

# CITY OF KELOWNA

## BYLAW NO. 8945

### **A Bylaw to Authorize the Strategic Alliance Agreement with Pepsi Bottling Group (Canada) Co.**

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WHEREAS pursuant to the powers granted to the City by the *Local Government Act* and other legislation and after due consideration for the substantial benefits which Council considers will accrue to the City;

AND WHEREAS the Council has provided a counter petition opportunity in relation to the proposed agreement;

The Municipal Council of the City of Kelowna, in open meeting assembled, enacts as follows:

1. This bylaw may be cited as "Strategic Alliance Agreement (Pepsi Bottling Group (Canada) Co.) Authorization Bylaw No. 8945".
2. The Council is hereby authorized to enter into and carry out the Strategic Alliance Agreement with the Pepsi Bottling Group (Canada) Co. (the "Agreement") attached to and forming part of this Bylaw as Schedule "1".
3. The Mayor and Clerk are authorized to execute, seal and deliver the Agreement and all other transfers, statements, plans, documents and other instruments as contemplated by or necessarily related to the Agreement.

Read a first, second and third time by the Municipal Council this

Adopted by the Municipal Council of the City of Kelowna this

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Mayor

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City Clerk

## STRATEGIC ALLIANCE AGREEMENT

THIS AGREEMENT made as of the \_\_\_\_ day of \_\_\_\_\_, 2002,

BETWEEN:

**CITY OF KELOWNA**, a municipality under the Local Government Act of British Columbia, having its head office at 1435 Water Street, Kelowna, British Columbia, V1V 1V7

(hereinafter called the “City of Kelowna”)

AND:

**THE PEPSI BOTTLING GROUP (CANADA), CO.**, a company incorporated pursuant to the laws of Nova Scotia, having a business office at 1610 Dilworth Drive, Kelowna, British Columbia, V1Y 7V3

(hereinafter called “PBG”)

WITNESSES THAT WHEREAS:

A. City of Kelowna is a municipal corporation with jurisdiction over the geographic area also known as the “City of Kelowna”, in Kelowna, British Columbia;

B. City of Kelowna has the right to occupy, manage and operate certain facilities located within the Kelowna municipal boundaries;

C. PBG is the authorized bottler and distributor in British Columbia of beverages manufactured or produced under licence or authorized for distribution by or on behalf of PepsiCo, Inc.;

D. City of Kelowna and PBG have agreed that for the term of this Agreement:

- (a) PBG will supply Cold Beverage Products to City of Kelowna and parties designated by City of Kelowna, for sale at City Facilities;
- (b) PBG will supply to City of Kelowna or parties designated by City of Kelowna beverage dispensing, vending, point of sale and other equipment, and will upgrade certain of the existing equipment and will maintain and service all such equipment; and
- (c) City of Kelowna will provide to PBG certain exclusive supply, advertising, marketing and promotional rights;

all on the terms and subject to the conditions set forth in this Agreement.

NOW THEREFORE in consideration of the premises, the mutual covenants and agreements herein contained, and for other good and valuable consideration (the sufficiency of which is hereby mutually acknowledged), the parties hereto covenant and agree as follows:

## **INTERPRETATION**

### **Definitions**

Unless otherwise indicated herein, the terms set forth below as used in this Agreement shall have the following meanings:

- (a) “Agreement” means this Strategic Alliance Agreement made as of the day the City signs, including the recitals and all Schedules hereto;
- (b) “Annual Cash Rights Fee” means the fee payable on the first day of each Contract Year by PBG for the rights granted to PBG hereunder, as more particularly described in paragraph 7.1 hereof;
- (c) “Authorized Cups” means, unless otherwise agreed, the disposable cups used to serve Cold Beverage Products of PBG, illustrating one or more of the PBG Marks (and any other mutually agreed graphics), to be supplied by PBG to City of Kelowna or City Designated Purchasers pursuant to paragraph 4.1 hereof;
- (d) “Beverage Outlet” means a restaurant, cafeteria or concession within a City Facility from which Cold Beverage Products are made available for sale;
- (e) “Business Day”, except as otherwise noted, means any day on which City of Kelowna’s Parks and Leisure Services Department is open for business, and does not include any statutory or civil holiday observed by City of Kelowna’s Parks and Leisure Services Department;
- (f) “City Designated Purchasers” means the food services operators and other licensees or lessees of City of Kelowna operating a Beverage Outlet from a location at any City Facilities who may purchase Cold Beverage Products for resale at the City Facilities from time to time, which at the Commencement Date means those listed in Schedule B;
- (g) “City Facilities” means those parks, stadiums and other facilities which are situated within the City of Kelowna Area, governed by this Agreement and described in Schedule A attached hereto (together with any additional facility that City of Kelowna may, in its discretion and with the agreement of PBG, elect in writing to add to Schedule A as an additional City Facility);
- (h) “City of Kelowna Area” means the geographic area governed by the City of Kelowna as set out in its Letters Patent;

- (i) “City of Kelowna Authorized Events” means sporting, recreational or other events or activities occurring on one or more of the City Facilities which are organized by or otherwise controlled by the City of Kelowna, at which Cold Beverage Products are to be served or made available;
- (j) “City Facilities Marks” means the registered and unregistered official marks, trade-marks, trade names, logos and design marks from time to time relating to the City Facilities, owned by City of Kelowna or which City of Kelowna has the legal right to use and/or sublicense, including but not limited to those set out in Schedule D attached hereto;
- (k) “Coca-Cola” means Coca-Cola Ltd. or Cott Corporation or any of their respective subsidiaries and affiliates, related companies, bottlers, or distributors;
- (l) “Cold Beverage Products” means:

all carbonated and non-carbonated, natural or artificially-flavoured, non-alcoholic beverages, whether meant to be served at room temperature or colder, consumed independently or used as a mixer, including but not limited to: non-alcoholic beverages with nutritive or non-nutritive sweeteners; flavoured and/or sweetened water; naturally or artificially flavoured fruit juices; fruit juice-containing drinks, fruit-flavoured drinks (sweetened or unsweetened); fruit punches and ades; hypertonic, hypotonic and isotonic energy and fluid replacement drinks (sometimes referred to as “sports drinks”); frozen carbonated beverages; bottled/canned carbonated and non-carbonated waters, and packaged cold teas and coffees; and

all drink or beverage bases, whether in the form of syrups, powders, crystals, concentrates or otherwise, from which drinks and beverages as described in sub-paragraph (i) are prepared;

from time to time sold hereunder including those currently available Cold Beverage Products listed in Schedule F hereof, BUT DOES NOT INCLUDE:

dairy and dairy-like beverages including, without limitation, milk, milkshakes, flavoured milk, hot chocolate beverages and cocoa, and hot coffee beverages which are primarily (that is, more than 50% by volume) dairy based;

cold brewed unpackaged coffee or tea, hot coffee, hot tea, tea bags, loose tea, loose coffee grains or beans, water packaged in bulk or water drawn from the public water supply;

beer and near beer beverages whether alcoholic or non-alcoholic;

alcoholic or low alcoholic beverages, and non-alcoholic wines, coolers and spirits;

all drink or beverage bases, whether in the form of syrups, powders, crystals, concentrates or otherwise, from which drinks and beverages as described in sub-paragraphs (iii) through (vi) are prepared; and

freshly squeezed or extruded vegetable and fruit juices;

- (m) “Commencement Date” means the date the City signs the Agreement;
- (n) “Commission” means 36% of Revenues From Vending Machines;
- (o) “Contract Year” means each period of one year throughout the Term (and, if applicable, the Extended Period) beginning with the Commencement Date and thereafter beginning with each anniversary date of the Commencement Date;
- (p) “Equipment” shall have the meaning set forth in paragraph 5.1.1 hereof,
- (q) “Equipment Placement Plan” means the list of Equipment (including, without limitation, Vending Machines) to be supplied by PBG as at the Commencement Date and the initial plan for the placement or location of such Equipment, as described in Schedule “E” hereto;
- (r) “Equipment Services” shall have the meaning set forth in paragraph 5.7 hereof;
- (s) “Extended Period” shall have the meaning set forth in paragraph 7.2 hereof;
- (t) “GAAP”, wherever in this Agreement reference is made to a calculation to be made or an action to be taken in accordance with GAAP, means generally accepted accounting principles in Canada from time to time approved by the Canadian Institute of Chartered Accountants, or any successor institute, applicable as at the date on which such calculation or action is made or taken or required to be made or taken;
- (u) “Graphic Standards” means specifications and standards relating to the use and reproduction of official marks, trade-marks, trade names, logos, design marks, crests and other marketing and advertising materials;
- (u1) “Guaranteed Commission Amount” shall have the meaning set forth in paragraph 7.3.2 hereof;
- (u2) “Implementation Period” means the period commencing June 1, 2001 and ending on the Commencement Date, it being agreed that all Cold Beverage Product purchases from PBG and all PBG vending sales during this period will be counted towards achieving the Volume Expectation hereunder;
- (v) “OTC Supply Services” shall have the meaning set forth in paragraph 4.1 hereof;
- (w) “PBG Marks” means the registered and unregistered trade-marks, trade names, logos and design marks and other intangible property from time to time owned by PBG or which have been licensed by PepsiCo, Inc. or others to PBG for its use, and includes for purposes of this definition domain names and all website content which PBG has developed or which PBG otherwise has a right to use or reproduce;

- (x) “Premiums” means items of merchandise (excluding food and beverages) which bear one or more of the PBG Marks and at PBG’s cost are given away free of charge or sold at a subsidized price by PBG for advertising or promotional purposes and are approved in advance in writing by City of Kelowna for use by PBG pursuant to the provisions of this Agreement;
- (y) “Raw Case” shall mean the case sizes and conversion ratios of PBG communicated to the industry for a “raw case” of each Cold Beverage Product of PBG, being those listed in Schedule J with respect to the Cold Beverage Products listed in Schedule F;
- (z) “Revenues From Vending Machines” means all gross revenues from Cold Beverage Products sold through the Vending Machines net of GST, deposits and any future tax or government levy on vended products that is applicable and legislated after the Commencement Date;
- (aa) “Rules and Regulations” means the rules and regulations of general application established by City of Kelowna from time to time, notice of which has been given to PBG, providing for the orderly and efficient use and operation of the City Facilities;
- (bb) “Services” means the Vending Machine Supply Service, the OTC Supply Services and the Equipment Services;
- (bb1) “Period” shall have the meaning set forth in paragraph [7.3.1](#) hereof;
- (cc) “Term” means the 10 year period commencing on the Commencement Date and terminating, subject to the provisions of paragraph 8.2 hereof, ten years from the date of the City signing;
- (dd) “Third Party Events” means events or activities organized by third parties held on or about one or more of the City Facilities under rental or license agreements with City of Kelowna, examples of which include but are not limited to athletic or sporting events hosted by athletic associations or athletic teams which rent or license one or more of the City Facilities on a regular basis for games;
- (ee) “Unauthorized Events” means any events or activities held on one or more of the City Facilities from time to time, other than Third Party Events and City of Kelowna Authorized Events, at which Cold Beverage Products are likely, in City of Kelowna’s reasonable judgment, to be served or sold;
- (ff) “Vending Machines” means all vending machines located on the City Facilities or in outdoor vending locations which are made available by PBG and are intended to dispense Cold Beverage Products during the Term and, if applicable, the Extended Period, including those listed at the locations set out in the Equipment Placement Plan attached as Schedule E;

- (gg) “Vending Machine Supply Service” shall have the meaning set forth in paragraph 4.2.1 hereof; and
- (hh) “Volume Expectation” means fifty-four thousand, six hundred and ninety-four (54,694) Raw Cases of Cold Beverage Products of PBG, of which twenty thousand four hundred and thirty-three (20,433) Raw Cases are expected to be sold through Vending Machines.

### **Schedules**

The following Schedules are attached to this Agreement and shall form a part hereof:

<u>Schedule</u>	<u>Description</u>
A	City of Kelowna Facilities
B	Current City Designated Purchasers
C	This schedule originally referred to information specific to the Okanagan University College Agreement and does not apply to the City of Kelowna Agreement
D	City Facilities Marks
E	Equipment Placement Plan
F	Cold Beverage Products List
G	City <a href="#">Facilities</a> Official Publications
H	Wholesale and Retail Vending Prices
I	Conditions of Use of City Facilities Marks
J	Raw Case - Conversion Table
K	Equipment Loan Agreement (PBG Standard Form)
L	Conversion Schedule
M	Certificate of Insurance

### **Number and Gender**

All words contained in this Agreement shall be read as the singular or the plural and as the masculine, feminine or neuter gender as may be applicable in the particular context, and shall result in the particular clause being given the most reasonable interpretation.

### **References**

The words “herein”, “hereby”, “hereunder”, “hereof”, “hereto”, and words of similar import, refer to this Agreement as a whole and not to any particular section, paragraph or clause of this Agreement. References to sections, paragraphs or clauses refer to the sections, paragraphs and clauses of this Agreement unless otherwise stated.

