is subject to the general provisions of the *LLA*. This is true whether the person is a private social host, a licensee or permittee under the *LLA*, or is acting pursuant to authorization. For our purposes, the most relevant general provisions relate to the transportation of liquor, and the sale or supply of liquor to those who are underage or intoxicated. Under section 61(1)(c) of the *LLA*, any violation of these or any other provision of the Act or regulations is an offence, and is subject to the stipulated penalties. Even if no charge is laid, the Board of the AGCO may suspend, revoke or refuse to renew the licence or permit of a person who contravenes the Act or its regulations.

a) Provision to and Possession by the Underage

The *LLA* provides that no person shall knowingly sell or supply liquor to a person who is under 19²³ or to a person who appears to be under 19.²⁴ Since the age of a customer or patron will rarely be known, the majority of convictions arise from selling or supplying

"No person shall knowingly sell or supply liquor to a person who is under 19 or to a person who appears to be under 19."

liquor to those who are apparently underage. In order to reduce the problems of identifying the underage, the government has established a system for issuing proof-of-age cards and recognizing certain forms of identification. Thus, the Act specifically exempts from liability those who can prove that they reasonably relied on an AGCO proof-of-age card, a

LCBO proof-of-age card, an Ontario photo-identification driver's licence, a Canadian passport, a Canadian citizenship card with a photograph, or a Canadian Armed Forces identification card.²⁵ By regulation, licensees are required to inspect one of these items of identification or another government-issued, photo-identification document before selling or supplying liquor to anyone who is apparently underage.²⁶ As indicated, parallel proof-of-age provisions apply to those operating under an alcohol delivery licence.²⁷

Given the Act's broad definition of the term "sell," a private operator delivering alcohol to a customer would be "selling liquor." In any event, the underage provisions apply to both selling and supplying liquor. Consequently, a delivery service could be prosecuted if it left liquor with a person who was apparently underage, unless the service could establish that it had reasonably relied on one of the specified types of documentation.

Moreover, section 30(8) of the *LLA* prohibits any person under 19 from having, consuming, attempting to purchase, purchasing, or otherwise obtaining liquor. Consequently, a delivery service could not employ anyone under 19 to deliver alcohol. While the *LLA* contains several exemptions from section 30(8),²⁸ none is applicable to an 18-year-old who delivers liquor or, for that matter, receives liquor from a delivery service.

b) Provision to the Intoxicated

Section 29 of the *LLA* prohibits selling, supplying or permitting liquor to be sold or supplied to any person who is or appears to be intoxicated. This prohibition is very broad, applying equally to licensees, permittees, government liquor stores, beer stores, private social hosts, and alcohol delivery services. The Act prohibits giving alcohol to people who appear intoxicated and to those who, while apparently sober, are in fact intoxicated.²⁹ Unfortunately, neither the legislation nor the courts have defined the term “intoxicated.” In several civil liability cases, the courts appear to equate a blood-alcohol concentration (BAC) of .08% or more with intoxication.³⁰ This is the level at which it is a federal criminal offence to drive or have care or control of a motor vehicle.³¹ It is unclear whether this standard will be adopted in prosecutions under section 29 of the *LLA*, since most of the reported prosecutions involve individuals who were very intoxicated.³² However, until there is a definitive court ruling, the most prudent course is to assume that the *LLA* prohibits serving or supplying anyone who has or appears to have a BAC of .08% or higher.

Invariably, the staff of a delivery service would rely on visible signs of intoxication in determining whether a customer is intoxicated or apparently intoxicated. These signs could include slurred speech, unsteady gait, dilated pupils, a heavy odour of alcohol on the customer’s breath, inappropriate responses to questions, loud or boisterous conduct, and a lack of physical co-ordination. Unlike the situation in a licensed bar, the staff of a delivery service will likely have a limited opportunity to observe customers and a very short period of time in which to determine if they are intoxicated or apparently intoxicated. Nevertheless, a driver who delivered liquor to a customer who was in fact or apparently intoxicated would be in violation of section 29 of the *LLA*.

c) Transporting Liquor

The *LLA* prohibits a person from driving or having care or control of a motor vehicle while any liquor is in the vehicle, unless the liquor is in an unopened container with an

“Liquor transported in the delivery vehicle must remain unopened or kept out of reach of the driver and any passengers.”

unbroken seal, or the liquor is packed in baggage that is not readily available to any person in the vehicle.³³ While the Act contains limited exemptions,³⁴ these are not applicable to alcohol delivery services. Consequently, any liquor transported in the delivery vehicle must remain unopened or kept out of reach of the driver and any passengers.

SECTION 3: ADVERTISING AND MARKETING LIQUOR

a) Introduction

The law governing liquor advertising and marketing is complex. In addition to provincial law, there is federal legislation governing the broadcast advertising of liquor. We have discussed the federal legislation in another publication³⁵ and it will not be further analyzed here. In any event, delivery services are unlikely to undertake major broadcast advertising campaigns. However, it should be noted that the federal legislation prohibits any broadcast advertising that would violate the provincial advertising legislation.

b) Ontario Alcohol Advertising Legislation

Even within Ontario, the regulatory framework governing alcohol advertising is convoluted. In order to understand the regulatory framework governing advertising by alcohol delivery services, it is necessary to review the relevant provisions of the *LLA* and its regulations, the 1994 Advertising Guidelines³⁶ and the specific advertising provisions governing alcohol delivery licences.

i. Advertising Under the *LLA* and Its Regulations

In Ontario, liquor advertising is governed almost exclusively by the *LLA*. Section 38(1) of the Act prohibits all advertising, unless it is specifically authorized by the regulations. In turn, the regulations authorize licensees³⁷ and permittees³⁸ to advertise in certain limited circumstances. In virtually all other situations, the regulations require that any advertising by licensees, permittees and manufacturers be approved in advance by the Registrar.³⁹ Neither the Act nor the regulations provide criteria for the Registrar's exercise of authority to approve or reject advertisements. The Board of the AGCO also has statutory power to order the cessation of any advertisement if two Board members believe that it contravenes the *LLA* or its regulations.⁴⁰ A person affected by such an order may request a hearing.⁴¹

ii. The 1994 Advertising Guidelines

In addition to stated principles, the *Guidelines* contain extensive commentary, explaining and illustrating how the principles will likely be interpreted. However, the *Guidelines* merely reflect the current policy, which may be changed at any time. The *Guidelines* do not have the force of law and, consequently, are not binding on the courts, the Board of the AGCO, or even the Registrar. If a guideline or its interpretation is inconsistent with the Act or the regulations, the courts are required to give effect to the legislation. This limitation appears to be recognized in the document itself, where it is stated: “[t]he purpose of these guidelines is to outline the potential interpretations of the regulations. By no means is this an exhaustive list of all interpretations.”⁴²

The *Guidelines* begin with a broad definition of advertising that includes any public notice, representation, promotion, or marketing activity that is intended to attract

attention to liquor, the brand name, the name of a premises where liquor is available, or the name under which a licensee carries on business. The heart of the *Guidelines* is section 1, which is entitled “Guidelines for all Licensees, Permit Holders and Manufacturers.” The *Guidelines* were introduced seven years before the first alcohol delivery licences were issued. However, the wording of the *Guidelines* is broad enough to encompass holders of alcohol delivery licences.

