

CORPORATION OF THE TOWN OF AMHERSTBURG

BY-LAW NO. 2002-10

**Being a By-law to authorize the execution of an Agreement
between the Town of Amherstburg and the Pepsi
Bottling Group (Canada) Co.**

Whereas the Town of Amherstburg desires to enter into an agreement for the exclusive supply of soft drinks and other beverage products for retail sale and distribution through all distribution locations on or about Town of Amherstburg properties and;

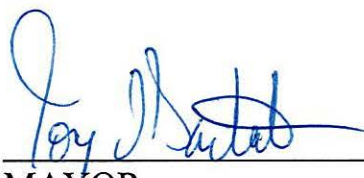
Whereas the Town of Amherstburg has received proposals from soft drink companies and;

Whereas the Town of Amherstburg is desirous of entering into an agreement for a 5 year period with the Pepsi Bottling Group (Canada) Co.

Now therefore, the Council of the Corporation of the Town of Amherstburg hereby enacts as follows:

1. That the Mayor & Clerk be and they are hereby authorized to sign the contract with the Pepsi Bottling Group (Canada) Co. in the form annexed hereto.
2. That this By-law shall come into force and take effect on the final date of passing thereof.

Read a first, second and third time and finally this 11th day of March, 2002.



MAYOR



CLERK

January 29, 2002

Town of Amherstburg
271 Sandwich S.
Amherstburg, Ontario
N9A 6T3

Dear Sirs/Mesdames:

Re: Supply Arrangements

This letter will confirm the exclusive agreement between The Pepsi Bottling Group (Canada), Co. ("PBG") and The Town of Amherstburg (the "Account"), as the owner and operator of The Town of Amherstburg properties (the "Facility"), regarding the exclusive supply of soft drinks and other beverage products for retail sale and distribution through all distribution locations on or about the premises of the Facility (the "Outlets").

1.0 Term

- 1.1 The term of this agreement shall be five (5) years commencing [April 1, 2002] (the "Commencement Date") and terminating [March 31, 2007] (the "Term"). For the purposes of this Agreement, a "Contract Year" shall be defined as each 12-month period during the Term, commencing on the Commencement Date or an anniversary thereof.

2.0 Products

- 2.1 On and subject to the terms and conditions described herein, PBG shall sell to the Account, and the Account shall purchase from PBG the following soft drink and beverage products, whether in fountain beverage syrup and packaged product format: Pepsi, Diet Pepsi, 7Up, Orange Crush, Mug Root Beer, Schweppes Ginger Ale, Country Time Lemonade, Ocean Spray blended juices and Lipton Ice Tea, and such other products which may be available from the local Pepsi bottler network (collectively, the "Products").

3.0 Exclusivity

- 3.1 PBG shall be the sole and exclusive supplier to the Account of soft drinks and other beverage products whether in fountain beverage syrup, packaged product or other format. For greater clarity, and without limiting the generality of the foregoing, the soft drinks and beverage products sold or distributed by the Account through Outlets shall be brands supplied exclusively by PBG in the following categories: carbonated soft drinks, frozen carbonated beverages, teas other than fresh brewed, isotonic,

juices, juice based products, lemonade, cold coffee and bottled waters, but expressly excluding hot coffee, hot tea, dairy products and alcoholic beverages.

- 3.2 In no event shall the Account purchase or make available for sale at the Outlets, beverage products (whether in packaged product, fountain beverage syrup or other format) trademarked, licensed, produced or sold by Coca-Cola Ltd., or Cott Corporation or any of their respective subsidiaries, affiliates, related companies, bottlers, or distributors.

4.0 Pricing

- 4.1 The current prices for the Products in are listed in **Schedule "A"** attached hereto.
- 4.2 PBG agrees not to change the Prices for a period of one (1) year from the Commencement Date. Thereafter, Prices may be increased by PBG upon thirty (30) days written notice to the Account's head office. PBG's Prices may be increased in any Contract Year by an amount that is the lesser of 2.5% or the increase in the Canadian Consumer Price Index (or equivalent other Federal Government statistical base in replacement thereof) for the period of time since the most recent price change.
- 4.3 Notwithstanding **Section 4.2** above, price changes exceeding those set out above may be made by PBG, as a result of extraordinary increases or decreases in the price of commodities used in the production of the Products, but such increase in prices shall be limited to the extent of the increase in commodity price in proportion to the amount of such commodity used in the production of such Products. Such decreases in the price of the products shall be limited to the extent of the decreases in commodity price in proportion to the amount of such commodity used in the production of such Products.
- 4.4 Payment of invoices shall be in accordance with their stated terms, currently the 20th day of the month following the date of issuance.
- 4.5 Increases and decreases due to taxes or duties (including, without limitation, goods and services tax) shall be added to or deducted from the prices and any applicable allowances and rebates.
- 4.6 All invoices for Products delivered to the Outlets will be issued to the Account.
- 4.7 All payments to PBG hereunder shall be rendered without deduction or set off.