### **Currency**

All sums of money expressed in this Agreement are expressed in lawful money of Canada.

## **No Influence Over City Policies or Bylaws**

PBG acknowledges and agrees that this Strategic Alliance Agreement governs only the supply of Cold Beverage Products and does not give PBG, nor does it imply that PBG has, any influence or control whatsoever over City of Kelowna policies or bylaws.

## **GRANT OF RIGHTS**

### **Rights**

Subject in each case to the provisions of this Agreement (and, in particular, the provisions of paragraphs 2.3, 2.4, 4.5, 6 and 11.3 hereof), City of Kelowna hereby grants to PBG for the duration of the Term and, if applicable, the Extended Period:

- (ii) the exclusive right to sell Cold Beverage Products to City of Kelowna and subject to the provisions of Section 2.1.2 hereof to City Designated Purchasers for sale or distribution at the City Facilities;
- (jj) the exclusive right in the Cold Beverage Products category to designate itself as an “Official Sponsor/Supplier” of or to the City Facilities;
- (kk) the exclusive right to advertise Cold Beverage Products at the City Facilities (including, without limitation, the right to display signage for one or more of the Cold Beverage Products on all Equipment located at the City Facilities), which advertising shall be limited to that set out in paragraph 6 hereof;
- (ll) the exclusive right to:

use one or more of the City Facilities Marks in the promotion and advertising of Cold Beverage Products;

promote Cold Beverage Products in one or more of the City Facilities which have a Beverage Outlet including, without limitation, by the distribution of Premiums therein; and

use one or more of the City Facilities Marks in a joint marketing and promotion program undertaken by PBG and one of its marketing partners or accounts promoting and advertising Cold Beverage Products and displaying their respective marks, logos and branded products, including by way of example in electronic or print media and on point-of-sale materials (it being understood and agreed that under no circumstances shall PBG’s marketing partners or accounts be presented as, or appear to be themselves, sponsors of or suppliers to the City Facilities),

subject in all cases to the approval provisions of Section 3 hereof;

- (mm) the exclusive opportunity to conduct sampling of Cold Beverage Products at the City Facilities, subject to the provisions of Section 3 hereof;



- (nn) together with its agents and employees, a reasonable non-exclusive right of access to the City Facilities for the purpose of fulfilling its obligations hereunder, provided that such access:

does not unreasonably conflict with or impede the carrying on of any activities on the City Facilities; and

is subject always to the restrictions set forth herein and to the Rules and Regulations as well as any requirements under any collective bargaining agreements in place from time to time in respect of any aspect of the City Facilities and City of Kelowna.

### **Purchase and Supply of Cold Beverage Products - City Designated Purchasers**

The City of Kelowna agrees that it shall require all current City Designated Purchasers to deal only in PBG Cold Beverage Products and to adhere to the provisions of exclusivity herein. The City of Kelowna further agrees that all agreements made by the City of Kelowna during the term with City Designated Purchasers shall require that such City Designated Purchaser sell or distribute only those Cold Beverage Products purchased exclusively from PBG. PBG shall supply City Designated Purchasers with Cold Beverage Products, Services and Equipment at the same prices and on similar terms and conditions as the City of Kelowna, unless such City Designated Purchaser is already subject to an agreement with PBG, in which case that agreement shall govern with the exception that the volume of Cold Beverage Product purchased by such City Designated Purchaser during the Term shall be counted towards the Volume Expectation pursuant to Section 8 hereof. City of Kelowna shall give notice in writing of any addition, change or removal of a City Designated Purchaser to PBG.

### **Scope of Exclusivity**

Subject in each case to the provisions of this Agreement (and, in particular, the provisions of paragraphs 2.3, 2.4, 4.5 and 11.3 hereof), and without limiting the provisions of paragraph 2.1 hereof, City of Kelowna will not during the Term or, if applicable, the Extended Period:

- (oo) license any competitor of PBG to use the City Facilities Marks in connection with the sale or distribution of Cold Beverage Products;
- (pp) grant to any manufacturer or supplier of Cold Beverage Products, other than PBG, the right to associate its Cold Beverage Products with the City Facilities;
- (qq) except where expressly permitted hereunder, authorize any other supplier to sell or distribute Cold Beverage Products to the City Facilities; or
- (rr) purchase from Coca-Cola any Cold Beverage Products for the City Facilities.

### **Limitations on Exclusivity**

The exclusivity of the grant of rights under paragraphs 2.1 hereof and the exercise of such rights are subject to the following limitations, restrictions and acknowledgements:

- (ss) PBG's exclusive right to designate itself as an "Official Supplier/Sponsor" under paragraph 2.1.1(b) above shall be subject to the provisions of Section 3 hereof;
- (tt) PBG acknowledges that City of Kelowna has little control over Unauthorized Events and that City of Kelowna's obligations hereunder with respect to Unauthorized Events shall be limited to the following:

should City of Kelowna's Parks and Leisure Services Department receive actual notice of an Unauthorized Event sufficiently in advance of the event taking place it will take commercially reasonable steps to (A) inform the organizers of such Unauthorized Event that PBG has exclusive rights to supply Cold Beverage Products to the City Facilities, and (B) request that the Unauthorized Event be held in a manner which is not inconsistent with PBG's exclusive rights hereunder;

- (uu) with respect to Third Party Events, PBG acknowledges that City of Kelowna rents or licences the City Facilities on a regular basis for Third Party Events, the organizers of which may have supply arrangements with competing suppliers of Cold Beverage Products. City of Kelowna shall be entitled to permit such competing suppliers to supply their own Cold Beverage Products to the participants in such Third Party Events and to advertise their Cold Beverage Products during such Third Party Events, provided that:

such advertising shall only be permitted in the particular City Facilities hosting or involved in the Third Party Event and PBG's signage will not be removed during such Third Party Event;

each Third Party Event will have a duration of not more than seven (7) days in any one Contract Year; and

the Beverage Outlets and/or Vending Machines, as the case may be, at each of the City Facilities shall continue to sell only PBG Cold Beverage Products at all Third Party Events;

- (vv) City of Kelowna shall not be accountable for the individual use or consumption on or about the City Facilities of, or for individuals on or about the City Facilities associating themselves in any manner with, competing Cold Beverage Products including consumption or advertising by individuals utilizing the City Facilities from time to time provided that City of Kelowna will circulate a statement to staff encouraging the individuals comprising same to respect the relationship between City of Kelowna and PBG;
- (ww) PBG's right of exclusivity with respect to the advertising of Cold Beverage Products in the City Facilities shall, in relation to flyers, posters, magazines, newspapers, radio and other media, apply solely in relation to the official publications directly controlled by the City Facilities;
- (xx) to the extent that a particular section of the Vending Machine servicing route is not ordinarily serviced directly by PBG, it may engage a third party to service that section on its behalf but PBG shall at all times remain responsible for such servicing and shall be liable for the acts and omissions of its contractors.

### **Subject to Laws**

The exercise of the various rights granted under this Agreement and the performance of obligations under this Agreement are subject to all applicable laws, regulations and ordinances of governmental authorities. Each party shall comply with all applicable laws, regulations and ordinances from time to time in effect in fulfilling its duties or exercising its rights hereunder. All rights, authorizations and consents not expressly granted under this Agreement to PBG are expressly reserved to City of Kelowna.

### **Appointment of Account Managers**

Each party shall appoint a designated account manager to the administration, management, marketing and servicing of City of Kelowna's account. Each party shall use reasonable efforts not to change the designated representative more often than once during any Contract Year.

## **TRADE MARKS AND PROMOTIONAL ACTIVITIES**

### **Use of City Facilities Marks**

PBG shall comply with and agrees to be bound by all provisions of Schedule I hereof relating to its use of the City Facilities Marks as permitted hereunder.

### **Approval of Advertising and Promotional Activities**

The advertising, promotional activity, display of PBG Marks, and sampling of Cold Beverage Products at City Facilities, permitted under this Agreement will be conceived, designed and implemented by PBG in co-operation with City of Kelowna, and in the best interests of the City of Kelowna and PBG. At least thirty (30) days prior to the commencement of each Contract Year of the Term and, if applicable, the Extended Period, the PBG account manager designated pursuant to paragraph 2.5 hereof shall meet with his or her City of Kelowna counterpart and discuss and obtain approval for all proposed advertising, promotional activities, (including, without limitation, any proposed use of the designation of "Official Supplier/Sponsor pursuant to paragraph 2.1.1(b) hereof), display of the PBG Marks, materials (including Premiums) and sampling to be used or carried out during such Contract Year. Such proposals shall outline in reasonable detail (including, without limitation, space needs, location(s), dates of commencement, duration and hours of operation, as applicable) each advertising, promotional or sampling activity planned for execution and the proposed nature, manner and extent of use of promotional materials, the City Facilities Marks, PBG Marks and, if applicable, any trade-marks of PBG's marketing partners or accounts in relation thereto. Once approval is obtained, PBG shall not without the prior consent of City of Kelowna deviate in any material respect from the approved activity or materials and such City of Kelowna approval shall be valid only for that particular Contract Year.

### **Use of PBG Marks**

Neither this Agreement nor the relationship of the parties described herein shall confer upon City of Kelowna or any City Designated Purchaser any interest in the PBG Marks or any other trademarks (other than the City Facilities Marks) from time to time associated with the PBG Cold Beverage Products or any Premiums, and City of Kelowna agrees not to utilize the PBG Marks or such other trademarks in any manner calculated to represent that it is the owner of such marks. City of Kelowna shall not use the PBG Marks or such other trademarks without the prior written approval of PBG. City of Kelowna 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 PBG Cold Beverage 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.

### **Protection of City Facilities Marks**

If, during the Term or, if applicable, the Extended Period, any unauthorized use or misuse by a third party of the City Facilities Marks occurs in connection with any Cold Beverage Products, the party discovering the unauthorized use or misuse of City Facilities Marks shall, immediately upon learning thereof, promptly notify the other party in writing, setting forth the facts in reasonable detail. PBG agrees that City of Kelowna shall have the sole right to determine whether any action should be taken to terminate such unauthorized use or misuse or settle any action, proceeding or claim brought by City of Kelowna to terminate such misuse, subject to City of Kelowna obligations of exclusivity hereunder.

### **Protection of PBG Marks**

If, during the Term or, if applicable, the Extended Period, any unauthorized use or misuse by a third party of the PBG Marks occurs in connection with the City Facilities, the party discovering the unauthorized use or misuse of the PBG Marks shall, immediately upon learning thereof, promptly notify the other, in writing, setting forth the facts in reasonable detail. City of Kelowna agrees that PBG shall have the sole right to determine whether any action should be taken to terminate such unauthorized use or misuse or settle any action, proceeding or claim brought by PBG to terminate such misuse.

## **SUPPLY OF COLD BEVERAGE PRODUCTS**

### **OTC Supply, Pricing and Payment**

During the Term, PBG shall supply, sell and deliver to City of Kelowna and to City Designated Purchasers, as the case may be, such brands and formats of Cold Beverage Products set forth in Schedule F hereto as the same may be amended or supplemented from time to time, in such quantities and at such locations on or about the City Facilities, as may be reasonably directed by City of Kelowna or a Designated Purchaser (the "OTC Supply Services"), together with Authorized Cups and lids in the case of fountain Cold Beverage Products supplied hereunder. While the account managers appointed pursuant to paragraph 2.5 hereof shall meet at least once per Contract Year to discuss PBG's recommendations with respect to the optimum

mix of brands and formats of PBG Cold Beverage Products set forth on Schedule F hereof and to be purchased by City of Kelowna and the City Designated Purchasers from time to time hereunder, PBG acknowledges that the City of Kelowna and the City Designated Purchasers shall each be entitled to select, in their sole discretion, which such brands and formats of PBG Cold Beverage Products it wishes to purchase from time to time (it being agreed, however, that PBG may advise City of Kelowna if it determines that any Designated Purchaser is not providing a reasonable selection of brands and packaging to consumers). PBG shall accept and fill orders for the Cold Beverage Products from City of Kelowna or any Designated Purchaser based solely upon a purchase order placed by telephone or upon such other method of ordering Cold Beverage Products as PBG and City of Kelowna or such Designated Purchaser may reasonably agree upon. Unless otherwise agreed, all orders will be communicated to and delivered by PBG at no charge during the particular City Facility's normal business hours, and delivered within forty-eight (48) hours from the time the order was placed. If PBG fails to deliver a particular order within such forty-eight hour period and the order of Cold Beverage Products is required for an event or activity taking place within such forty-eight hour period, then the City of Kelowna or City Designated Purchaser may purchase PBG Cold Beverage Products from another supplier to fill such order.