Section 1(1) states that advertising must be consistent with the principles of responsibility in depicting the use and service of liquor. The commentary indicates that an advertisement cannot depict excessive or prolonged consumption, an excessive quantity of liquor, or drinking in circumstances in which it would pose a risk. The next two subsections purport to prohibit what is generally referred to as “lifestyle advertising.” Section 1(2) provides that an advertisement may promote a particular brand or type of liquor, but must not promote liquor consumption in general. Section 1(3) states that an advertisement must not imply that liquor consumption is required for: social or professional achievements, personal success, athletic prowess, sexuality or sexual opportunity, enjoyment of any activity, fulfilment of any goal, or resolution of social, physical or personal problems.

“Delivery services are subject to the Alcohol Advertising Guidelines.”

Section 1(4) provides that, except for public service advertising,⁴³ an advertisement involving liquor must not appeal, either directly or indirectly, to persons under the legal drinking age, or be placed in media that are targeted at those who are underage. The enforcement of the Guidelines is not a matter that falls within the scope of this paper. Nonetheless, we feel compelled to note that we cannot reconcile the prohibitions in section 1(2), (3) and (4) with what appears daily in many liquor commercials and print advertisements.

Section 1(5) prohibits associating consumption with any activity that requires care and skill, or involves physical danger. Section 1(6) specifically prohibits associating consumption with driving a motor vehicle. Moreover, except for public transportation, motor vehicles cannot be depicted in advertisements that include consumption. Sections 1(5) and (6) also include an exception for public service advertising. Under section 1(7), no advertisement can include a suggestion of any illegal sale, purchase, gift, handling, or consumption of liquor. Finally, section 1(8) prohibits any person from offering a gift or the opportunity to receive a gift that requires the purchase of liquor, except for a gift of a nominal value relative to the product’s regular purchase price.

Section 3(2) of the *Guidelines* provides that manufacturers do not need the Registrar’s prior approval for advertisements appearing within licensed premises in a form prescribed by the Board of the AGCO, or advertisements displayed within or made on behalf of government stores. Even though prior approval is not required, these advertisements must still comply with all of the other guidelines. In our view, these provisions of the *Guidelines* conflict with the regulations, which specifically require a regulatory exemption for all advertising. The *Guidelines*, which do not have the force of law, cannot authorize what the regulations specifically prohibit. This conflict can be readily resolved by expressly incorporating the *Guidelines* into the regulations. Alternatively, the regulations to the *LLA* could be amended to permit liquor advertising that has been approved by either the Registrar or the LCBO. Despite the questionable legality of section 3(2), it will not likely be challenged in the immediate future. First, the

legal basis for such a challenge is quite technical. Second, and perhaps more importantly, none of the affected parties appears to have an interest in challenging the status quo.

iii. Advertising by Holders of Alcohol Delivery Licences

Section 38(1) of the *LLA* which prohibits all advertising unless it is specifically authorized by the regulations applies to alcohol delivery licences. In turn, the regulations prohibit delivery services from advertising without the Registrar's prior approval, except in the following situations.⁴⁴ Licence holders may state in an advertisement, without approval: that they are licensed by the AGCO to deliver alcohol from an LCBO or Brewers Retail store to a person's residence; their name, address, phone and fax numbers, e-mail address, and delivery fees; and the general types of alcohol available. In all other circumstances, the licence holder would require the Registrar's prior approval. As indicated, the *Guidelines* would also apply to alcohol delivery licences.

The regulations contain specific prohibitions precluding advertising that promotes the immoderate consumption of alcohol, suggests that liquor is offered for sale by the licence holder, or targets those under 19 years of age.⁴⁵ Finally, as indicated, an alcohol delivery service must operate under the name on its licence, unless the use of another name would not mislead the public as to the licensee's obligations under the Act or its regulations and the Registrar has approved that name.⁴⁶

c) Promotions and Inducements

The *LLA* and its regulations prohibit specified types of marketing by manufacturers, licensees and permittees. In this section, we outline those restrictions on marketing that are most relevant to alcohol delivery services.

Manufacturers are prohibited from giving liquor to any person, unless specifically authorized to do so by the regulations.⁴⁷ In turn, the regulations create a small number of narrowly defined exceptions to the general prohibition. The most relevant exception authorizes manufacturers to give limited quantities of liquor to a person for the purpose of sampling a new product.⁴⁸ Sections 10(1) and (2) of the *Guidelines* outline how the Board of the AGCO will determine whether the gift is for the purpose of sampling. In the case of an individual, the sample must be provided within a year of the introduction of the new brand and must be distributed by the manufacturer's licensed agents or registered representatives. The size of the sample per individual cannot exceed six (355 ml.) bottles of beer or cooler, one (750 ml.) bottle of wine or one (375 ml.) bottle of spirits. Thus, manufacturers could give, and staff of delivery services could accept, limited quantities of alcohol under this provision.

Now that control over delivery services has been transferred to a licensing system under section 10 of the *LLA*, additional marketing restrictions apply. Section 10(5) of the *LLA* specifically prohibits the Board of the AGCO from issuing a delivery licence to a person who has an agreement to, a financial interest in, or would likely promote the sale or delivery of the liquor of any particular manufacturer. Manufacturers are prohibited from directly or indirectly offering, or giving a financial or material inducement to, a licensee

or permittee for the purpose of increasing the sales or distribution of their products.⁴⁹ Licensees are subject to a corresponding prohibition against directly or indirectly requesting, demanding or receiving any financial or material benefit from any manufacturer or its representatives or employees.⁵⁰ Although there are additional restrictions on those with “sales licences,”⁵¹ this would not appear to include delivery licences. Delivery services are now also subject to section 1(8) of the *Guidelines*, which prohibits any person from offering a gift or the opportunity to receive a gift that requires the purchase of liquor, unless the gift is of nominal value relative to the product’s regular purchase price.

Two limits on promotions and inducements apply exclusively to holders of delivery licences.⁵² However, these limits add nothing, as the conduct is already prohibited by the *LLA* and other regulations. First, a holder of a delivery licence is prohibited from offering or giving alcohol to a customer as a prize in a contest.⁵³ Second, a holder of a delivery licence may not, directly or indirectly, demand or receive any financial or material benefit from an alcohol manufacturer or its representatives or employees.⁵⁴

SECTION 4: ENFORCEMENT POWERS AND SANCTIONS

a) Enforcement Powers

Both the *LLA* and the *LCA* grant designated officials broad powers of entry, search, investigation and seizure. These powers are geared to inspecting licensed establishments, events held under a permit, retail liquor outlets, and liquor production, manufacturing and warehousing facilities. The current law is not designed to investigate delivery services, which conduct critical aspects of their business in the private residence of their customers.

i. Authority Under the *LLA*

The police⁵⁵ and any persons designated as inspectors by the Board of the AGCO⁵⁶ may enter any place, without a warrant, at any reasonable time to ensure that the Act and regulations are not being violated.⁵⁷ However, this does not entitle inspectors or the police to enter dwellings or rooms actually used as dwellings without the occupier’s consent.⁵⁸ In order to enter and search a dwelling or room used as a dwelling, an inspector or officer requires a warrant from a justice of the peace.⁵⁹