5.0 Conditions of Payment of Allowances

- 5.1 Allowances in respect of Product purchased by the Account will only be paid by PBG if all accounts payable to PBG in respect of the Facility are current and in good standing. The Account acknowledges and agrees that allowances will not be paid (and credit shall not be given) in respect of Product supplied by PBG free of charge or for Products purchased by the Account from a source other than PBG, its affiliates or local Pepsi bottlers, in contravention of this Agreement.
- 5.2 Notwithstanding any other remedies that PBG may have, if the Account fails to pay PBG any amount owing when due, PBG may deduct any amounts unpaid by the Account from money or credit held by PBG for the benefit of the Account, including money or credit pertaining to an allowance for Product delivered to one or more Outlets.

6.0 Equipment

- 6.1 PBG shall supply, as reasonably required, post-mix dispensing equipment and coolers ("Equipment") on a loan basis to the Account for use in the Outlets in accordance with the local Pepsi bottler's policy. The type and number of pieces of Equipment shall be mutually agreed between the parties. The Account acknowledges and agrees that no right, title or interest in any loaned Equipment shall pass to the Account.
- 6.2 The Account shall ensure that all Equipment is used solely to dispense and sell PBG Products and display only the trademarks associated with the Products.
- 6.3 All Equipment supplied by PBG hereunder shall remain the property of PBG. Equipment will be loaned at no charge to the Account for use in the Outlets, until the expiration of the Term or such earlier date as the Equipment may be removed and replaced by PBG. In order to protect the Equipment from damage or destruction (reasonable wear-and-tear accepted) the Account shall, and shall ensure that its Contractors (as defined in **Article 17.0** hereof), if any, and each of their respective servants and employees, exercise or cause to be exercised the same standard of care of the Equipment as a prudent owner would exercise if he/she owned the Equipment.
- 6.4 Equipment services and maintenance at all Outlets will be performed at no charge to the Outlet by the local Pepsi bottler under the terms of PBG's "Sudden Service Program".

7.0 Vending Machines

- 7.1 During the Term, PBG shall have the exclusive right to install, service and maintain vending machines ("Vendors"), and to stock and re-stock

Products in such Vendors, on or about the Facility. All such services shall be performed by qualified employees or representatives of PBG. All such Vendors and all Product stocked therein will remain the property of PBG. The Account acknowledges and agrees that all revenues in each Vendor are PBG's and only a PBG employee or agent shall remove such monies at the time of re-stocking.

- 7.2 Within the Vendors placed at the facility, PBG shall have the right to determine the package sizes and product mix therein, and the vend prices for same. The placement locations and quantity of such Vendors shall be as mutually agreed between the parties. The Account agrees that each Vendor must achieve a Product throughput of at least three (3) 24-pack Cases of Product per week. If a Vendor fails to generate such volume, averaged over the preceding three months, PBG will have the right to remove the Vendor or move it to another location at the Facility, the latter as mutually agreed between the parties.
- 7.3 In full consideration for such exclusive rights, PBG shall pay to the Account, a commission equal to thirty percent (30%) of the vend price, after the deduction of duties, levies, taxes and deposits, for each single serve can or bottle of Product sold from any PBG Vendor located on or about the Facility during the Term. The Account acknowledges and agrees that the commission rate above has been set based on a vend price of at least \$1.00 per canned Product and at least \$1.50 per bottled Product and may be decreased if the vend prices are decreased. For greater certainty, the Account agrees that commissions will not be paid on Product sold at reduced prices through Vendor's located in areas not accessible to the general public. PBG shall not change the vend prices for a period of one (1) year from the Commencement Date of this Agreement. Thereafter, PBG may, at its sole discretion and on thirty days written notice, change the vend prices, which change shall be consistent with current marketplace conditions.
- 7.4 Notwithstanding **Section 9.3** above and in lieu of the commission set out, PBG shall pay to the account lump sum commissions and marketing allowances as set out in attached schedule A. Such annual commissions and allowances shall be paid within 120 days of the signing of this agreement and within 90 days of the yearly anniversary date thereafter.