The Cold Beverage Products and the Authorized Cups and lids supplied under paragraph 4.1.1 hereof shall be sold to City of Kelowna and the City Designated Purchasers at the wholesale prices set out in Schedule H under the heading "Wholesale Prices", plus applicable taxes and deposits. The initial prices set forth in Schedule H shall be no greater than the current pricing available to City of Kelowna immediately prior to the Commencement Date, and shall remain unchanged until the third anniversary of the Commencement Date, being \_\_\_\_\_, 2005. Thereafter, PBG may increase prices once per Contract Year during the Term and, if applicable, the Extended Period, which increase shall take effect on or after January 1 but prior to March 15th of such Contract Year. PBG agrees that at no time shall any proposed price increase:

- (yy) result in any wholesale prices which are greater than the lowest wholesale prices offered by PBG to its commercial accounts in similar channels (business, institutional, educational, recreational) having similar aggregate annual volume, taking into account all PBG Cold Beverage Products supplied to City of Kelowna, its City Designated Purchasers and to the City Facilities (including Vending Machine volume) together with all such Cold Beverage Products supplied to or on behalf of the *Okanagan University College* and the Interior Health Authority;
- (zz) result in any wholesale prices which are greater than the lowest wholesale prices offered by PBG in its most up-to-date published schedule of wholesale prices; or
- (aaa) be greater than the percentage increase (if any) in the Consumer Price Index (All Items) as published by Statistics Canada (or any successor government agency) for British Columbia for the immediately preceding calendar year (from January 1st until December 31st) up to a maximum percentage increase of 3%.

Notwithstanding the provisions of paragraph 4.1.2, in the event there is a significant ingredient change or new formulation of a Cold Beverage Product of PBG, or a significant

increase in price of commodities used in the production or packaging of the Products, including without limitation, sweeteners, sugar, resin, aluminium and/or packaging materials, and PBG increases the applicable price(s) charged to its commercial accounts purchasing similar annual volumes of PBG's Cold Beverage Products as the total annual volume purchased under this Agreement, PBG may make price changes exceeding those set out above, 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.

Payment of invoices shall be in accordance with their stated terms, currently the 20th day of the month following the date of issuance. Interest on overdue accounts shall be calculated at a rate of 18% per annum or such other rate established by PBG in its standard invoice to customers.

Increases and decreases due to taxes or duties (including, without limitation, goods and services tax, and any new government imposed taxes) shall be added to or deducted from the Prices and any applicable allowances and rebates.

All payments to or by PBG hereunder shall be rendered without deduction or set off.

At the request of City of Kelowna from time to time, PBG shall meet with the account manager of City of Kelowna to review the wholesale pricing applicable to PBG's commercial accounts purchasing similar annual volume, prior to and in connection with any proposed price increase under paragraph 4.1.2 of this Agreement.

Authorized Cups and lids shall be provided to City of Kelowna and the City Designated Purchasers at the wholesale prices set out in Schedule H. Prices for Authorized Cups and lids shall not be increased until after the third anniversary of the Commencement Date. Thereafter, any price increases shall be governed by the same restrictions as are set out in paragraph 4.1.2 applicable to Cold Beverage Product wholesale price increases.

PBG shall give City of Kelowna, the City Facilities and all City Designated Purchasers at least ninety (90) days' written notice of any price increase.

### **Supply of Vended Product**

During the Term and, if applicable, the Extended Period, PBG shall diligently maintain and service the Vending Machines under the Vending Machine Supply Service. For purposes of this Agreement, the term "Vending Machine Supply Service" shall mean that:

- (bbb) PBG shall fill all Vending Machines exclusively with Cold Beverage Products distributed by PBG subject only to paragraph 4.2.5 hereof, at a frequency which is sufficient to continuously meet the consumer demand for each of the Cold Beverage Products dispensed by each Vending Machine;
- (ccc) PBG shall promptly maintain and repair all Vending Machines at no charge to City of Kelowna;

(ddd) All stocking services shall be performed by qualified employees or representatives of PBG, and shall be provided promptly and courteously with the minimum amount of interruption and inconvenience possible. PBG's employees shall respond to any stocking service request on a priority basis within twenty-four (24) hours of such request (or at such time as may be mutually agreed upon by the parties), but shall use reasonable efforts to respond the same day as the request if the request is made by 11:00 a.m. on a Business Day. City of Kelowna acknowledges and agrees that all revenues in each Vending Machine are PBG's and only a PBG employee or agent shall remove such monies at the time of re-stocking.

The Vending Machines, all Cold Beverage Products stocked therein and the proceeds from the sales of Cold Beverage Products dispensed through Vending Machines shall be and remain the property of PBG.

In providing the Vending Machine Supply Service, PBG shall use all reasonable efforts to meet customer needs and service requirements, thereby maximizing Revenues From Vending Machines and Commissions in a manner which is consistent with the standards required hereunder and all other terms and conditions of this Agreement.

Throughout the Contract Term, PBG and City of Kelowna shall agree on the selection, product mix and packaging of Cold Beverage Products that shall be offered for sale from time to time in the Vending Machines, which shall at all times include a reasonable mix of Sun-Rype brand juice products. PBG agrees that any transition from cans to bottles will be phased in, in accordance with a written schedule to be prepared by PBG prior to the execution of this Agreement and approved in advance by City of Kelowna, a copy of which shall be attached as Schedule L hereto.

During the Term, PBG will not materially reduce the scope of the variety of its Cold Beverage Products and packaging available as at the Commencement Date. PBG shall at all times use all reasonable commercial efforts to provide at least one brand (which brand shall be one of the top five in sales in the industry category) in each segment of the carbonated, non-carbonated, "sport drink", natural and artificially flavoured drink categories, as available products evolve in the industry from time to time. In addition, throughout the Term PBG shall provide a competitively priced domestic packaged water acceptable to City of Kelowna acting reasonably, in a variety of packaging sizes acceptable to City of Kelowna.

City of Kelowna acknowledges and agrees that PBG has the exclusive right to establish its own retail prices for Cold Beverage Products sold by PBG at City Facilities through Vending Machines. PBG agrees that, until \_\_\_\_\_, 2005, it shall not increase the retail prices for Cold Beverage Products available as at the Commencement Date and sold through Vending Machines above the retail prices set forth in Schedule H hereof under the heading "Vending Prices". Thereafter, Vending Prices may be increased by PBG (but not more frequently than once each Contract Year) provided that PBG shall give City of Kelowna at least 60 days advance written notice of any proposed price increase. Notwithstanding the foregoing, in no event shall any Vending Machine retail price increases hereunder be greater than any increase in the retail Vending Machine prices for PBG Cold Beverage Products in the surrounding marketplace.

### Additional Products

In addition to the list of Cold Beverage Products currently available attached as Schedule F, PBG shall inform City of Kelowna and the City Designated Purchasers of additional Cold Beverage Products from time to time sold or distributed by PBG, and shall make such new products available hereunder as soon as they are available to any other customer in British Columbia (such as, by way of example, the “Sobe” brand, which will be available as of the Commencement Date) at such initial prices as PBG shall determine. For greater certainty, all of the terms and conditions hereof shall apply *pari passu* to all such new Cold Beverage Products supplied hereunder.

### Quality

PBG warrants that the Cold Beverage Products supplied by it pursuant to this Agreement (excluding for all purposes of this paragraph 4.4.1 any Cold Beverage Product not manufactured by PBG, which for greater certainty as at the Commencement Date means the Frappuccino and Sun-Rype products to be supplied by PBG hereunder) shall be fit for human consumption and shall meet all applicable standards imposed by law, regulations or ordinances, provided that such warranty shall be void in the event of damage, contamination or other alteration of the Cold Beverage Products resulting from misuse, neglect, or accident of the City of Kelowna, a City Designated Purchaser or a third party as the case may be, occurring after delivery by PBG. There are no representations, warranties or conditions with respect to the Cold Beverage Products, express, implied or statutory, other than those expressly set out herein. PBG further warrants that the level of Services provided by it hereunder shall meet or exceed the standard prevailing in the industry.

City of Kelowna and their City Designated Purchasers shall be entitled to return to PBG and PBG shall reimburse City of Kelowna or the City Designated Purchaser, as the case may be, for all Cold Beverage Products supplied pursuant to Section 4.1 hereof which:

- (eee) do not meet the standards of quality provided for in this Agreement;
- (fff) are stale-dated at or within 30 days of the time of delivery or spoiled (by PBG’s product flaw or equipment failure); or
- (ggg) remain unsold upon the termination or expiration of the Term (so long as such products are saleable and have been properly stored).

In the event that the quality (for greater certainty, a change in flavour or formulation will not be a deterioration in quality unless it impacts on the fitness of the Cold Beverage Product for human consumption) of any Cold Beverage Product supplied by PBG deteriorates in any material respect (through no fault of City of Kelowna or a City Designated Purchaser), or in the event that there is an occurrence connected with any Cold Beverage Products supplied by PBG which reflects unfavourably in any material way upon the good name, goodwill or reputation of the City of Kelowna or any of the City Facilities (as determined by City of Kelowna in its reasonably exercised discretion) City of Kelowna shall have the right, in addition to any other remedies available to it, upon prior written notice to PBG, to source from any other supplier a comparable Cold Beverage Product if the quality, occurrence or factor (as the case may be) is not



remedied or corrected to the satisfaction of City of Kelowna in its reasonably exercised discretion within thirty (30) days of such notice, and may continue to do so until either the quality, occurrence or factor has been remedied or corrected or until such comparable Cold Beverage Product is available from PBG.

### **Unavailability of Cold Beverage Products**

PBG shall at all times make reasonable efforts to have available a sufficient supply of each Cold Beverage Product it from time to time distributes to enable PBG to promptly fill orders from City of Kelowna or any City Designated Purchaser.

If there is no Cold Beverage Product of PBG similar to one which City of Kelowna wishes to sell or otherwise supply at the City Facilities (each a “New Product”), then City of Kelowna and the City Designated Purchasers shall be entitled to source the supply of such New Product from a supplier other than PBG (the “Other Supplier”) provided that:

- (hhh) City of Kelowna has first notified PBG of the desire for such New Product and given PBG the opportunity to source a similar Cold Beverage Product which is competitive in price and quality to that of the New Product (it being agreed that PBG shall have 30 days from the date of City of Kelowna’s notice to do so);
- (iii) City of Kelowna shall not enter into any long-term exclusive supply contracts with any Other Supplier for such New Product;
- (jjj) if City of Kelowna wishes to dispense the New Product through vending machines, City of Kelowna shall be responsible for providing and maintaining the vending machines for the New Product (it being agreed, however, that the number of vending machines so operated by City of Kelowna shall not exceed 7% rounded “up” to the nearest “whole number” of the aggregate number of PBG Vending Machines on the City Facilities); and
- (kkk) if PBG subsequently produces and/or supplies a Cold Beverage Product which is similar to a New Product that City of Kelowna is purchasing from an Other Supplier and which is competitive in price and quality, then City of Kelowna will, within thirty (30) days after being satisfied (acting reasonably) that such PBG product is similar and competitive, cease purchasing such New Product from the Other Supplier and purchase such similar Cold Beverage Product exclusively from PBG under and subject to all the terms and conditions of this Agreement.

City of Kelowna agrees not to grant any advertising rights with respect to the New Product to any Other Supplier, except that the New Product name may appear on containers, and on menus and/or menu boards, if applicable, solely in the venues located within the City Facilities where such New Product is sold.

PBG acknowledges that as at the Commencement Date it does not have available a product which is similar to the Cold Beverage Products listed below which are currently available for sale in City Facilities, and agrees that City of Kelowna and its City Designated Purchasers shall

be entitled to continue to purchase such products from Other Suppliers subject to the provisions of paragraphs 4.5.2(b) through (d) inclusive:

- (a) iced products;
- (b) powdered drink products; and
- (c) “tetrapac” juices.

### **Sun-Rype Products**

PBG acknowledges the importance to City of Kelowna of continuing to make available a reasonable mix of Sun-Rype Products Ltd. (“Sun-Rype”) juice products at the City Facilities. Throughout the Term, conditional upon the entering into by PBG of an agreement with Sun-Rype on terms commercially acceptable to PBG, PBG agrees that it shall make available for purchase, at the City Facilities, a reasonable mix of Sun-Rype brand juice products, both for OTC Supply Services and Vending Machine sales. Should for any reason PBG be unable to supply a reasonable mix of Sun-Rype juice products (at the prices contemplated in this Agreement) at any time during the Term, then City of Kelowna and the City Designated Purchasers shall be permitted to purchase and sell such products from alternate sources, and shall be entitled in its discretion to install vending machines for vending sales of such products.