Inspectors and police may also request, inspect and seize “things and documents” that may be relevant to the inspection.⁶⁰ Inspectors have additional powers to inquire into the financial dealings of a licensee or permittee,⁶¹ conduct reasonably necessary tests⁶² and remove materials or substances for testing.⁶³ It is an offence to obstruct an inspector or police officer, or withhold, destroy, conceal, or refuse to provide relevant information or things.⁶⁴ It is a condition of each licence and permit that the licensee or permittee facilitate an inspection.⁶⁵ A police officer who has reasonable grounds to believe that liquor is being illegally kept in a vehicle or boat may at any time, without a warrant, enter and search the vehicle or boat and any person found in it.⁶⁶ Moreover, persons designated by the Chair of the Board of the AGCO may enter and search, without a

warrant, vehicles, vessels, aircraft and trains, if they have reasonable grounds to believe that they contain evidence of any contravention of the *LLA*, *LCA* or the regulations.⁶⁷

ii. Authority Under the *LCA*

Inspectors designated by the LCBO⁶⁸ may enter, without a warrant, premises at which liquor is sold, served, manufactured or stored, or at which there are related books or records for the purpose of ensuring compliance with the *LLA*, *LCA*, the *Wine Content Act*, and the related regulations.⁶⁹ If designated by the Chair of the Board of the AGCO, an LCBO inspector may also search, without a warrant, vehicles, vessels, aircraft and trains that he or she reasonably believes contain evidence of any contravention of the *LLA*, *LCA* or the regulations.⁷⁰ An inspector may inquire into the financial dealings of those granted an authorization⁷¹ and may demand production of any relevant records or documents.⁷² It is an offence to obstruct an inspector.⁷³ Licensees, permittees, manufacturers, importers, and anyone granted an authorization under the *LCA* must answer an inspector's relevant inquiries.⁷⁴

Despite their otherwise broad powers, LCBO inspectors require a search warrant to enter and search any place used as a dwelling.⁷⁵ Since transactions between delivery services and their customers take place in dwellings, an inspector will rarely be able to determine if liquor is being provided to underage or intoxicated customers. Moreover, the LCBO appears to lack the necessary resources to monitor delivery services.

b) The Scope of Liability and Sanctions Under the *LLA*

Any person who contravenes any provision of the Act or regulations is guilty of a provincial offence.⁷⁶ Depending on the circumstances, both the front-line staff member and his or her supervisor may be prosecuted. Moreover, any director or officer of a corporation who caused, authorized, permitted, or participated in an offence under the Act or regulations may be prosecuted individually, in addition to the corporation.⁷⁷

The maximum penalties are substantial. Any individual convicted of an offence, other than underage sale or supply, may be fined up to \$100,000 and imprisoned for one year.⁷⁸ The maximum fine for a corporation is \$250,000.⁷⁹ Individuals convicted of selling or supplying alcohol to those who are underage are subject to a minimum fine of \$100⁸⁰ and may be fined a maximum of \$200,000.⁸¹ Licensees convicted of underage service are subject to a minimum fine of \$500⁸² and a minimum licence suspension of seven days.⁸³ A corporation may be fined up to \$500,000 for this offence.⁸⁴

In addition to prosecution, licensees, permittees and those acting under authorization may be subject to significant administrative sanctions for any contravention of the *LLA*, *LCA*, regulations, or the conditions of the licence, permit or authorization. Moreover, these powers to impose administrative sanctions may be invoked independently of any prosecution. In other words, following a hearing, the Board of the AGCO could revoke a delivery service's licence if it concluded that an operator breached the legislation, even if no charge were laid.

SECTION 5: THE POTENTIAL ALCOHOL-RELATED LIABILITY OF DELIVERY SERVICES

a) Introduction

There are three potential bases of liability that may apply to an alcohol delivery service: liability for providing liquor to customers who are intoxicated, under 19 years old, or who are otherwise vulnerable, such as the elderly or disabled. As we shall discuss, actions brought on the first basis of liability currently have the greatest chance of success. The courts have not yet been called upon to decide if simply providing alcohol to a person under 19 gives rise to civil liability. Moreover, while there may be valid concerns about delivery services targeting vulnerable groups, liability is not likely to be imposed unless the vulnerable person is already intoxicated or otherwise obviously at risk of imminent harm.

b) Liability for Providing Alcohol to the Intoxicated

i. Introduction

The case law indicates that a delivery service may be held civilly liable for providing alcohol to intoxicated customers who subsequently injure themselves or others. However, the court may be reluctant to impose liability unless it was apparent that the customer intended to drive or there was some other risk factor in addition to the customer's intoxication.

There are two independent bases for holding alcohol providers liable in Ontario – the common law and section 39 of the *LLA*. Section 39 only applies if the defendant sells liquor to individuals whose condition is such that consumption would apparently intoxicate them or increase their intoxication to the point that they would endanger themselves or others. Moreover, the section only applies if the intoxicated person dies or injures a third party. An intoxicated person who merely injures him or herself has no statutory cause of action. Although statutory liability is limited to those who “sell” alcohol, this term is defined broadly enough to encompass delivery services.

The common law imposes a far broader duty of care on alcohol providers than section 39 of the *LLA*. The common law duty is not limited to situations involving sales or to cases in which the intoxicated individual dies or injures a third party. Consequently, almost all of the provider liability cases are brought under the common law and that will be our focus in the remainder of this section.

Although the term “provider liability” is a convenient short form for the principle, it is somewhat misleading. Individuals are not held liable simply because they serve alcohol to a person who subsequently injures him or herself, or others. Rather, provider liability is limited to cases in which a person is served past the point of intoxication or served when he or she is already intoxicated. It is important to remember that such conduct is illegal under the *LLA*. Neither section 39 nor the common law imposes civil liability on individuals who provide or serve alcohol lawfully and responsibly.

"The Liquor Licence Act and the courts have not defined intoxication for civil liability purposes. Rather, the courts appear to equate intoxication with a BAC of more than .08%."

As indicated, the *LLA* and the courts have not defined intoxication for civil liability purposes. Rather, the courts appear to equate intoxication with a BAC of more than .08%⁸⁵ -- the level at which it becomes a federal criminal offence to drive.⁸⁶ However, as we shall discuss, almost all the provider liability cases involve individuals whose BACs were close to double the legal limit or more. Typically, the individuals were served even though they were visibly intoxicated or had already been served large quantities of alcohol. Indeed, the latest Supreme Court of Canada decision suggested that provider liability requires overservice as well as some other risk factor, such as obvious impairment or knowledge that the individual plans to drive.

ii. *Jordan House Ltd. v. Menow (1974)*⁸⁷

In this landmark case, the Supreme Court of Canada imposed a common law duty on alcohol providers to protect their intoxicated patrons. Menow, a regular patron, had previously been banned from the hotel because of his tendency to become intoxicated, irresponsible and annoying. Once the ban was lifted, the staff were instructed not to serve him unless a responsible adult accompanied him. On the night of the crash, Menow entered the hotel with friends but later drank alone for three hours, becoming visibly intoxicated. When he began bothering other patrons, the staff ejected him. While staggering along the highway, Menow was hit by a negligent driver. Menow sued both the driver and the hotel, claiming that the latter had a common law duty to protect him in his intoxicated condition.