8.0 Survival of PBG's Rights to Supply

- 8.1 The rights of PBG to supply the Products to the Outlets pursuant to the terms of this Agreement shall survive the sale, assignment, transfer, mortgage, lease, rental or other disposition in whole or in part by the Account of any interest in the Outlets, including any sale of assets or shares of the Account (any such disposition being hereinafter referred to as a "Transfer"). The Account agrees that it will not effect any Transfer unless on or before the effective date of such Transfer, it secures the

transferee's covenant to enter into an agreement with PBG, in form and substance satisfactory to PBG, pursuant to which the transferee is legally obligated to honour the right of PBG to supply the Products to the transferee on substantially the same terms as are set out in this Agreement.

9.0 Termination

9.1 PBG may terminate this Agreement forthwith upon written notice to the Account, without liability and without limiting any of its other rights or remedies, upon the occurrence of any of the following:

- (a) if, at any time, the Account takes any action with respect to its liquidation or winding-up, or makes an assignment for the benefit of creditors, or any proposal under the *Bankruptcy and Insolvency Act* or any comparable statute, or if a bankruptcy petition is filed or presented by such party or if a court of competent jurisdiction enters a judgment or order approving any such petition or any petition seeking reorganization, arrangement or composition of such party or its debts or obligations, or if a custodian or receiver or receiver and manager or similar official is appointed for any of such party or its assets;
- (b) The Account is in material breach of any of its obligations under this Agreement, provided that such breach continues for a period of thirty (30) days following receipt by the Account of written notice from PBG calling upon the Account to remedy that breach, unless such breach cannot be reasonably cured within thirty (30) days, in which case the Account shall be permitted ninety (90) days within which to cure same provided the Account commences to cure same and diligently continues its efforts through such ninety (90) day period; or
- (c) if the Account fails to purchase including sales through Vendors annual net sales of sixty thousand dollars (\$60,000.00) in Product from PBG in any Contract Year.

9.2 The Account may terminate this Agreement forthwith upon written notice to PBG, without liability and without limiting any of its other rights or remedies, upon the occurrence of any of the following:

- (a) PBG is in material breach of any of its obligations under this agreement, provided that such breach continues for a period of thirty (30) days following receipt by PBG of written notice from the Account calling upon PBG to remedy that breach, unless such breach cannot be reasonably cured within thirty (30) days, in which case PBG shall be permitted ninety (90) days within which to cure

same provided PBG commences to cure same and diligently continues its efforts through such ninety (90) day period;

- (b) PBG is in material breach of the Standards, as defined below;
- (c) PBG is in material breach of the representations and warranties hereunder; or
- (d) PBG takes any action with respect to its liquidation or winding-up, or makes an assignment for the benefit of creditors, or any proposal under the *Bankruptcy and Insolvency Act* or any comparable statute, or if a bankruptcy petition is filed or presented by such party or if a court of competent jurisdiction enters a judgment or order approving any such petition or any petition seeking reorganization, arrangement or composition of such party or its debts or obligations, or if a custodian or receiver or receiver and manager or similar official is appointed for any of such party or its assets;

10.0 Standards

10.1 PBG shall provide goods and perform services, if any, in compliance with the following standards (collectively, the "Standards");

- (a) all applicable laws; and
- (b) prevailing industry standards.

11.0 Workers' Compensation

11.1 When work is to be performed hereunder on the Facility premises by PBG employees, PBG acknowledges and agrees that it is the employer of such employees for the purpose of the *Workers' Compensation Act* (Ontario), as amended, and for all other purposes and PBG agrees that it shall comply with the provisions of the *Workers' Compensation Act* (Ontario), as the case may be in relation thereto.

12.0 Notices

12.1 All notices or payments required to be given or made to the Account pursuant to the terms of this Agreement shall be given or made in writing and sent by mail or personal delivery to:

Town of Amherstburg
271 Sandwich S.
Amherstburg, Ontario
N9V 2A5

12.2 All notices required to be given or made pursuant to the terms of this Agreement shall be given in writing and sent by registered mail to:

The Pepsi Bottling Group (Canada), Co.
333 Gosfield Townline West
Essex, Ontario
N8M 2X5

Attention: Unit Sales Manager

12.3 All notices shall be deemed to have been given five (5) business days from the date of mailing. Notices delivered by courier shall be deemed to have been given on the business day following the day of dispatch and immediately upon receipt in the case of personal delivery.

13.0 Confidentiality

13.1 The Account and PBG agree to keep the terms of this Agreement confidential and not to disclose the terms of this Agreement to any third party without the prior written consent of the non-disclosing party.

14.0 Assignment of Agreement / Transfer of Food Service Operations

14.1 This Agreement and/or the rights and obligations hereunder, shall not be assigned by either party hereto without the prior written consent of the other party, not to be unreasonably withheld. Any attempted assignment absent such consent shall be deemed void and of no force or effect. This Agreement shall be fully binding on the parties hereto, and on their successors, successors-in-interest, transferees, permitted assigns, beneficiaries or representatives.