## **SUPPLY AND MAINTENANCE OF EQUIPMENT**

### **Equipment Supply**

PBG shall as soon as practicable following the Commencement Date (and in any event within thirty (30) days), unless otherwise mutually agreed by City of Kelowna and PBG, at its cost, replace or upgrade all existing Cold Beverage Products fountain and other dispensing equipment, merchandisers, refrigerators, coolers and Cold Beverage Products vending machines on the City Facilities with such fountain and dispensing equipment (including without limitation portable bars and carts, and “on field/on floor” dispensers), merchandisers, refrigerators, coolers and Vending Machines as are mutually agreed upon by the parties, and which are in good working condition and “as new” appearance (including illuminated vending fronts and “banking” if more than one Vending Machine) (which requirements are collectively referred to as the “Standards”). PBG shall also supply (as soon as practicable following the Commencement Date, and in any event within thirty (30) days), at its cost, such additional fountain and other dispensing equipment, merchandisers, refrigerators, coolers and Vending Machines as it and City of Kelowna mutually determine and agree to be necessary to meet the demand for Cold Beverage Products at the City Facilities, at such locations as may be agreed to in advance by PBG and City of Kelowna, and shall supply additional bars and carts for portable use as may be agreed by PBG and City of Kelowna, and shall supply sufficient “on field/on floor” dispensers as may be reasonably required for use by Team members/staff and opposing team players/staff. PBG covenants and agrees that all Cold Beverage Products equipment supplied to the City Facilities by PBG during the Term (collectively, the “Equipment”) shall, meet or exceed the Standards. The Equipment supplied by PBG shall be C.S.A. and British Columbia Electrical Safety Branch approved. PBG further covenants and agrees that the Vending Machines will not automatically

supply an alternate product if the customer's selection is unavailable. The list of all Equipment to be supplied by PBG to the City of Kelowna or a City Designated Purchaser on or within 30 days of the Commencement Date and the initial plan for the placement or location of such Equipment shall be described and attached as Schedule "E" hereto.

### **Implementation**

PBG will, at its cost, provide, install and prepare for operation (including, for new locations, the cost of installing additional electric power outlets from existing electrical lines, water from an existing water source with back flow preventor valve, drainage from PBG's fountain equipment to existing drain pipe and any similar facilities necessary for the use and operation of the Equipment), the Equipment at such times and such locations as may be mutually agreed. All Vending Machines shall be bolted to the adjacent wall. A supply of electricity and/or water as the case may be for each item of dispensing equipment or Vending Machine provided by PBG hereunder shall be provided by City of Kelowna at no cost, provided that City of Kelowna does not guarantee an uninterrupted supply of water or electricity and shall not be responsible for any loss or damage which may result from interruptions or failures of any such utility service. Notwithstanding the foregoing, City of Kelowna shall take reasonable steps to restore such supply after an interruption, without undue delay.

### **Ownership**

All Equipment (including without limitation can vendors, bottle vendors, premix beverage dispensers, postmix beverage dispensers, change machines and coolers) supplied by PBG hereunder is and shall remain the sole property of PBG. The said Equipment is made available at no charge by PBG to City of Kelowna or a City Designated Purchaser as the case may be, until the expiration of the Term or such earlier date as it may be removed and replaced by PBG. City of Kelowna shall, and shall ensure that City Designated Purchasers 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 owned the Equipment, but shall not have any obligation to maintain, repair or insure the Equipment except as indicated below. PBG shall bear the cost of any loss, damage or destruction of or to the Equipment (including, without limitation, due to theft or vandalism), provided however that City of Kelowna shall be responsible for damage or destruction to Equipment (reasonable wear and tear excepted) where PBG is able to establish to City of Kelowna's satisfaction, acting reasonably, that such damage was caused by the gross negligence or wilful misconduct of City of Kelowna or its agents or employees. City of Kelowna agrees to notify PBG promptly of any damage to Equipment. Except as provided in this Agreement, the provisions of PBG's standard form of equipment loan agreement shall apply to the Equipment loaned to City of Kelowna hereunder and to Equipment loaned to any City Designated Purchaser who has executed the standard form of equipment loan agreement with PBG, a copy of which is attached as Schedule K hereto (it being agreed that the provisions of this Agreement shall govern in the event of an inconsistency between this Agreement and the PBG equipment loan agreement).

Notwithstanding the provisions of Section 5.3.1, PBG agrees that City of Kelowna shall not be responsible or accountable in any respect for the failure in whole or in part of any City Designated Purchaser to observe or comply with the provisions of Section 5.3.1 and any failure

on the part of a City Designated Purchaser to comply or observe in whole or in part with the provisions of Section 5.3.1 shall not constitute a default under this Agreement.

### **Equipment Use**

The parties agree that the Equipment may be used solely to dispense or sell the Cold Beverage Products of PBG and display only the PBG Marks.

### **Additional or Upgraded Equipment**

At least once each Contract Year during the Term, PBG and City of Kelowna shall jointly conduct an Equipment and location audit and shall review Equipment upgrade, location upgrade and additional Equipment supply opportunities. During the Term, PBG shall, at its own expense, provide, install and prepare for operation such additional Equipment, if any, or upgrade existing Equipment or locations, as it and City of Kelowna may reasonably determine and agree to be necessary to maintain the Standards and to meet demand for Cold Beverage Products on the City Facilities. All such additional or upgraded Equipment shall be owned by PBG and loaned to City of Kelowna or a City Designated Purchaser, in accordance with paragraph 5.3 hereof. Installation costs for electric power outlets, drainage and/or water supply and any similar facilities for the use and operation of additional Equipment shall be:

- (lll) paid for by City of Kelowna in respect of locations in newly built or retrofitted facilities (it being agreed that City of Kelowna may always refuse to approve a new location in a newly built or retrofitted facility if in its reasonable discretion the cost of installing utilities, drainage or similar facilities necessary for the use and operation of the Equipment would be unreasonably high); and
- (mmm) paid for by PBG in respect of additional locations in any of the existing City Facilities, or in respect of substituted or redeployed locations.

The parties further agree that:

- (nnn) they shall use reasonable efforts to ensure that the number of Vending Machines on the City Facilities from time to time shall not fall below twenty-five (25); and
- (ooo) for greater certainty, the provision or supply to the City Facilities of any Vending Machines in addition to the number listed in the Equipment Placement Plan attached as Schedule E hereto shall be subject to the prior consent of City of Kelowna, which consent may not be arbitrarily and unreasonably withheld.

### **Warranty**

PBG shall use reasonable commercial efforts to obtain and pass on to City of Kelowna the benefit of all warranties regarding the Equipment.

## **Service**

PBG will, throughout the Term, maintain, service and promptly repair or replace, at its cost, on a “priority” basis all Equipment, menu boards, point of sale or other materials supplied by PBG hereunder as is necessary to maintain the Equipment and such materials in good working order at all times (the “Equipment Services”). As part of the Equipment Services, PBG shall carry out regular inspections and preventative maintenance and service. All Equipment Services shall be performed by qualified technicians and shall be consistent with industry standards, and shall be provided promptly and courteously with the minimum amount of interruption and inconvenience possible. PBG’s technicians shall respond on site within four (4) hours of the service request, provided the request is made at least four (4) hours prior to the end of the business day of the party making the service request. In any other case, PBG’s technicians will respond before noon the next business day. For the purposes of this paragraph 5.7.1, “business day” means any day on which the facility requiring the service is open for business. Emergency service during other times will be available on an “as needed” basis at no charge through a 24 hour phone number.

## **Recycling Containers**

PBG shall, at its own expense, supply sufficient permanent recycling containers which are equipped with a locking mechanism and are waterproof (either fibreglass or cardboard) with lids and waterproof replaceable liners, for each type of Cold Beverage Product packaging (i.e. plastic, glass or cans) supplied by PBG from time to time hereunder. At least one such container shall be located at each Beverage Outlet and at each “vending bank” having a group of two (2) or more Vending Machines. City of Kelowna may continue to service such recycling containers for all recycled materials from each location on each of the City Facilities and City of Kelowna shall be entitled to retain all revenues related to such recycling.

## **Debit Cards/Smart Cards**

Upon the request of City of Kelowna, PBG will at its expense convert the Vending Machines on the City Facilities (or install new Vending Machines) within a reasonable period of time (not to exceed three (3) months) so that the Vending Machines accept a City of Kelowna debit card and/or a financial institution “smart card” acceptable to City of Kelowna, as determined by City of Kelowna acting reasonably.

## **ADVERTISING**

### **Signage on Equipment, Scoreboards and Menu Boards**

Subject to Section 3 hereof, PBG shall be entitled to display the PBG Marks on the Equipment, on scoreboards and on point-of-purchase materials and menu boards.

### **Point of Purchase**

Subject to Section 3 hereof, PBG will throughout the Term at its expense supply point-of-purchase materials, menu boards and promotional displays (including concession

visuals) for those Beverage Outlets designated by City of Kelowna. At least once each Contract Year during the Term, City of Kelowna and PBG shall jointly review opportunities for additional point-of-purchase materials and displays or for upgrading existing materials and displays, to achieve optimal category awareness and improve merchandising techniques.

**Temporary Event Signage**

Subject to Section 3 hereof, from time to time at PBG’s written request and at PBG’s sole expense, City of Kelowna may permit PBG to display on a temporary basis during an City of Kelowna Authorized Event promotional banners or other signage (subject also to the approval of any third party involved in the organization of such event).

**Advertising in Official Publications**

Subject to Section 3 hereof, throughout the Term PBG shall have the exclusive opportunity within the Cold Beverage Products category, at standard advertising rates, to advertise its Cold Beverage Products or to illustrate one or more of the PBG Marks in those official publications of City Facilities, if any, that accept advertising, provided however that:

- (ppp) the opportunity to advertise in any particular publication shall terminate should such publication be discontinued without substitution, or should such publication cease to accept all advertising; and
- (qqq) PBG shall be responsible, at its own expense, for timely delivery to the particular publication of satisfactory “camera ready” ad copy for each advertisement.

**Sign Inserts and Displays**

During the Term and Subject to Section 3 hereof, PBG will provide to City of Kelowna at PBG’s expense sign inserts and display materials for use in connection with the signage space to be provided by City of Kelowna pursuant to paragraph 6.1, and shall reimburse City of Kelowna for the reasonable costs and expenses associated with the installation of the signage.

**CONSIDERATION**

**Annual Cash Rights Fee**

In consideration for the rights granted pursuant to Section 2 hereof, PBG shall pay to City of Kelowna an Annual Cash Rights Fee for and in advance of each of the 10 Contract Years comprising the Term in the amount per Contract Year set out in the following table:

<u>Contract Year(s)</u>	<u>Annual Cash Rights Fee</u>
1 - 2 inclusive	\$21,000 per Contract Year
3 - 5 inclusive	\$23,000 per Contract Year
6 - 10 inclusive	\$24,000 per Contract Year

The Annual Cash Rights Fee for each Contract Year shall be paid in advance to City of Kelowna and in full within seven (7) days of the commencement date of each Contract Year. City of Kelowna acknowledges the receipt from PBG in advance of the execution of this Agreement of a cheque for \$16,666 (the “deposit”) (exclusive of GST) of the Annual Cash Rights Fee applicable to the first Contract Year, the balance of which will be paid by PBG to City of Kelowna on the date of execution of this Agreement by both parties.

### **Additional Marketing/Promotional Support**

PBG agrees to establish a fund (the “Marketing Fund”) which will be expended each Contract Year on marketing and promotional support activities developed in accordance with Section 3 hereof and designed to support events and activities occurring in relation to the City Facilities, and which will be primarily “soft-drink” focused. The amount to be contributed by PBG to the Marketing Fund each Contract Year (and any Extended Period) will be four hundred and twenty-five (\$425.00) dollars. Any balance of the Marketing Fund not expended in a Contract Year shall be carried forward and added to the amount of funds to be contributed by PBG to the Marketing Fund for the next Contract Year. Should there be any outstanding contributions to the Marketing Fund at the last Business Day of the Term (or Extended Period), then the parties shall meet to determine each acting reasonably the manner in which such funding will be disbursed to or for the benefit of City of Kelowna. PBG will not unreasonably withhold its consent to an expenditure out of the Marketing Fund proposed by City of Kelowna.

In addition to the Marketing Fund, and subject to the provisions of Section 4.6 hereof, PBG agrees to establish a fund with Sun-Rype which will be expended each Contract Year on marketing and support activities to be developed by PBG and Sun-Rype in consultation with City of Kelowna in the manner provided for in Section 3 hereof, designed to support events and activities occurring in relation to the City Facilities, and which will be focused primarily on Sun-Rype juice products. The amount to be contributed by PBG (inclusive of any portion contributed by Sun-Rype) to the Juice Fund each Contract Year (and any Extended Period) will be four hundred and twenty-five (\$425.00) dollars. Any balance of the Juice Fund not expended in a Contract Year shall be carried forward and added to the amount of funds to be contributed by PBG to the Juice Fund for the next Contract Year. Should there be any outstanding contributions to the Juice Fund at the last Business Day of the Term (or Extended Period), then the parties shall meet to determine each acting reasonably the manner in which such funding will be disbursed to or for the benefit of City of Kelowna. PBG will not unreasonably withhold its consent to an expenditure out of the Juice Fund proposed by City of Kelowna.

In making expenditures on such marketing and promotional support activities, PBG shall take advantage of and shall “pass through” to City of Kelowna all discount and wholesale rates, prices and costs offered to or available from PBG. PBG shall report in writing to City of Kelowna in reasonable detail within 30 days of the end of each Contract Year during the Term (or Extended Period) on the marketing activities funded out of the Marketing Fund and the Juice Fund and any accumulated balance as at the end of each such Contract Year, and shall provide reasonable evidence to City of Kelowna to support the cash dollars contributed or spent in this regard.