The Supreme Court of Canada unanimously upheld both claims, although two different tests emerged concerning the hotel's liability. Mr. Justice Laskin emphasized that the staff knew Menow was irresponsible when intoxicated, violated the provincial liquor legislation by serving him past the point of intoxication, and ejected him even though they knew he had no safe way of getting home. In Laskin's view, the staff should have tried to protect Menow by allowing him to spend the night in one of the hotel rooms, calling the police or arranging safe transportation home.⁸⁸

The hotel argued that the provincial liquor legislation required its staff to eject Menow because he was intoxicated. While acknowledging this obligation, Laskin held that it was subject to a broader duty not to eject patrons if doing so would expose them to a foreseeable risk of injury.⁸⁹ In closing, Laskin again emphasized that the hotel had special knowledge of Menow's irresponsibility when intoxicated. Quoting the trial Judge, Laskin stated that he was not imposing "a duty on every tavern owner to act as a watch dog for all patrons who enter his place of business and drink to excess."⁹⁰

Mr. Justice Ritchie agreed with the result, but appears to have provided a second, broader test of an alcohol provider's liability. In Ritchie's view, the staff breached their duty by serving Menow past the point of intoxication. Their obligation was to prevent intoxication, and not simply protect patrons after they become intoxicated.⁹¹ As the following cases illustrate, Laskin's narrow test initially gave way to Ritchie's broader statement of this duty.

iii. *Picka v. Porter and the Royal Canadian Legion* (1980)⁹²

Approximately two hours after leaving the Legion hall, Porter drove through a stop sign and crashed into the Picka station wagon, killing three people and injuring two others. Based on his BAC of .15%, it was established that Porter had consumed between 9 and 11½ bottles of beer over a five-hour period at the Legion. The beer was served from behind a partition in circumstances where the bartender could neither determine how much alcohol any patron consumed, nor observe the patrons' condition. The plaintiffs sued both Porter and the Legion.

The plaintiffs argued that the Legion breached its common law and statutory duties by supplying Porter "with beer until he became intoxicated and then allowed him to go forth...to the risk of all in his path."⁹³ The Legion contended that, since its employee was unaware of Porter's intoxication, it could not be held liable. The Court of Appeal rejected the Legion's argument. In effect, the Court held that providers must establish serving practices that ensure patrons are not served past the point of intoxication. The Legion was held to have breached both its common law and statutory duties, even though it had no prior dealing with Porter and no special knowledge of his susceptibility to alcohol. The bartender was unaware of Porter's condition and did not eject him or encourage him to leave. The Legion had simply provided Porter with alcohol past the point of intoxication in circumstances in which it could not determine his sobriety.

iv. *Schmidt v. Sharpe* (1983)⁹⁴

Like *Porter*, the *Sharpe* case supports the expansion of an alcohol provider's liability. Shortly after finishing his third beer and leaving the Arlington House Hotel, Sharpe drove off the road. He suffered only minor injuries in the ensuing crash, but his 19-year-old passenger, Schmidt, was rendered a quadriplegic. Following a lengthy trial, the defendants were held jointly and severally liable for 70% of Schmidt's losses. Including interest, legal fees and court costs, this crash probably cost the defendants and their insurers over \$1,750,000.

Sharpe was held liable because his impaired driving caused Schmidt's injuries. The hotel was sued in its capacity as a provider of alcohol for breaching its legal obligation not to serve an intoxicated patron. By serving Sharpe, who was already intoxicated when he entered, the hotel became liable for his conduct both on and off the premises.⁹⁵

Sharpe had consumed only a small percentage of the alcohol that caused his intoxication at the hotel, the staff had no special knowledge of his susceptibility to alcohol and they had not ejected him. There was no evidence that Sharpe was loud, belligerent or visibly intoxicated. Rather, the plaintiff's expert witnesses stated that, based on Sharpe's BAC of .15%, properly trained staff should have been able to recognize some signs of Sharpe's intoxication when he was served.⁹⁶ It was on this basis that the hotel was held jointly and severally liable for Schmidt's losses.

v. *Hague v. Billings* (1989)⁹⁷

Billings and his two friends entered the Oasis tavern and were each served a beer before the staff realized that they were intoxicated. They were refused further service. The

proprietor failed in his efforts to persuade Billings to give his car keys to one of his less intoxicated friends. Billing and his friends then drove to the Ship & Shore hotel, where they were each served four beers. Billings, whose BAC was .26%, drove so erratically after leaving the hotel that his friends insisted on getting out and walking. Minutes later, Billings crossed the centre-line and hit the Hague vehicle, killing Mrs. Hague and paralyzing her 14-year-old daughter.

At trial, Billings admitted his obvious liability and the Ship & Shore hotel was held liable for serving him when he was already intoxicated. However, the Court held that, since the Oasis tavern did not have a sufficient opportunity to assess Billings' intoxication before taking his initial order, it could not be held liable as an alcohol provider for serving him only a single beer. To this extent, the Court appears to have narrowed liability, as *Porter* and *Sharpe* suggested that a provider cannot even serve a single drink to an intoxicated patron with impunity.

Nevertheless, the Court held that, once the staff of the Oasis tavern realized Billings was drunk, they had an affirmative duty to prevent him from driving. In a statement with profound implications for the hospitality industry, the judge stated that the tavern should have called the police if it could not otherwise have stopped Billings from driving. While the tavern breached this obligation, the Court found that alerting the police would not, in the circumstances of this particular case, have prevented the subsequent collision. Consequently, the tavern was absolved of liability.⁹⁸

vi. *Stewart v. Pettie* (1995)⁹⁹

In this case, a dinner theatre served the defendant driver between five and seven double rum and colas shortly before he had a car crash in which the plaintiff, his sister, was rendered a quadriplegic. The plaintiff sued her brother and the theatre for damages, which were assessed at \$4,300,000. The trial Judge found that the defendant was driving properly and below the speed limit when he momentarily lost control, due to icy roads. The Judge also held that the plaintiff would not have been injured in the relatively minor collision had she been wearing her seatbelt. Moreover, the plaintiff testified that her brother showed no signs of intoxication at the theatre, even though his BAC was about 2½ times the *Criminal Code* limit for driving. The Judge held that the theatre had not been negligent in failing to intervene, because the defendant exhibited no signs of intoxication and was accompanied by three sober adults who were fully aware of his condition.

The Alberta Court of Appeal reversed the trial decision. It held that the theatre's waitress was negligent in overserving the defendant, who she ought to have known was intoxicated and in failing to take any steps to ensure that the defendant did not endanger himself or others. The Supreme Court of Canada overturned the Court of Appeal decision. While the Supreme Court recognized that licensees have a duty to protect third parties from the foreseeable risks posed by their intoxicated patrons,¹⁰⁰ the Court rejected the principle that serving patrons past the point of intoxication could, in itself, pose a foreseeable risk of injury. Rather, the overservice had to be accompanied by some additional risk factor.¹⁰¹ The Court reasoned that, since responsible sober adults accompanied the defendant, it was not foreseeable that he would drive.¹⁰² As such, the theatre had not negligently breached its duty to the plaintiff by overserving the defendant or by failing to ensure that he did not drive.