14.2 If the Account at any time during the Term of this Agreement, contracts out the operation of some or all aspects of its food service requirements to another person or entity ("Contractor"), then the Account's obligations under this Agreement will be applicable to the Contractor as well as to the Account for the remainder of the Term. In such event, the Account agrees that it will not effect the transfer of such operations to the Contractor unless on or before the effective date of same, the Account has entered into a written agreement with the Contractor pursuant to which the Contractor is legally obligated to sell or distribute only those soft drinks and beverage products purchased exclusively from PBG. In the case of current Contractors, if any, the Account agrees that it shall require such Contractors to sell or distribute only those soft drinks and beverage products purchased exclusively from PBG and to adhere to the provisions of **Article 3.0** hereof. PBG shall supply all such Contractors with Products, services and equipment at the Facility at the same prices as to

the Account, unless such Contractor is already subject to an agreement with PBG, or one of its affiliates, in which case that agreement shall govern to the exclusion of this Agreement. Notwithstanding the foregoing, the Account shall continue to be responsible for the full performance of all obligations to PBG hereunder.

15.0 General

- 15.1 This Agreement shall enure to the benefit of and be binding upon the successors and assigns of PBG and the Account. This Agreement rescinds and supersedes all prior agreements between PBG and the Account with regard to the subject matter hereof. This Agreement can only be amended in writing, signed by all parties.
- 15.2 There are no representations, warranties or conditions of sale other than those expressly set out herein. In particular, all warranties and conditions which would otherwise apply to this Agreement under any *sale of goods* legislation shall have no application to any material delivered by PBG thereunder.
- 15.3 If any provision of this Agreement is determined to be invalid or unenforceable in whole or in part, such invalidity or unenforceability shall attach only to such provision or part thereof and the remaining part of the provision and all other provisions hereof shall continue in full force and effect.
- 15.4 This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.
- 15.5 Neither this Agreement nor the relationship of the parties described herein shall confer upon the Account any interest in trademarks associated with the Products, and the Account agrees not to utilize such trademarks in any manner calculated to represent that it is the owner of such marks. The Account agrees, during the Term and thereafter not to dispute or contest, directly or indirectly, the validity of the registration of any trademarks associated with the Products or otherwise to attempt to dilute the value or good will attaching to such trademarks nor to counsel, procure or assist any one else to do the same.
- 15.6 Title or risk of loss to the Products shall pass to the Account immediately upon delivery of same to an Outlet.

Schedule A

Pricing

Package	Products	Invoice
600/591ml x 24	All except Aquafina & Sobe	\$18.20
600/591ml x 24	Aquafina	\$10.20
600/591ml x 12	Sobe	\$17.00
473ml x 12	Ocean Spray	\$9.50
473ml x 12	Lipton	\$9.50
341ml x 24	Sunrype (Juices)	\$12.00
355ml x 24	Carbonated	\$7.40
355ml x 24	Lipton / Countrytime	\$7.40
355ml x 12	Carbonated	\$3.70
355ml x 12	Lipton / Countrytime	\$3.70
281ml x 12	Frappucino	\$17.80
Fountain		
20L BIS	All Brands	\$45.10
12L BIS	All Brands	\$27.06
CO2	20lb.	\$20.00
Cups and Lids		
12oz Cup (2500)		\$115.00
16oz Cup (1000)		\$49.00
20oz Cup (1000)		\$58.00
12oz Lid (2500)		\$47.00
16/20oz Lid (1000)		\$25.00
Note: Specialty and collector cups available at market prices		

Vending Commissions:

A lump sum payment of \$24,000.00 in vending commissions shall be paid to the Town of Amherstburg each year of the contract. Should the amount exceed the lump sum payment based on 30% of net monies collected from the vending machines, the difference would be reconciled and paid at the end of the contract year.

Marketing

The Town of Amherstburg will receive an annual marketing payment of \$10,000.00 in each year of the contract, in support of logo exposure and electrical considerations.

Support

Upon request from the Town of Amherstburg, PBG will make available up to 200 cases of 24x355ml. cans or their equivalent at no charge in support of special events and/or fund raisers.

Please indicate your agreement with the above terms and conditions by signing this document as indicated below.

Yours very truly,

THE PEPSI BOTTLING GROUP (CANADA), CO.

By: _____
Name: _____
Title: _____

Accepted and Agreed this 11th day of MARCH, 2002.

Town of Amherstburg

By: <u>Tony DiBartolomeo</u>	<u>David Mallouf</u>
Name: <u>TONY DIBARTOLOMEO</u>	<u>DAVID MALLOUF</u>
Title: <u>MAYOR</u>	<u>CLERK</u>