PBG shall supply to City of Kelowna (when and as directed by City of Kelowna, acting reasonably) at no cost in each Contract Year forty (40) cases of PBG Cold Beverage Products each Contract Year for use as City of Kelowna shall see fit. In addition, PBG will provide up to \$1,000.00 additional “in kind” product and pricing support for tournaments and special events (and shall make available special discount pricing at such tournaments and events).

PBG will also provide to City of Kelowna, at no cost, the following additional marketing and promotional support contributions:

- (rrr) throughout the Term, Total Sports Packages for special events and tournaments (consisting of 5 gallon dispensers (NFL style), juice crystals, cups and banners), requiring an investment annually by PBG of at least \$170.00; and
- (sss) within thirty (30) days of the Commencement Date PBG will provide and install at PBG’s expense scoreclocks and/or scoreboards, in such number and having such specifications as may be requested by City of Kelowna and approved by PBG (which approval shall not be unreasonably withheld or delayed), and having an aggregate value not to exceed \$44,500.00, to be located in the following locations or such other locations as the City of Kelowna may reasonably direct:

Location

Apple Bowl  
Memorial Arena  
Rutland Arena  
Elk’s Stadium  
King’s Stadium outfield sign  
Kinsman Baseball Diamonds

City of Kelowna shall become the sole and exclusive owner, and have sole risk of loss, of such scoreboards and clocks immediately upon installation of the said scoreboards and clocks; and

**Commission, Guaranteed Commission and Vending Reports**

PBG shall pay to City of Kelowna the Commission for each Contract Year, or portion thereof, commencing on the Commencement Date and continuing for the balance of the Term including any Extended Period. Subject to the provisions of paragraph 7.3.2, the Commission shall be payable within 30 days after end of each calendar quarter (each a “Period” e.g. January 1 to March 30, April 1 to June 30, July 1 to September 30 and October 1 to December 31) of each such Contract Year in respect of Revenues from Vending Machines for the immediately preceding Period. Throughout the Term, PBG shall provide to City of Kelowna Period vending reports within 30 days of the end of the preceding Period, in detail satisfactory to City of Kelowna acting reasonably, setting out the volume of Cold Beverage Products (in units of Raw Cases) dispensed for sale through Vending Machines and the Revenues from Vending Machines and corresponding Commission for the preceding Period and the cumulative total for the Contract Year and the Term to date, as well as any other available data as may be mutually agreed upon by the parties such as the frequency of credit payments and sales data by machine,



brand and package, and sales by debit card and/or smart card. During any Extended Period, the vending reports shall instead be provided on a monthly basis, on or before the 15<sup>th</sup> day of each month, setting out the information for the previous month. City of Kelowna shall be entitled, at least once each Period during the Term (and any Extended Period), to conduct an “ad hoc” audit of Vending Machine meter readings, and shall in any event be entitled to receive copies of the meter readings from each of the Vending Machines, and PBG shall supply copies of the actual meter readings at City of Kelowna’s request.

Notwithstanding paragraph 7.3.1 hereof, PBG shall pay to City of Kelowna a guaranteed annual commission amount (the “Guaranteed Commission Amount”) for each of the 1<sup>st</sup> through the 10<sup>th</sup> Contract Years, inclusive, of the Term in the amount for each Contract Year set out in the following table:

<u>Contract Year</u>	<u>Guaranteed Commission Amount</u>
1 – 5	\$19,537
6 – 10	\$21,491

totalling two hundred five thousand, one hundred and forty (\$205,140.00) dollars over the Term. PBG shall pay each Guaranteed Commission Amount to City of Kelowna annually in advance, on the first day of each respective Contract Year. The Guaranteed Commission Amount paid for a particular Contract Year will be credited against the quarterly payments of Commission otherwise payable during such Contract Year pursuant to paragraph 7.3.1 until such time as the entire amount of such Guaranteed Commission Amount for that Contract Year has been so credited, whereupon PBG shall commence paying to City of Kelowna the balance of the quarterly Commission payments contemplated under paragraph 7.3.1.

**Taxes**

All dollar amounts expressed to be payable by PBG to City of Kelowna hereunder are exclusive of GST and PST. Each party will remit GST and PST as required under applicable laws.

**Distribution**

City of Kelowna shall be solely responsible for distributing any portion of the Commission and/or rebates to any other parties within the City Facilities who may have a legal entitlement thereto and shall indemnify and hold PBG harmless from any Liabilities and Expenses (as those terms are defined in 12.2) connected with or arising from such distribution or non-distribution by City of Kelowna.

**VOLUME EXPECTATION**

**Volume Expectation**

Commencing with the first day of the Implementation Period on June 1, 2001 and continuing over the course of the ten (10) year Term, City of Kelowna expects to purchase under

this Agreement (whether directly or through their City Designated Purchasers), and expects to sell through Vending Machines, that aggregate volume of Cold Beverage Products of PBG which totals the Volume Expectation. The Volume Expectation is an estimated target only, and City of Kelowna shall not be considered in default of any obligation under this Agreement if the Volume Expectation is not achieved.

### **Expectation Shortfall**

In the event that the Volume Expectation has not been achieved on or before the commencement of the last ninety (90) days of the Term and it appears based on reasonable grounds that it will not be achieved by the end of the Term, the parties will calculate the shortfall in terms of Raw Cases (the "Shortfall") and at the option of PBG to be exercised in its sole discretion by written direction to City of Kelowna at least twenty (20) days prior to the expiration of the Term, the Term of this Agreement shall be extended on a monthly basis with no additional Annual Cash Rights Fee payable by PBG whatsoever during such extension, for a period (the "Extended Period") which is the shorter of:

- (ttt) the number of additional months required after the expiration of the Term in order for the Volume Expectation to be satisfied over the course of the Implementation Period and the Term plus the Extended Period; or
- (uuu) twenty-four (24) months.

PBG's right to extend the Term of this Agreement as contemplated above shall be the only remedy available to PBG in the event that for any reason the Volume Expectation is not attained on or before the expiration of the Term. For greater certainty, PBG's obligations under this Agreement to pay the Commission and all amounts under the Marketing Fund and the Juice Fund shall continue throughout the Extended Period.

### **Expectation Surplus**

In the event that the Volume Expectation is exceeded at any time before the date which is six months prior to the expiry of the Term, then PBG shall pay to City of Kelowna an additional annual cash compensation, in respect of each and every Contract Year (or portion thereof) in which the Volume Expectation is exceeded, in an amount equal to the same percentage of the Annual Cash Rights Fee payable in that particular Contract Year as is equal to three-quarters (3/4ths) of the percentage increase representing the excess over the Volume Expectation. The additional cash compensation shall be paid by PBG to City of Kelowna within thirty (30) days of the end of each applicable Contract Year. By way of example, if the Volume Expectation was exceeded half way through the ninth Contract Year and the amount of the excess equalled 9.7% of the Volume Expectation at the end of the ninth Contract Year (being 60,000 Raw Cases, an additional 5,306 Raw Cases over the Volume Expectation of 54,694), PBG would pay to City of Kelowna an additional \$1,746 (being \$24,000 x 9.7% x 0.75) at the end of the ninth Contract Year. If the excess was 18.8% by the end of the tenth Contract Year (being 65,000 Raw Cases, an additional 10,306 Raw Cases over the Volume Expectation of 54,694), PBG would pay to City of Kelowna an additional \$3,384 (being \$24,000 x 18.8% x 0.75) at the end of the tenth Contract Year.

## **Volume Expectation Reports**

PBG shall provide City of Kelowna with Volume Expectation reports by the thirtieth (30<sup>th</sup>) day of each Period, in detail satisfactory to City of Kelowna acting reasonably, setting out the volume of Cold Beverage Products (in units of Raw Cases):

(vvv) supplied to and paid for by City of Kelowna and its City Designated Purchasers, and

(www) dispensed for sale through Vending Machines,

both for the preceding Period and as a cumulative total for the Contract Year and for the Implementation Period and Term as a whole. The reports shall be delivered to the Recreation Manager at the City of Kelowna. During the Extended Period, if applicable, PBG shall provide City of Kelowna with monthly Volume Expectation reports on or before the fifteenth (15<sup>th</sup>) day of each month.

## **PREMIUMS**

Subject to Section 3 hereof, PBG shall be entitled to distribute Premiums in accordance with the rights granted hereunder, provided however if PBG has notice of agreements with other “official” suppliers and/or sponsors of City of Kelowna, PBG shall select Premiums so as to avoid products and suppliers which compete with any other “official” suppliers and/or sponsors of City of Kelowna under exclusive supply and/or sponsorship agreements. The Premiums shall be distributed only in close connection with the Cold Beverage Products of PBG or the City of Kelowna Authorized Events.

## **TERM**

Unless earlier terminated in whole or in part pursuant to the provisions hereof, the Term of this Agreement shall commence on the Commencement Date and shall continue for a period of ten (10) years thereafter, expiring on \_\_\_\_\_, 2012 (subject to extension in accordance with paragraph 8.2). All rights granted to City of Kelowna by PBG and to PBG by City of Kelowna hereunder shall expire upon the expiration or sooner termination of the Term.

## **TERMINATION/FORCE MAJEURE**

### **Termination**

In addition to all other remedies available to it in law or in equity, City of Kelowna or PBG, as the case may be (the “Non-defaulting Party”) may at its sole option immediately terminate this Agreement in its entirety, effective upon notice to the other such party (herein called the “Defaulting Party”), in the event that:

- (xxx) the Defaulting Party is in breach of any material provision of this Agreement and such breach continues to exist after thirty (30) days from the date of the giving by the Non-defaulting Party of notice of that breach in writing to the Defaulting Party specifying in reasonable detail the nature of the alleged breach (provided that if such default cannot by its nature be cured within thirty (30) days after notice from the Non-defaulting Party and provided that the Defaulting Party is using its best efforts and all due diligence to cure such default, then the Defaulting Party shall have a reasonable period of time to cure such default);
- (yyy) the Defaulting Party ceases or threatens to cease carrying on its business or a resolution is passed for the winding up or liquidation of the Defaulting Party;
- (zzz) a petition is filed or an order is made for the winding up or liquidation of the Defaulting Party;
- (aaaa) the Defaulting Party (i) becomes insolvent; (ii) makes a bulk sale of its assets (other than in connection with a merger or corporate reorganization); or (iii) makes a general assignment for the benefit of its creditors or a proposal under the Bankruptcy Act; or if a bankruptcy petition shall be filed and presented against the Defaulting Party or if a custodian or receiver/manager or any other officer with similar powers is appointed in respect of the Defaulting Party or either of their properties, or any substantial part thereof;
- (bbbb) any proceedings are commenced in respect of the Defaulting Party under creditors arrangements legislation;
- (cccc) an encumbrancer shall lawfully take possession of the property of the Defaulting Party or any substantial part thereof, or if a distress or execution or any similar process is levied or enforced against the Defaulting Party and remains unsatisfied for such period as would permit such property or part thereof to be sold thereunder, provided that in any such case the taking of possession, distress or execution, as the case may be, could reasonably be considered to jeopardize the carrying on of the Defaulting Party's obligations under this Agreement; or
- (dddd) legislation is passed or repealed altering the nature of City of Kelowna's existence or capacity at law to such an extent as to render it incapable of performing all or substantially all of its obligations hereunder with no successor having been appointed to assume such obligations, provided that in the case of an event under this paragraph (g), only City of Kelowna shall in such instance constitute a Defaulting Party within the meaning of this paragraph 11.1.1.

In the event this Agreement is terminated by PBG during a Contract Year as a result of a default by City of Kelowna hereunder, City of Kelowna shall (without limiting the payment of any other amounts that may be owing hereunder) repay to PBG the "unrecouped" portion of the following prepaid amounts:

- (eeee) the prepaid but unrecouped portion of the Annual Cash Rights Fee for that Contract Year, calculated on a “pro rata” basis based upon the number of days remaining in the Contract Year;
- (ffff) the prepaid but unrecouped portion of the Guaranteed Commission Amount for that Contract Year, calculated on a “pro rata” basis based upon the number of days remaining in the Contract Year; and
- (gggg) the outstanding undepreciated value of the LED Scoreboards and the debit card readers supplied by PBG hereunder (calculated on a straight-line 10 year depreciation schedule).

Except to the extent otherwise expressly provided in this Agreement, termination (or partial termination) hereunder shall be without prejudice to any existing rights and/or claims that either party may have against the other arising prior to the termination, and shall not relieve any party from fulfilling the obligations accrued prior to such termination.