In the alternative, the Court held that the plaintiff's claim against the theatre would have failed at the causation stage. The plaintiff did not prove on the balance of probabilities that the defendant's intoxication was a cause of the crash or that the theatre's intervention would have convinced the defendant not to drive.¹⁰³ In our view, dismissing the claim on the basis of causation is far more compelling and compatible with the pre-existing case law than dismissing it on the basis of providers' liability.

At least until *Stewart*, there had been a clear trend toward expanding the liability of those who sell, supply or provide alcohol to others. The Canadian courts went far beyond the narrow duty that Justice Laskin established in *Jordan House*, holding alcohol providers liable even though they had no prior dealings with the patron, no knowledge of the patron's susceptibility to alcohol, no actual knowledge of the patron's intoxication, and had not ejected the patron. Nor did the courts require that the patron obtain all or even most of the alcohol causing his or her intoxication from the defendant. Rather, the courts imposed a general duty on alcohol providers not to serve anyone past the point of intoxication. Although the majority of provider liability cases involved bars, restaurants and other commercial licensed establishments, successful claims have been brought against universities,¹⁰⁴ service clubs,¹⁰⁵ government liquor stores,¹⁰⁶ employers,¹⁰⁷ and private social hosts.¹⁰⁸ In these cases, the courts applied the same principles that developed in the cases against commercial licensed establishments.

While the Supreme Court reaffirmed in *Stewart* that alcohol providers have a duty to prevent foreseeable risks of injury posed by intoxicated patrons, its analysis of foreseeability is troubling. By holding that overservice does not, in itself, create a foreseeable risk, the case ignored the extensive empirical evidence linking increased BACs with elevated risks of traumatic death and injury. Moreover, these risks are not limited to driving, but also stem from falls, fires, drownings and assaults, as well as activities such as cycling, snowmobiling, walking, and participating in sports. In spite of this, *Stewart* appears to have narrowed the broad obligation to prevent intoxication that emerged from *Porter*, *Sharpe* and *Billings*.¹⁰⁹

vii. Alcohol Delivery Services and Provider Liability

Based on these common law principles, a delivery service cannot be held liable for providing alcohol to sober customers who subsequently become intoxicated and injure themselves or others. Even if the customer is intoxicated at the time of the delivery, liability still may not be imposed. It is unlikely that the person making the delivery will spend much time at the residence dropping off the liquor and collecting the money. The delivery person may have little opportunity to observe the customer and determine if he or she is exhibiting visible signs of intoxication. As first suggested in *Billings* and confirmed in subsequent cases, alcohol providers may be absolved of liability if they do not have a reasonable opportunity to determine that a customer is intoxicated. Thus, the courts may limit a delivery service's liability to situations in which its staff knew or ought to have known that the customer was already intoxicated.

Even then, if the questionable reasoning in *Stewart* is followed, a delivery service may still be absolved of liability unless there are some obvious risk factors in addition to the customer's intoxication. If it is not foreseeable that an intoxicated patron would drive away from a dinner theatre when accompanied by sober adults, then it is even less

foreseeable that an intoxicated customer having liquor delivered to his or her residence would drive.

c) Liability for Providing Alcohol to the Underage

Perhaps the greatest concern about delivery services is their use by underage individuals to obtain alcohol. A recent American study found that 10% of grade 12 students had purchased alcohol from a delivery service.¹¹⁰ Although there is no comparable Canadian study, it is reasonable to assume that at least some Ontario youth will perceive that there are fewer risks in purchasing alcohol from a home delivery service than from a LCBO or Brewers Retail store.

It is important to recognize that young people are much more vulnerable to alcohol-related risks than adults. First, young people tend to be risk-takers and are more likely to be compromised by peer pressure. They also tend to be inexperienced drinkers and, thus, are more susceptible to alcohol's intoxicating effects. The heightened vulnerability of youth has been most fully documented in regard to drinking and driving. For example, a recent Australian study reported that older drivers with BACs of .05% were twice as likely to be injured in a crash as their sober counterparts, whereas young drivers with the same BAC were at eight times the risk.¹¹¹ While the relative risks may not be as dramatic in other situations, underage drinking, even at BAC levels below .08%, creates a broad range of foreseeable risks.

In all of the provider liability cases involving minors to date, the young person was sold or given alcohol when he or she was already intoxicated. The Canadian courts have not yet addressed whether an alcohol provider can be held liable simply for supplying alcohol to a sober minor. Nevertheless, the Canadian courts have expressed strong disapproval of supplying alcohol to minors and young adults. For example, one of the grounds on which the jury held the hotel liable in *Sharpe*¹¹² was its failure to deny service to the underage defendant. Moreover, in *Jacobsen*,¹¹³ the court held that the defendant employer to a higher duty of care in supplying alcohol because his 19-year-old employee, while of legal age, was a young, inexperienced drinker.

"Young people are much more vulnerable to alcohol-related risks than adults."

A person who simply allows underage drinking on his or her property may have a broad duty to ensure that no harm ensues. In *Prevost (Committee of) v. Vetter*,¹¹⁴ a couple was held liable in negligence for allowing their teenage sons and other underage youth to drink on their property. The Vettters had frequently allowed underage teenagers to have parties on their property, but did not provide them with any alcohol. In the past, the Vettters had taken steps to prevent intoxicated teenagers from driving home.

On the night in question, the Vettters knew that underage teens were drinking in their home and that the police had come because of a noise complaint. This was the eighth noise complaint lodged against the Vettters arising from such parties in the previous 20 months. However, the Vettters were asleep when their underage, intoxicated niece left with six passengers in her car. Shortly thereafter, she lost control of the vehicle and the plaintiff, a passenger, was severely injured. The court stated that the Vettters "recognized they had a duty to protect minors from the potential dangers of driving under the

influence of alcohol.”¹¹⁵ They had breached that duty by knowingly permitting drinking on their property, without taking steps to control the situation.

The decision in *Vetter* is reminiscent of the result in *Munier v. Lapman*.¹¹⁶ In that case, a farmer allowed his son to host “bush parties” on his property. Previous bush parties had generated a broad range of problems, including underage drinking, intoxication, illicit drug use, fights, and impaired driving. No formal invitations were issued to the 300 youths who attended, nor did the defendant or his son provide any alcohol. Nevertheless, the farmer’s insurance company settled out of court for \$700,000 with a young partygoer who was rendered a quadriplegic in a fight that he initiated while intoxicated. The farmer had simply allowed an event to occur on his property, which he knew or ought to have known posed foreseeable risks of injury to those attending.

“Canadian courts would likely impose liability for supplying alcohol to a sober minor if doing so created a foreseeable risk.”

Although there is no authority directly on point, the Canadian courts would likely impose liability for supplying alcohol to a sober minor if doing so created a foreseeable risk of injury. For example, a delivery service that handed over four cases of beer to a sober 17-year-old in the midst of an ongoing teenage party would likely be held civilly liable for any alcohol-related injuries

that ensued. The Canadian courts have recognized the tendency of young people to act irresponsibly when drinking, as well as their relative inexperience with alcohol and their increased vulnerability to alcohol-related injuries. There is likely to be little sympathy for delivery services that breach the statutory prohibitions against providing alcohol to those underage – a prohibition that is specifically designed to prevent alcohol-related injuries and death among youth.

d) Liability for Providing Alcohol to Vulnerable Individuals

Two types of situations have raised concerns in this area. The first involves regular deliveries to a person who the operator knows or ought to know has a drinking problem. It is most unlikely that a delivery service would be held liable in these circumstances if the customer was apparently sober at the time. Just as stores have no liability for selling cigarettes to those addicted to tobacco, delivery services cannot be held accountable for providing alcohol to sober alcoholics.

The second situation involves delivery of alcohol to sober individuals who, because of their frailty, age or disability, are at a significantly increased risk of injury. In *Crocker v. Sundance Northwest Resorts Ltd.*,¹¹⁷ the Supreme Court of Canada stated:

The common thread running through these cases is that one is under a duty not to place another in a position where it is foreseeable that that person could suffer injury. The plaintiff’s inability to handle the situation in which he or she has been placed – either through youth, intoxication or other incapacity – is an element in determining how foreseeable the injury is.¹¹⁸

This statement must be put in its factual context. The plaintiff, who was obviously extremely intoxicated, was allowed to participate in a tube-racing contest down a steep, mogulled ski slope, on which one of the defendant’s own employees had previously suffered a serious neck injury that required hospitalization. Thus, the *Crocker* case

might only be relevant where the provision of alcohol posed an immediate risk of serious physical injury to a person who was obviously vulnerable. The mere fact that the elderly and those with physical or mental disabilities may be more vulnerable to alcohol-related injuries is not sufficient, in and of itself, to give rise to liability.

Finally, delivery services that refuse to provide alcohol to customers simply because they are elderly, have a physical or mental disability, or have a drinking problem, may be subject to a human rights complaint. Section 1 of the *Ontario Human Rights Code*¹¹⁹ generally prohibits discrimination in the provision of goods and services on the basis of age, disability or illness, which would include alcohol dependency. Indeed, Human Rights Tribunals have upheld several complaints by individuals with disabilities who were refused alcohol service.¹²⁰ While refusing alcohol to a person who is obviously at risk of imminent harm is justifiable, refusing to deliver alcohol to a person because he or she is, or may be, more vulnerable to alcohol-related risks would be difficult to justify.

SECTION 6: CONCLUSION

The current statutory framework governing alcohol and delivery services is hopelessly convoluted. The *LLA* and *LCA*, the two major acts governing alcohol in the province of Ontario, must now be read in conjunction with the recent amendments which provide for the transfer of responsibilities previously exercised by the LCBO and the Chair of the LCBO to the AGCO, the Board of the AGCO or the Registrar. Similarly, responsibilities once assigned to the Board of the AGCO have been transferred to the Registrar. Unfortunately, this cannot be determined without referring to the *LLA*, the *LCA*, the *AGA*, and the regulations created under them.

In the case of advertising and promotions, general prohibitions in the Acts are subject to exceptions created by the regulations which then appear to be contradicted by guidelines. In other situations, general provisions in the Acts and regulations are simply repeated in specific provisions that deal exclusively with delivery systems. These and similar problems have made it extremely difficult to understand the current law.

There are currently at least four different ways in which alcohol may be delivered to private premises. First, there is the licensing system under section 10 of the *LLA* for private delivery services. Second, there is the authorization system that had been controlled by the LCBO until July 2001, when authority in the *LCA* over alcohol deliveries to private premises was transferred to the Registrar. Third, licensed representations of alcohol manufacturers are permitted to solicit orders and deliver alcohol. Finally, employees of Ontario licensed alcohol manufacturers can solicit orders and arrange for the delivery of the alcohol.

While our focus is on private licensed delivery services, it is appropriate to at least raise concerns about the other delivery systems. First, it is appropriate to question whether all of these systems are necessary. What is the rationale for maintaining the largely unfettered system of authorizations now that the system for issuing delivery licences has been operationalized? Finally, it is unclear what administrative safeguards and enforcement resources are available to ensure that those operating under authorizations, as licensed representatives of alcohol manufacturers, or as employees of Ontario

manufacturers do not exceed their authority or otherwise violate the *LLA*, *LCA* and the regulations.

The current system of issuing licences for private delivery services provides no clear mechanism for public input. As with other licences, an applicant for a delivery licence has a right to a licence and is entitled to elaborate legal safeguards if any disciplinary action is proposed. Unlike licences to sell alcohol, there is no formal mechanism for the public to object to the establishment of a private delivery service in their community. Nor does there seem to be any formal way for a parent or other occupier to prohibit deliveries from being made to their home. One can easily imagine that parents, who are going to be absent, might want to ensure that no alcohol is delivered to their teenage children. Apparently, under the previous LCBO authorization system, the Program Co-ordinator would notify delivery services, if such a request had been made. It is not clear if this practice or some other procedure will be implemented to allow individuals to prevent deliveries to their homes.

“The current system of issuing licences for private delivery services provides no clear mechanism for public input.”

Concerns have been expressed about the extent to which private delivery services have complied with the general prohibitions in the *LLA*. Given that the LCBO promoted private delivery services as a means of reducing impaired driving, it is doubtful that the prohibition against providing alcohol to the intoxicated was given sufficient emphasis. This is particularly troublesome because delivery operators are in contact with their customers for a relatively short period of time and have limited opportunities to assess the customer’s state of sobriety.

It is also reasonable to assume that underage youth will perceive private delivery services as an easier means to obtain alcohol than attempting to purchase it at an LCBO or Brewers Retail store. Moreover, given the circumstances surrounding the transaction, the likelihood of an operator being prosecuted or disciplined for failing to demand and carefully scrutinize identification is limited. Finally, some less conscientious operators who have filled an order may be reluctant to demand conclusive proof of age, if it means leaving without the delivery fee and having to get a refund for the liquor they purchased.

Although the video-training package developed for LCBO employees is available to holders of delivery service licences, there is no specialized training program. Moreover, operators and their staff are not required to undergo training as a condition of obtaining or maintaining a delivery licence. We would suggest that a mandatory training program be developed for delivery services and their staff. This relatively short program should emphasize the rules governing advertising and the prohibitions against supplying alcohol to those who are underage or intoxicated.

Unfortunately, the current inspection and enforcement powers of the AGCO are insufficient to monitor deliveries to private residences. Since inspectors require a warrant to enter and search any place used as a dwelling, where most transactions involving delivery operators take place, inspectors will rarely be able to determine if liquor is being provided to underage or intoxicated customers. The Project Co-ordinator under the LCBO authorization program relied primarily on the operators themselves to inform her of problems. However, this would appear to provide operators with little incentive to comply with the law. Instead, the government needs to provide broader powers to

enforce the legislation in private dwellings, or the AGCO needs to establish a system to test delivery operators through random or undercover investigations.