Upon the expiration or earlier termination of this Agreement for any reason whatsoever, all PBG’s rights and opportunities hereunder shall forthwith terminate and automatically revert to City of Kelowna and PBG shall forthwith discontinue all uses of the City Facilities Marks and shall not refer to them directly or indirectly with respect to the advertising, sale or promotion of Cold Beverage Products or otherwise, provided that the publishing of advertising then already committed to be run by PBG (to the extent that such advertising cannot reasonably be withheld or altered without penalty, material loss or substantial expense to PBG) may be run, provided further that notwithstanding the foregoing, all PBG’s rights with respect to such advertising already committed to be run by PBG (including the publication thereof) shall expire after three (3) months following termination or expiration, as the case may be. Upon expiration or earlier termination of this Agreement in whole or in part, City of Kelowna shall be free to grant to others any of the rights and opportunities that were granted to PBG hereunder.

Notwithstanding the provisions of paragraph 11.1.1 hereof, in the event that during the Term a City Facility is closed (not including a temporary closure, for example for repairs or upgrades) or in the event that City of Kelowna for any reason no longer has the right or authority to designate the supplier or advertiser of Cold Beverage Products in respect of a particular City Facility or Facilities, and it does not foresee that it will within a reasonable period of time reopen such City Facility or reacquire such right or authority, then upon written notice from the City of Kelowna to PBG such City Facility or Facilities shall be deemed to be excluded from the application of this Agreement (the “Excluded City Facility or Facilities”) and, at the option of PBG, the amount of the Annual Cash Rights Fee reasonably attributable to the Excluded City Facility or Facilities and, correspondingly, the amount of the Volume Expectation reasonably attributable to the Excluded City Facility or Facilities shall both be adjusted downward on a “pro rata” basis based upon the volume of sales of Cold Beverage Products arising from such Excluded City Facility or Facilities in relation to the total volume of sales of Cold Beverage Products arising from all City Facilities, in each case measured over the most recent completed 12 month period. Furthermore, if the Excluded City Facility or Facilities has one or more Vending Machines (the “Excluded Vending Machine(s)”) and the parties are unable to agree on a new location(s) for the Excluded Vending Machine(s) after using all reasonable efforts to do so,

then at the option of PBG (exercised upon written notice to City of Kelowna) the Guaranteed Commission Amount reasonably attributable to the Excluded Vending Machine(s) shall be adjusted downward on a “pro rata” basis based upon the volume of vending sales of Cold Beverage Products arising from the Excluded Vending Machine(s) in relation to the total volume of vending sales from all Vending Machines, in each case measured over the most recent completed 12 month period. PBG shall have no claim against the City of Kelowna in respect of the Excluded City Facility or Facilities or in respect of the Excluded Vending Machine(s), its only recourse being the right to have an adjustment of the Annual Cash Rights Fee, the Guaranteed Commission Amount if applicable, and, correspondingly, the Volume Expectation on the basis provided herein.

### **Force Majeure**

In the event that the performance by any party of any of its respective obligations hereunder is prevented by any riot, war, governmental order, proceeding or regulation, legislation, embargo, act of God or the Queen’s enemies, direct or indirect labour disturbance including strike, lockout or slowdown, damage to facilities necessary for the production, transportation, manufacture or delivery of Cold Beverage Products of PBG or to the materials from which such Cold Beverage Products are manufactured or derived and where such damage was beyond the reasonable control of PBG and which PBG cannot or could not reasonably protect or have protected itself against, temporary loss of City of Kelowna’s access to or entitlement to use or occupy any of the City Facilities or any part thereof for any reason beyond its reasonable control and which it cannot or could not reasonably protect or have protected itself against, or any other cause (other than lack of funds or credit) (collectively, the “Cause”) beyond the reasonable control of the party claiming the benefit of this clause, such party shall have the right, at its sole option, to suspend the obligations under this Agreement which the party is incapable of performing as a result of the Cause (but only with respect to any City Facility directly affected by such Cause) during such interruption or prevention and until such a time as such party can again perform its obligations hereunder. Should City of Kelowna by written notice to PBG suspend its obligations under this Agreement pursuant to this paragraph 11.2, the amount of the Annual Cash Rights Fee reasonably attributable to the City Facility or Facilities directly affected by such Cause and the amount of the Volume Expectation reasonably attributable to the City Facility or Facilities directly affected by such Cause may, at PBG’s option exercised by written notice to City of Kelowna, both be adjusted downward on a “pro rata” basis, as follows: each shall be multiplied by a fraction, the numerator of which is the total number of days that the City of Kelowna’s obligations were suspended pursuant to this paragraph 11.2 and the denominator of which is the total number of days in the Contract Year in which such suspension commences (the “Adjustment Formula”). For purposes of this paragraph 11.2, the amount of the Annual Cash Rights Fees and the amount of the Volume Expectation, in each case “reasonably attributable to the City Facility or Facilities directly affected by such Cause”, shall also be calculated on a “pro rata” basis based upon the volume of sales of Cold Beverage Products arising from such City Facility or Facilities in relation to the total volume of sales of Cold Beverage Products arising from all City Facilities, in each case measured over the most recent completed 12 month period. In addition, that portion of the Guaranteed Commission Amount reasonably attributable to the Vending Machine(s), if any, directly affected by such Cause may, at PBG’s option exercised by written notice to City of Kelowna, also be adjusted based on the Adjustment Formula, but only on the following basis: first the Parties shall use all

reasonable efforts to temporarily relocate such Vending Machine(s) during the continuance of the Cause, failing which the Guaranteed Commission Amount “reasonably attributable to the Vending Machine(s), if any, directly affected by such Cause” shall be calculated on a “pro rata” based upon the volume of vending sales of Cold Beverage Products arising from any such directly affected Vending Machine(s) in relation to the total volume of vending sales from all Vending Machines, in each case measured over the most recent completed 12 month period. All Commissions payable, if any, shall continue to be paid in the ordinary course. Should PBG by written notice to City of Kelowna suspend its obligations pursuant to this paragraph 11.2, then during the period of suspension

- (hhhh) there will be no pro rata refund of any prepaid amount of the Annual Cash Rights Fees nor any abatement in future Annual Cash Rights Fees;
- (iiii) PBG shall continue to pay all Commissions in the ordinary course; and
- (jjjj) City of Kelowna and its City Designated Purchasers shall be entitled to purchase Cold Beverage Products from any other supplier on the basis set out in paragraph 11.3 hereof.

#### **Failure to Supply PBG Cold Beverage Products**

Should for any reason PBG be unable to supply one or more of its Cold Beverage Products in accordance with this Agreement for a period of three (3) or more consecutive days during the Term, then (without limiting any other rights that may be available to City of Kelowna under this Agreement) City of Kelowna and its City Designated Purchasers may take any steps reasonably necessary to ensure that the supply of Cold Beverage Products to the City Facilities is sufficient to meet the demand therefore from time to time during the period of non-supply. To this end, City of Kelowna and its City Designated Purchasers may purchase Cold Beverage Products from any local supplier, provided City of Kelowna and the City Designated Purchasers resume purchasing such Cold Beverage Products exclusively from PBG within 7 days of notice from PBG that PBG’s Cold Beverage Products are again available for immediate purchase.

#### **Removal of Equipment**

Upon the expiry or earlier termination of this Agreement, PBG shall in accordance with a mutually agreed upon schedule and in any event within 30 days of termination take possession of and remove the Equipment whether or not it is attached to any other property. PBG shall take reasonable care in removing such Equipment not to damage the property of City of Kelowna and shall at its expense forthwith repair any such damage. City of Kelowna shall not move or remove any Equipment from its location or cause or permit it to be moved or removed by anyone other than an authorized representative or agent of PBG, except where such move or removal is necessitated by safety considerations or in an emergency situation and PBG is not, or would not be, able to respond within the necessary time period, or in the event PBG fails to remove such Equipment when required to do so hereunder. Notwithstanding termination, PBG shall continue to pay the Commission solely on sales of PBG Cold Beverage Product through such remaining Equipment until all of the Equipment is removed.

## 1.2 **Outdoor Vending Sites Deemed Insecure**

In the event that there is a Vending Machine located in an outdoor vending location which is deemed to be “not secure” on the basis set forth below (an “Insecure Vending Machine”), the Parties shall first use all reasonable efforts to agree upon a new location for such Insecure Vending Machine and, if the Parties are unable to so agree within a reasonable period of time, then such Insecure Vending Machine shall be removed and, at the option of PBG exercised by written notice from PBG to City of Kelowna, the amount of the Annual Cash Rights Fee and the Guaranteed Commission Amount, in each case reasonably attributable to the Insecure Vending Machine and, correspondingly, the amount of the Volume Expectation reasonably attributable to the Insecure Vending Machine, shall be adjusted downward on a “pro rata” basis based upon the volume of vending sales of Cold Beverage Products arising from the Insecure Vending Machine in relation to the total volume of vending sales from all Vending Machines, in each case measured over the most recent 12 month period. PBG shall have no claim against City of Kelowna in respect of the Insecure Vending Machine, its only recourse being the right to have an adjustment to the Annual Cash Rights Fee, the Guaranteed Commission Amount and, correspondingly, the Volume Expectation on the basis provided herein. For the purposes of this paragraph, a Vending Machine will be deemed to be an Insecure Vending Machine if three separate acts of vandalism within one Contract Year are recorded with respect to such Vending Machine, or vandalism repair costs with respect to such Vending Machine accumulated within a 12 month period exceeds the cost of replacing one Vending Machine. The cost to replace one Vending Machine is agreed to be \$3,000.00.

## 1.3 **Survival**

The provisions of paragraphs 11.1 and 11.4 shall survive the termination of this Agreement.

## **INDEMNITY-PBG**

### **Indemnity - PBG**

PBG shall indemnify and save harmless City of Kelowna and its elected and appointed officials and representatives, officers, employees and agents of City of Kelowna (collectively, the “City of Kelowna Indemnitees”), from and against any and all:

- (a) liabilities, losses, claims, demands, actions, causes of action, suits or proceedings whatsoever, including but not limited to those arising in respect of personal injury or death, property damage, (collectively, the “Liabilities”), and
- (b) costs and expenses (including reasonable lawyers’ fees and expenses on a solicitor and own client basis) whatsoever, reasonably and actually incurred (collectively, the “Expenses”),

made, brought or claimed against any of the City of Kelowna Indemnitees or to which any of the City of Kelowna Indemnitees may become subject, as a result of:



- (c) the breach or non-performance by PBG (or those persons for whom PBG is responsible at law) of any covenant, agreement, term or condition of this Agreement, or
- (d) the negligent act or omission of PBG (or those persons for whom PBG is responsible at law) in connection with, directly or indirectly, the use, supply and operation of the Equipment, and the use and occupation of the City Facilities or any part thereof or otherwise arising under this Agreement, or the improper use of the City Facilities Marks by PBG or its respective agents, employees or licensees, or
- (e) the negligence, act or omission of PBG (or those persons for whom PBG is responsible at law) in connection with the manufacture, bottling, supply, sale, packaging or advertising of Cold Beverage Products of PBG or by the conduct of the operations of PBG under this Agreement, or
- (f) any claim that any use by City of Kelowna (or those persons for whom City of Kelowna is responsible at law) of the PBG Marks infringes or violates the rights of any third party (provided that the alleged infringing use by City of Kelowna was in the format, style and treatment furnished or approved in writing by PBG and in compliance with the Graphic Standards established by PBG for the use of the PBG Marks),

except where and to the extent that such Liabilities and Expenses are caused by the negligence or wilful act or omission of any of the City of Kelowna Indemnitees.

#### **Indemnity - City of Kelowna**

City of Kelowna shall indemnify and save harmless PBG and its directors, officers, employees and agents (collectively, the "PBG Indemnitees") from and against any and all:

- (g) liabilities, losses, claims, demands, actions, causes of action, suits or proceedings whatsoever, including but not limited to those arising in respect of personal injury or death or property damage (collectively, the "Liabilities"); and
- (h) costs and expenses (including reasonable lawyers' fees and expenses on a solicitor and own client basis) whatsoever, reasonably and actually incurred (collectively, the "Expenses")

made, brought or claimed against any of the PBG Indemnitees or to which any of the PBG Indemnitees may become subject, as a result of:

- (i) the breach or non-performance by City of Kelowna (or those persons for whom City of Kelowna is at law responsible) of any covenant, agreement, term or condition of this Agreement;

- (j) the negligent act or omission of City of Kelowna (or those persons for whom City of Kelowna is responsible at law) in connection with, directly or indirectly, the use, operation or occupation of the City Facilities or any part thereof or otherwise arising under this Agreement, or the improper use of the PBG Marks by City of Kelowna or its agents, employees or licensees; or
- (k) any claim that any use by PBG (or those persons for whom PBG is responsible at law) of the City Facilities Marks infringes or violates the rights of any third party (provided that the alleged infringing use by PBG was in the format, style and treatment furnished or approved in writing by City of Kelowna and in compliance with the Graphic Standards established by City of Kelowna for the use of the City Facilities Marks);

except where and to the extent that such Liabilities and Expenses are caused by the negligence or wilful act or omission of any of the PBG Indemnitees.