Based on their potential for misuse by the underage and intoxicated, there is potential civil liability for delivery services that provide alcohol to these groups. While provider liability may be limited to situations in which the delivery service knew or ought to have known that the customer was already intoxicated, liability for providing alcohol to minors is likely broader. Due to young people's vulnerability to alcohol-related injuries, the courts are quick to condemn defendants who illegally provide alcohol to them. Thus, the prohibition against providing alcohol to minors should be stressed to delivery operators and strictly enforced by the AGCO.

It is necessary to improve the enforcement of Ontario's liquor legislation with respect to private delivery operators. Currently, there is no formal complaints system and no structured inspection process. Moreover, because most transactions occur in private dwellings, there is little opportunity to assess an operator's compliance with the law. This level of governance increases the opportunity for misuse, and, in turn, the risk of alcohol-related injury.

¹ R.S.O. 1990, c. L.19 [hereinafter *LLA*].

² R.S.O. 1990, c. L.18 [hereinafter *LCA*].

³ S.O. 1996, c. 26, Sched. [hereinafter *AGA*].

⁴ *Ibid.*, s. 3(1).

⁵ O. Reg. 61/98, amended to O. Reg. 209/00.

⁶ O. Reg. 141/01, amended to O. Reg. 232/01.

⁷ *LLA*, *supra* note 1, s. 1.

⁸ With the enactment of O. Reg. 209/01, amending O. Reg. 61/98, responsibility for delivery services under section 10 of the *LLA* was largely transferred from the Board of the AGCO to the Registrar.

⁹ *LLA*, *supra* note 1, s. 12(1).

¹⁰ *Ibid.*, ss. 15(2) and 23(11).

¹¹ R.R.O. 1990, Reg. 718, s. 15 [hereinafter *Reg. 718*].

¹² *Ibid.*, s. 15(1) and (2).

¹³ *Ibid.*, s. 15(3).

¹⁴ *Ibid.*, s. 15(4) and (5).

¹⁵ *Ibid.*, s. 15(6).

¹⁶ *Ibid.*, s. 16(3).

¹⁷ *Ibid.*, s. 15(7). The minimum fee is: \$6 in Burlington, Peterborough, Toronto and Welland; \$5.50 in Barrie and Petawawa; \$5 in Niagara Falls, Orillia and St. Catharines; and \$4 in all other municipalities.

¹⁸ *Ibid.*, s. 16(1).

¹⁹ *Ibid.*, s. 17.

²⁰ *Ibid.*, s. 18.

²¹ *Ibid.*, s. 22.

²² *Ibid.*, s. 23.

²³ *LLA*, *supra* note 1, s. 30(1).

²⁴ *Ibid.*, s. 30(2).

²⁵ *Ibid.*, s. 30(6).

²⁶ R.R.O. 1990, Reg. 719, s. 41(1) [hereinafter *Reg. 719*].

²⁷ *Reg. 718*, *supra* note 11, s. 17(1) – (4).

²⁸ For example, section 30(9) of the *LLA* permits an 18-year-old to possess liquor during the course of employment in a licensed premise.

²⁹ Once it is established that a patron was intoxicated, a court may be sceptical that the patron did not exhibit any signs of intoxication.

³⁰ See, for example, *Picka v. Porter and the Royal Canadian Legion* (1980), unreported (Ont. C.A.) [hereinafter *Porter*]; and *Schmidt v. Sharpe and the Arlington House Hotel* (1983), 27 C.C.L.T. 1 (Ont. S.C.) [hereinafter *Sharpe*].

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- ³¹ *Criminal Code*, R.S.C. 1985, c. C-46, s. 253 [hereinafter *Criminal Code*].
- ³² See, for example, *Keenan v. Scandals Ltd.*, [2000] O.J. No. 992 (Ont. S.C.J.); and *R. v. Poopalrajah* (1999), 138 C.C.C. (3d) 549 (Ont. S.C.J.).
- ³³ *LLA*, *supra* note 1, s. 32(1) and (2).
- ³⁴ For example, a licence or permit may be obtained to serve and have open alcohol in a vehicle, such as a licensed tour bus. *Ibid.*, s. 32(1).
- ³⁵ B. Hovius & R. Solomon, *Alcohol Advertising: A Legal Primer*, 3d ed. (Toronto: Association to Reduce Alcohol Promotion in Ontario, 2001).
- ³⁶ Liquor Licence Board of Ontario, *Advertising Guidelines* (November, 1994) [hereinafter *Guidelines*].
- ³⁷ *Reg. 719*, *supra* note 26, s. 87(2).
- ³⁸ O. Reg. 389/91, s. 7(2).
- ³⁹ See *Reg. 719*, *supra* note 26, s. 87(1), which applies to licensees; R.R.O. 1990, Reg. 720, s. 5 [hereinafter *Reg. 720*], which applies to manufacturers; and O. Reg. 389/91, s. 7(1), which applies to permittees.
- ⁴⁰ *LLA*, *supra* note 1, s. 38(2).
- ⁴¹ *Ibid.*, s. 38(4).
- ⁴² *Guidelines*, *supra* note 36 at 1.
- ⁴³ The *Guidelines* provide: “‘Public Service Advertising’ means any advertising carrying a strong message against irresponsible use of liquor where the message does not contain any direct or indirect endorsement of a liquor, the brand name of a liquor, or of the consumption of liquor.”
- ⁴⁴ *Reg. 718*, *supra* note 11, s. 21(1) and (2).
- ⁴⁵ *Ibid.*, s. 21(3)(a) – (c).
- ⁴⁶ *Ibid.*, s. 18(1) and (2).
- ⁴⁷ *LLA*, *supra* note 1, s. 28.
- ⁴⁸ *Reg. 720*, *supra* note 39, s. 3(2).
- ⁴⁹ *Ibid.*, s. 2(1).
- ⁵⁰ *Reg. 719*, *supra* note 26, s. 21. The *LLA* prohibits delivery services from selling liquor that a manufacturer had provided as a free sample. Section 5 of the *LLA* generally requires anyone who sells or delivers alcohol to have a sales licence or authorization from the LCBO.
- ⁵¹ *Ibid.*, s. 40(3).
- ⁵² See *Reg. 718*, *supra* note 11.
- ⁵³ *Ibid.*, s. 19.
- ⁵⁴ *Ibid.*, s. 20.
- ⁵⁵ *LLA*, *supra* note 1, s. 44(13).
- ⁵⁶ *Ibid.*, s. 43(1).
- ⁵⁷ *Ibid.*, s. 44(1)(a).
- ⁵⁸ *Ibid.*, s. 44(2).
- ⁵⁹ *Ibid.*, s. 44(3)(c). Pursuant to section 44(4)(c), the justice must be satisfied by information given under oath that it is necessary to enter the dwelling or room used as a dwelling to conduct an inspection, or that there are reasonable grounds to believe that the dwelling or room contains documents or other evidence relevant to an inspection.
- ⁶⁰ *Ibid.*, s. 44(1)(b) and (c).
- ⁶¹ *Ibid.*, s. 44(1)(d).
- ⁶² *Ibid.*, s. 44(1)(e).
- ⁶³ *Ibid.*, s. 44(1)(f).
- ⁶⁴ *Ibid.*, s. 45(1).
- ⁶⁵ *Ibid.*, s. 45(2).
- ⁶⁶ *Ibid.*, s. 32(5).
- ⁶⁷ *Ibid.*, s. 44.1(1).
- ⁶⁸ See *LCA*, *supra* note 2, s. 4.1(1).
- ⁶⁹ *Ibid.*, ss. 4.1(1) and (2) and 4.2(1) and (2).
- ⁷⁰ *LLA*, *supra* note 1, s. 44.1(1).
- ⁷¹ *LCA*, *supra* note 2, s. 4.2(3)(a) and (b).
- ⁷² *Ibid.*, s. 4.2(3)(c).
- ⁷³ *Ibid.*, s. 4.5(1).
- ⁷⁴ *Ibid.*, s. 4.5(2).
- ⁷⁵ *Ibid.*, s. 4.3(3).
- ⁷⁶ *LLA*, *supra* note 1, s. 61(1)(c).
- ⁷⁷ *Ibid.*, s. 61(2).