### **Insurance**

PBG shall, at its own cost (and without limiting its obligations or liabilities under this Agreement), place and maintain the following insurance throughout the Term:

- (a) workers' compensation insurance covering all employees of PBG engaged in connection with this Agreement in accordance with the statutory requirements of the province or territory having jurisdiction over such employees;
- (b) comprehensive general liability insurance:
  - (i) providing for an inclusive limit of not less than \$2,000,000 for each occurrence or accident;
  - (ii) providing for all sums which PBG shall become legally obligated to pay for damages because of bodily injury (including death at any time resulting therefrom) sustained by any person or persons or because of damage to or destruction of property caused by an occurrence or accident arising out of or related to this Agreement or any operations carried on in connection with this Agreement;
  - (iii) including coverage for products/completed operations, blanket contractual, contractor's protective, personal injury, contingent employer's liability, broad form property damage, and non-owned automobile liability;
  - (iv) including a cross liability clause providing that the inclusion of more than one insured shall not in any way affect the rights of any other insured hereunder, in respect to any claim, demand, suit or judgement made against any other insured;
- (c) automobile liability insurance covering all motor vehicles, owned, operated and used or to be used by PBG directly or indirectly in the performance of the

Agreement. The limit of liability shall not be less than \$2,000,000 inclusive, for loss or damage including personal injuries and death resulting from any one accident or occurrence;

- (d) the policy required by section 12.3(b) above shall provide that the City of Kelowna is named as an additional insured thereunder and that said policy is primary without any right of contribution from any insurance otherwise maintained by the City of Kelowna;
- (e) PBG agrees to submit a certificate of insurance, in the form of Schedule M, attached hereto and made a part hereof, to the risk management department of the City of Kelowna on or before execution of the Agreement. Such certificate shall provide that 30 days' written notice shall be given to the risk management department of the City of Kelowna, prior to any material changes or cancellations of any such policy or policies;
- (f) PBG may take out such additional insurance, as it may consider necessary and desirable. All such additional insurance shall be at no expense to the City of Kelowna;
- (g) all insurance, which PBG is required to obtain with respect to this Agreement, shall be with insurance companies registered in and licensed to underwrite such insurance in the Province of British Columbia;
- (h) if PBG fails to do all or anything which is required of it with regard to insurance, the City of Kelowna may do all that is necessary to effect and maintain such insurance, and any monies expended by the City of Kelowna shall be repayable by and recovered from PBG. PBG expressly authorizes the City of Kelowna to deduct from any monies owing PBG, any monies owing by PBG to the City of Kelowna; and
- (i) the failure or refusal to pay losses by an insurance company providing insurance on behalf of PBG shall not be held to waive or release PBG from any of the provisions of these insurance requirements or this Agreement, with respect to the liability of PBG otherwise. Any insurance deductible maintained by PBG under any of the insurance policies is solely for their account and any such amount incurred by the City of Kelowna will be recovered from PBG as stated in paragraph (h) above.

#### **No Indirect or Consequential Loss**

Notwithstanding any other provision of this Agreement, no party shall be entitled under any circumstances to claim any special, punitive, exemplary, indirect or consequential damages against any other party hereto, even if the possibility of such damages occurring is known; provided however that in no event shall this paragraph 12.4 restrict or in any way limit City of Kelowna from claiming the full amount of the Annual Cash Rights Fees, Commissions and other amounts payable or which would become payable under this Agreement, or restrict

PBG from claiming loss of profits arising directly out of loss of sales of Cold Beverage Products on the City Facilities due to breach of this Agreement by City of Kelowna.

### **Survival**

The provisions of all of the paragraphs of this Section 12 on Indemnity and Insurance shall survive the termination or expiration of this Agreement, and enure to the benefit of the City of Kelowna Indemnites and the PBG Indemnites.

## **REPRESENTATIONS, WARRANTIES AND COVENANTS**

### **Of PBG**

PBG represents and warrants to City of Kelowna as follows:

- (l) PBG is a company duly incorporated under the laws of Nova Scotia, PBG is qualified and registered to do business in British Columbia, and has the full legal right, power and authority to enter into this Agreement and comply with its terms;
- (m) PBG is and hereby covenants that its shareholders, directors and officers have done all things required by law and its respective charter documents to duly authorize the execution of this Agreement;
- (n) throughout the period that this Agreement is in effect PBG will continue to be:

a lawful distributor of the Cold Beverage Products sold in association with the trademark “Pepsi-Cola” in the Province of British Columbia;

entitled to use in the manner contemplated herein all the trade marks and other intellectual property rights associated with the Cold Beverage Products it has agreed to provide hereunder including, without limitation, the PBG Marks; and

- (o) entering into this Agreement and complying with all its terms and conditions will not cause PBG to be in default under any contract or agreement to which it is a party or by which it is bound.

### **Of City of Kelowna**

City of Kelowna represents and warrants to PBG as follows:

- (p) City of Kelowna is an incorporated municipality under the laws of British Columbia, is qualified to carry on its activities in British Columbia, and has the full legal right, power and authority to enter into this Agreement and comply with its terms;
- (q) its authorized representatives have done all things required by law and under its letters patent to duly authorize the execution hereof by it;

- (r) to the best of its knowledge, it is the owner or lawful user of the City Facilities Marks and has full authority to permit usage by third parties of the same; and
- (s) entering into this Agreement and complying with all its terms and conditions will not cause it to be in default under any contract or agreement to which it is a party or by which it is bound.

### **ASSIGNMENT**

City of Kelowna's entering into this Agreement with PBG is based in substantial part on the unique attributes which PBG and its business offers, including its management, the Cold Beverage Products of PBG and its methods of operation. Therefore, neither this Agreement nor any of PBG's rights hereunder may be assigned or sublicensed by PBG other than to an affiliate of PBG without the prior written consent of City of Kelowna, which consent may not be unreasonably withheld. City of Kelowna may not assign this Agreement without the prior written consent of PBG, which consent may not be unreasonably withheld.

### **RELATIONSHIP OF THE PARTIES**

This Agreement does not constitute any party the agent of any other party, or create a partnership, joint venture or similar relationship between any two or more of the parties, and none of the parties shall have the power to obligate or bind any of the other parties in any manner whatsoever.

### **WAIVER**

Any waiver by any party of a breach of any provision of this Agreement shall not operate as or be construed to be a waiver of any other breach of such provision or of any breach of any other provision of this Agreement. Any waiver must be in writing. Failure by any party to insist upon strict adherence to any term of this Agreement on one or more occasions shall not be considered a waiver or deprive such party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement.

### **SEVERABILITY OF PROVISIONS**

The determination that any provision of this Agreement is invalid or unenforceable shall not invalidate this Agreement, and this Agreement shall be construed and performed in all respects as if such invalid or unenforceable provisions were omitted provided that in so doing the primary purpose of this Agreement is not impeded.

### **ENTIRE AGREEMENT**

This Agreement including all of the schedules attached hereto contains the entire understanding between City of Kelowna and PBG relating to the subject matter herein contained

and supersedes all prior oral and written understandings, arrangements and agreements between all of the parties hereto. Any amendment to this Agreement must be in writing, signed by all parties. All Schedules shall be part of this Agreement. If a conflict arises regarding the terms of a purchase order or other contract issued pursuant to this Agreement, the terms of this Agreement will prevail.

## NOTICES

All reports, notices, requests or offers required or permitted to be made under this Agreement shall be in writing and shall be deemed to have been duly given and received either (a) on the day of delivery, if delivered to City of Kelowna and PBG at:

If to City of Kelowna, to:

City of Kelowna  
Parks and Leisure Services Department  
1800 Parkinson Way  
Kelowna, B.C., V1V 1V7

Attention: Recreation Manager  
Facsimile: (250) 862-3957

If to PBG, to:

The Pepsi Bottling Group (Canada), Co.  
1610 Dilworth Drive  
Kelowna, British Columbia, VIY 7V3

Attention: Unit Sales Manager  
Facsimile: (250) 862-2655

With a copy to:

Legal Department  
The Pepsi Bottling Group (Canada), Co.  
5205 Satellite Drive  
Mississauga, Ontario

Attention: General Counsel  
Facsimile: (905) 212-7320

or such other address as each party may designate in writing to the other party for this purpose, or (b) on the fifth (5th) business day after the date sent, when sent by prepaid registered mail to the addresses above, or (c) on the business day next following when actually sent by facsimile transmission.

## **HEADINGS**

The headings of the articles in this Agreement are for convenience only and shall not affect in any way the meaning of the provisions to which they refer.

## **GOVERNING LAW**

This Agreement, shall be governed by and interpreted under the laws of the Province of British Columbia, Canada and the laws of Canada having application.

## **ATTORNMEN AND SERVICE**

The parties hereby irrevocably and unconditionally submit to the non-exclusive jurisdiction of the Supreme Court of British Columbia over any suit, action or proceeding arising out of or relating to this Agreement. Each of the parties agrees that service of any process, summons, notice or document by Canadian registered mail addressed to the party shall be effective service of process for any action, suit or proceeding brought against the party in such court. Each of the parties hereby irrevocably and unconditionally waives any objection to laying of venue in Vancouver, British Columbia of any such suit, action or proceeding brought in such court and to any claim that it has been brought in an inconvenient forum.

## **MEDIATION AND ARBITRATION**

Except as otherwise provided hereunder, in the event of a dispute regarding the application or interpretation of this Agreement, the parties agree that they will first attempt to resolve the dispute by referring it to mediation. If the dispute remains unresolved after 20 days of referring it to mediation as aforesaid, then any party may refer that dispute to a single arbitrator under the provisions of the Commercial Arbitration Act (British Columbia) (including any amendments or successor legislation) and the decision of that single arbitrator shall be final and binding upon the parties hereto. The costs of any such mediation and/or arbitration shall be borne as agreed by the parties, or, failing agreement as awarded by the mediator and/or arbitrator. The venue for any mediation or arbitration shall be Kelowna, B.C.

## **INTEREST ON ARREARS**

Any amount payable by PBG to City of Kelowna under this Agreement (including all purchase orders) which is not paid in full on the due date therefor shall bear interest at a rate equal to eighteen (18%) percent per annum, compounded monthly, not in advance, both before and after judgment, commencing on the due date thereof and continuing until the amount due is paid in full.

## **BOOKS AND RECORDS**

During the Term, PBG shall maintain, and for two (2) years following the later of resolution of outstanding disputes, expiry of the Term or Extended Period, or termination of the Agreement prior to expiry, as the case may be, complete and accurate books, records and accounts in accordance with GAAP of the operations of PBG under this Agreement, including without limitation such books, records and accounts as may reasonably be required to determine and verify all and any amounts payable by PBG to City of Kelowna hereunder. City of Kelowna, or its duly authorized representatives, shall be entitled during normal business hours to examine and take copies of extracts from all such books, records and accounts specific to City of Kelowna business requirements in connection with this Agreement. PBG shall provide not less than thirty (30) days prior notice to City of Kelowna of any change in the basis of determination of the accounting periods as they pertain to this Agreement.

## **AUDIT**

City of Kelowna may at any time and from time to time require the books, records and accounts (specific to City of Kelowna's business requirements) maintained by PBG in relation to this agreement as provided under section 25 to be audited by representatives of City of Kelowna in its sole discretion. If any such audit discloses that PBG has underpaid City of Kelowna in respect of amounts due and payable by PBG to City of Kelowna hereunder for any period by an amount greater than two (2%) percent, the cost of such audit shall be the account of PBG and shall be payable by PBG to City of Kelowna forthwith on demand, unless PBG can establish that it has corrected this discrepancy and has paid the underpayment to City of Kelowna in an accounting period subsequent to the accounting periods reviewed in the audit but prior to the commencement of the audit. Otherwise, the cost of such audit shall be for the account of City of Kelowna. The amount of any underpayment disclosed by the audit shall be payable forthwith together with interest from the date the amount or amounts were properly payable until the date of actual payment.

## **CONFIDENTIAL INFORMATION**

### **Generally**

The parties to this Agreement agree to keep in confidence the material terms of this Agreement. Notwithstanding the foregoing, the parties may disclose the provisions of this Agreement:

- (a) to their employees, legal counsel and other professional advisors, to the extent reasonably necessary for them to carry out their duties;
- (b) as required by law including under any freedom of information and protection of privacy legislation; or
- (c) as required by order of a Court or government authority.



PBG acknowledges that City of Kelowna is subject to freedom of information and protection of privacy legislation in British Columbia.

### **APPROVALS**

Except as otherwise provided herein, any approvals or consents required under this Agreement by the parties hereto will be in writing and will not be unreasonably withheld or delayed.

### **ENUREMENT AND TIME OF ESSENCE**

This Agreement shall enure to the benefit of and shall be binding upon the parties hereto and their respective successors and permitted assigns. Time shall be of the essence in the performance of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized officers as of the day and year first above written.

**CITY OF KELOWNA** by it's authorized signatories )  
)

\_\_\_\_\_  
• Mayor Walter Gray )  
)

\_\_\_\_\_  
• City Clerk David Shipclark )  
)

**THE PEPSI BOTTLING GROUP (CANADA), CO.** )  
)

\_\_\_\_\_  
Authorized Signatory )  
)

\_\_\_\_\_  
Authorized Signatory )  
)

## SCHEDULE A

### City Facilities

<b><u>Property Description</u></b>	<b>Address</b>
Parkinson Recreation Centre	1800 Parkinson Way
Ben Lee Park	900 Houghton Road
Edith Gay Park	305 Moyer Road
Rutland Seniors Centre	765 Dodd Road
Rutland Sports Fields	485 and 525 Hartman Road
Okanagan Gymnastics Club	365 Hartman Road
East Kelowna Sports Fields	2741 East Kelowna Road
Mission Sports Fields	3925 Gordon Drive
Sarsons Beach	4398 Hobson Road
Rotary Beach	3726 Lakeshore Road
Gyro Beach	3400 Lakeshore Road
Tugboat Bay Beach	1220 Water Street
City Park	1600 Abbott Street
Apple Bowl	1555 Burtch Road
Cook Road Boat Launch	3786 Lakeshore Road
Kings Stadium	663 Recreation Avenue
Elks Stadium	663 Recreation Avenue
Belgo Park	895 Belgo Road
Strathcona Park	2290 Abbott Street
South Kelowna Fields	4194 Spiers Road
Kinsmen Park	2600 Abbott Street
City Works Yard	1495 Hardy Street
City Hall	1435 Water Street
Rutland Arena	645 Dodd Road
Memorial Arena	1424 Ellis Street
Hobson Road Yacht Club	4220 Hobson Road
Kelowna Community Theatre	1375 Water Street
Rotary Centre for the Arts	421 Cawston Avenue

**SCHEDULE B**

**Current City Designated Purchasers**

<b><u>Location</u></b>	<b><u>Contact</u></b>
<b><u>Apple Bowl</u></b>	Gord Delph
<b><u>Ben Lee Park Concession</u></b>	Una Mak - 868-0278
<b><u>City Park</u></b>	Inside Ken Schultz 979-0879
<b><u>City Works Yard</u></b>	
<b><u>Elks Stadium</u></b>	Dan Nonis - 862-1506
<b><u>Gyro Beach</u></b>	<b>New concessionaire</b>
<b><u>Kelowna Community Theatre</u></b>	Michael Utgaardt 862-3339 local 383
<b><u>Kelowna Minor Hockey</u></b>	Dutch Hopman
<b><u>Kings Stadium</u></b>	Geri Weninger - 717-7149
<b><u>Mission Sports Fields</u></b>	Inside Scott Thompson - 762-3290
<b><u>Ok Gymnastics</u></b>	Jennifer Charles or Kauri - 765-0888
<b><u>Rotary Centre for the Arts</u></b>	Robert or Gail Parisien 317-2861
<b><u>Rutland Minor Baseball Field</u></b>	Dave Easterbrook - 491-5656
<b><u>Senior Rec Center - Downtown</u></b>	Greg Murphy 762-4121
<b><u>Senior Rec Center - Rutland</u></b>	Greg Murphy 762-4121
<b><u>Tugboat Bay Beach</u></b>	Ken Schultz 979-0879

## **SCHEDULE C**

This schedule originally referred to information specific to Okanagan University College Agreement and does not apply to the City of Kelowna Agreement.

**SCHEDULE D**

City Facilities Marks

Recreation Services  
Or

Other designated City Departments or programs

## SCHEDULE E

### The City of Kelowna and Pepsi Equipment Placement Plan

#### Full Serve Vending Locations

<u>Facility</u>	<u>Location</u>	<u>Quantity</u>	<u>Contacts</u>
Parkinson Rec Center	Lounge	2	Jean Miles
	Gym	1	
	Outside	1	
	Tennis Court	1	
Ben Lee Park	Outside Concession	2	**
Ben Lee Skateboard Park	Concrete Pad	1	**
Rutland Minor Baseball Field	Outside Concession	1	Dave Easterbrook
Senior Rec Center- Rutland	Inside	1	Greg Murphy
Senior Rec Center-Downtown	Inside	1	Greg Murphy
Rutland Sports Fields	Outside Services Building	2	**
Ok Gymnasitics	Inside, Upstairs in viewing area	2	Jennifer Charles
East Kelowna Sports Fields	Outside Services Building	1	**
Mission Sports Fields			
-Kinsman Field	Against Washrooms	2	**
-Softball Complex	Against Washrooms	2	**
Rotary Beach	Against Washrooms	1	**
Gyro Beach	Against Washrooms	1	**
Tugboat Bay Beach	Against Washrooms	1	**
City Park	Against Concessions	2	**
Apple Bowl	Against Stands	2	**
Lawn Bowling	Inside Building	1	**
Cook Rd Boat Launch	On Concrete Pad	1	**
Kings Stadium	Inside Fence	1	Geri Weninger

Parks Dept. Works Yards	Inside Building	1	**
Kelowna Museum	Inside Building	1	**

**SCHEDULE E continued**

**The City of Kelowna and Pepsi Equipment Placement Plan**

**Full Serve Vending Locations Continued**

Laurel Building	Inside Building	1	**
Rotary Center for the Arts	Green Room / Restaurant Area	2	Robert Parisienne
City Hall	Basement	1	**
Kelowna Minor Hockey			Dutch Hopman
Memorial Arena	Inside Building	3	
Rutland Arena	Inside Building	4	



**SCHEDULE E continued**

**The City of Kelowna and Pepsi Equipment Placement Plan**

**OTC Equipment List**

<b><u>Facility</u></b>	<b><u>Coolers</u></b>	<b><u>Fountain</u></b>	<b><u>Operator</u></b>
Apple Bowl Concession	2 Door	Premix	Gord Delph
Ben Lee Concession	2 Door	Premix	Una Mak
Ok Gymnastics	2 Door	N/A	Jennifer Charles
Gyro Beach(Janzen Bait)	2- Countertop	N/A	Tim Janzen
Kel. Minor Hockey Memorial Arena Rutland Arena	2 Door 2 Door	2 Postmix Towers Countertop Postmix	Dutch Hopman
Rut. Minor Baseball	1 Door	Premix	Dave Easterbrook
Kel. Community Theatre	2 Door	Countertop Postmix	Mike Utgaard
Pavillion Concession	3 Door 2 Door	Countertop Postmix	Ken Shultz
Tugboat Bay Concession	2 Door	Premix	Ken Shultz
Elk's Stadium	2 Door	N/A	Ken Shultz
Staccato's Bistro	2 Door	Countertop Postmix	Robert Parisien
Mission Sports Fields	3 Door	N/A	Scott Thompson
Kings Stadium	1 Door	N/A	Geri Weninger

**SCHEDULE F**

**Cold Beverage Products List**

## **SCHEDULE G**

### City [Facilities](#) Official Publications

Parkinson Recreation Centre – Quarterly Brochure

Parkinson Recreation Centre – Monthly Newsletter

Sport Kelowna – Monthly Newsletter

Special Event Flyers

- Little Elves Craft Workshop
- Family Fun Day
- Little Goblins Halloween Howl
- Tree of Hope
- Civic Awards

Affinity Marketing Program

Recreationkelowna.com Web site

Sport Kelowna.com Web site

Sport Kelowna League Schedules

PRC League Schedules

**SCHEDULE H**

**Wholesale and Retail (Vending) Prices**

## SCHEDULE I

### CONDITIONS OF USE OF CITY OF KELOWNA MARKS

#### General Conditions

Each particular use of the City Facilities Marks by PBG, and each use of any likeness of the physical appearance of any part of the City Facilities (whether by photograph, drawing or any other form of reproduction), shall be subject to the express prior written approval of City of Kelowna. Without limiting the generality of the foregoing, the parties specifically agree as follows:

PBG shall undertake whatever measures are necessary so as to ensure that the City Facilities Marks are used by PBG only in accordance with the provisions of this Agreement;

PBG shall not, without the prior written approval of City of Kelowna, have any trademark, trade name, emblems, logos, service marks or other marks denoting or identifying any third party or any third party's product or service affixed to or as part of (i) those Cold Beverage Products which display the City Facilities Marks on their packaging, or (ii) any advertising or promotional materials which display the City Facilities Marks;

PBG shall not use or permit any of the City Facilities Marks to be used or exploited in any manner contrary to public morals or which is considered deceptive or misleading or reflects unfavourably upon the good name, goodwill, reputation and image of City of Kelowna, nor in any manner which is contrary to applicable laws;

all uses of the City Facilities Marks by PBG shall faithfully and accurately reproduce the colour, design and appearance without embellishment as shown in the then current Graphic Standards. No partial version of any of the City Facilities Marks or fragment thereof, or any likeness of any part of the City Facilities, may be used at any time for any purpose without the express prior written consent of City of Kelowna;

all uses of the City Facilities Marks shall comply with applicable laws and regulations and shall indicate appropriate intellectual property notices of protection within Canada as set out in the Graphic Standards, or in such other form as approved or directed in writing by City of Kelowna;

PBG shall use the City Facilities Marks in such manner as to protect and preserve all of City of Kelowna's respective rights in Canada and elsewhere. If the City Facilities Marks are to be used in combination with the PBG Marks, Pepsi shall maintain an identifiable separation between the City of Kelowna Mark and the

PBG Mark such that there are two or more distinct marks rather than a new composite mark;

PBG shall not adopt or use in Canada or elsewhere, any trade-mark, trade name, logo, service mark, insignia, emblem, symbol or mark which contains or is confusingly similar to or a simulation or colourable imitation of the City Facilities Marks or a likeness of the physical appearance of any part of the City Facilities, which commitment shall continue, notwithstanding expiration or termination of this Agreement; and

PBG shall not use any of the City Facilities Marks as part of a trade, business or corporate name nor style to be used by it.

### **Reservation of Rights**

PBG acknowledges and agrees that it has no right, title or interest in the City Facilities Marks except the use of the same as herein set out and that nothing in this Agreement shall be construed as an assignment or grant to either of them of any right, title or interest in or to any of the City Facilities Marks or in any copyright, trade-mark, trade name or official mark, industrial design or other intellectual property of City of Kelowna and that it shall not take any action to the detriment of City of Kelowna's respective right or interest in any of the aforesaid, either during the Term of this Agreement or thereafter.

### **Assignment of Rights**

PBG agrees that should any right, title or interest in or to any of the City Facilities Marks, or in any goodwill created or arising in connection with the use of any of the City Facilities Marks, or in any copyright, trade-mark, trade name, official mark, industrial design or other property of City of Kelowna become vested in it, or in any other person employed by or associated with it (by operation of law or otherwise), it shall hold the same in trust for City of Kelowna and they shall pass, and they are hereby irrevocably and unconditionally assigned, to City of Kelowna, as the case may be. Should PBG, with or without the prior written consent of City of Kelowna, create and make use of the City Facilities Marks in a configuration, other than as provided for in, or permitted by this Agreement, then PBG agrees that all rights in any new version, translation or arrangement of the City Facilities Marks or other change in such marks, created or used by or on behalf of PBG, shall be and shall remain the exclusive property of City of Kelowna (whether or not the same are registrable as a trade-mark or official mark, copyright or industrial design), and the provisions of this Agreement shall apply to same mutatis mutandis as they do to the City Facilities Marks.

**SCHEDULE J**

**RAW CASE CONVERSION TABLE**

<b><u>Package</u></b>	<b><u>Product</u></b>	<b><u>Raw Cases</u></b>
24 x 355ml	soft drinks	1
24 x 600ml	soft drinks	1
24 x 300ml	Juice	1
24 x 341ml	Juice	1
12 x 473ml	Juice/iced tea	1/2
24 x 600ml	Allsport	1
24 x 600ml	Aquafina Water	1
12 x 1.5 Litre	Aquafina Water	1
24 x 591ml	Fruitworks	1
12 x 280ml	Frappucino	1/2
20L	BIB Postmix	5.28
20L	BIB Postmix	3.17
18L	Premix	4.75
C02	20lb	1
12 x 591ml	Sobe	1/2

**SCHEDULE K**

Standard Equipment Loan Agreement

(see attached)



## **SCHEDULE L**

### **Conversion Schedule**

#### **Vending Machines**

PBG will ensure that the current mix of vending machines are maintained at each location.

#### **Fountain Cup Sizes**

PBG will ensure that 16oz, 24oz, 32oz cup sizes are available where current fountain drinks are dispensed.

Larger cup sizes may be available due to promotional purposes.

Subsequent changes to this cup size will be based on sales patterns of these cup sizes and agreement of City of Kelowna.

**SCHEDULE M**

Certificate of Insurance

(see attached)

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SCHEDULE B - Current City Designated Purchasers

SCHEDULE C – This schedule originally referred to information specific to Okanagan University College Agreement and does not apply to the City of Kelowna Agreement.

SCHEDULE D - City Facilities Marks

SCHEDULE E - Equipment Placement Plan

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SCHEDULE G - City of Kelowna Official Publications

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