⁷⁸ *Ibid.*, s. 61(3)(b).

⁷⁹ *Ibid.*, s. 61(3)(a).

⁸⁰ *Ibid.*, s. 61(7).

⁸¹ *Ibid.*, s. 61(3.0.1)(b).

⁸² *Ibid.*, s. 61(6).

⁸³ *Ibid.*, s. 61(5).

⁸⁴ *Ibid.*, s. 61(3.0.1)(a).

⁸⁵ See, for example, *Porter and Sharpe*, *supra* note 30.

⁸⁶ *Criminal Code*, *supra* note 31, s. 253.

⁸⁷ [1974] S.C.R. 239 [hereinafter *Jordan House*].

⁸⁸ *Ibid.* at 248-49.

⁸⁹ *Ibid.* at 249. In support of his position, Laskin J. cited *Dunn v. Dominion Atlantic Railway Company* (1920), 52 D.L.R. 149 (S.C.C.).

⁹⁰ *Ibid.* at 250.

⁹¹ *Ibid.* at 251.

⁹² *Porter*, *supra* note 30.

⁹³ *Ibid.* at 4.

⁹⁴ *Sharpe*, *supra* note 30.

⁹⁵ *Ibid.* at 1. The Court also emphasized that Schmidt and Sharpe were both underage, and yet were allowed to enter and were served several beers without being asked for identification.

⁹⁶ *Ibid.* at 10.

⁹⁷ (1989), 68 O.R. (2d) 321 (H.C.), *aff'd* (1993), 15 C.C.L.T. (2d) 264 (Ont. C.A.) [hereinafter *Billings*].

⁹⁸ In 1993, the Ontario Court of Appeal upheld the trial court's decision on liability, but altered the apportionment of fault, holding the Ship & Shore hotel 15% at fault and Billings 85% at fault. (1993), 15 C.C.L.T. (2d) 264.

⁹⁹ (1995), 23 C.C.L.T. (2d) 89 (S.C.C.) [hereinafter *Stewart*].

¹⁰⁰ *Ibid.* at 99-101.

¹⁰¹ *Ibid.* at 101.

¹⁰² *Ibid.* at 105-06.

¹⁰³ *Ibid.* at 106-08.

¹⁰⁴ To the author's knowledge, at least five alcohol-related civil suits were brought against Ontario universities during the late 1980s. For a general review of campus alcohol liability and policies in Canada, see R. Solomon and S. Usprich, "Liquor, Learning and Liability: Alcohol-Related Civil Liability of Canadian Universities" in S. Devine (ed.), *Universities and Colleges and the Law* (Victoria, British Columbia: Canadian Society for the Study of Higher Education, 1990) at 136.

¹⁰⁵ See, for example, *Porter*, *supra* note 30.

¹⁰⁶ See *Smink v. Nicholas and the Liquor Control Board of Ontario* (1985), unreported, in which the defendant Nicholas was allowed to purchase a bottle of whiskey at an LCBO store, even after a concerned customer warned one of the store clerks that Nicholas was intoxicated. Nicholas subsequently crashed into the Smink's car, killing three occupants and seriously injuring another three. The subsequent lawsuit for \$9.5 million named Nicholas, the owner of the car that Nicholas was driving, two of the store staff and the LCBO as defendants. Since the case was settled out of court, the clerks' and the LCBO's contributions to the settlement were not disclosed. See C. Martin, "LCBO sued for liquor sale after drunk driver kills man" *Ontario Lawyers Weekly* (1 May 1985) 1; and C. Martin, "Drunk driver who killed three jailed, given long ban" *London Free Press* (4 May 1985) 1.

¹⁰⁷ See *Jacobsen v. Nike Canada Ltd.* (1996), 133 D.L.R. (4th) 377 (B.C. S.C.) [hereinafter *Jacobsen*]; and *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.* (2001), 196 D.L.R. (4th) 738 (Ont. S.C.J.).

¹⁰⁸ *Dryden (Litigation Guardian of) v. Campbell Estate*, [2001] O.J. 829 (Ont. S.C.J.). See also *Baumeister v. Drake* (1986), 5 B.C.L.R. (2d) 382 (B.C. S.C.); *Broadfoot v. Ontario (Minister of Transportation and Communication)* (1997), 32 O.R. (3d) 361 (Ont. Gen. Div.) [hereinafter *Broadfoot*]; and *Fitkin (Litigation Administrator of) v. Latimer* (1997), 35 O.R. (3d) 464 (Ont. C.A.) [hereinafter *Fitkin*], where similar liability principles were applied, but the claims against the social hosts were dismissed on the facts.

¹⁰⁹ *Stewart* has subsequently been relied upon by some lower courts to limit the scope of provider liability. See, for example, *Fitkin*, *ibid.*; *Broadfoot*, *ibid.*; and *Temple v. T & C Motor Hotel Limited* (1998), 213 A.R. 362 (Alta. Q.B.).

¹¹⁰ L.A. Fletcher *et al.*, "Alcohol Home Delivery Services: A Source of Alcohol for Underage Drinkers" (January, 2000) *J. Stud. Alcohol* 81 at 82.

¹¹¹ D. Zaal, *Traffic Law Enforcement: A Review of the Literature*, Report No. 53 (Melbourne: Monash University Accident Research Centre, April 1994) at 51.

¹¹² *Supra* note 30.

¹¹³ *Supra* note 107.

¹¹⁴ (2001), 197 D.L.R. (4th) 292 (B.C. S.C.) [hereinafter *Vetter*].

¹¹⁵ *Ibid.* at 314.

¹¹⁶ J. Middlemiss, "Plaintiff beaten at drunken party gets \$700,000 from host's insurer" *The Lawyers Weekly* (7 July 1989) 1.

¹¹⁷ (1988), 44 C.C.L.T. 225 (S.C.C.).

¹¹⁸ *Ibid.* at 235.

¹¹⁹ R.S.O. 1990, c. H.19.

¹²⁰ See *DeSouza v. Ontario (Liquor Control Board)* (1993), 23 C.H.R.R. D/104 (Ont. Bd. of Inquiry); and *Johnston v. Levin* (1996), 25 C.H.R.R. D/182 (Ont. Bd. of Inquiry).