THE CORPORATION OF THE CITY OF PETERBOROUGH

BY-LAW NUMBER 09-067

BEING A BY-LAW TO AUTHORIZE THE EXECUTION OF AN AGREEMENT BETWEEN THE CORPORATION OF THE CITY OF PETERBOROUGH AND BROWN'S FINE FOOD SERVICES INC.

THE CORPORATION OF THE CITY OF PETERBOROUGH BY THE COUNCIL THEREOF HEREBY ENACTS AS FOLLOWS:

That the Mayor and the Clerk be and they are hereby authorized to execute an Agreement between The Corporation of the City of Peterborough and Brown's Fine Food Services Inc., in the form attached hereto as Schedule "A", and to affix the seal of the Corporation thereto.

By-law read a first, second and third time this 25th day of May, 2009

(Sgd.) D. Paul Ayotte, Mayor

(Sgd.) Nancy Wright-Laking, City Clerk
THIS AGREEMENT made in triplicate this _____ day of ______________, 2009

B E T W E E N:

THE CORPORATION OF THE CITY OF PETERBOROUGH
(the "City")

– and –

BROWN’S FINE FOOD SERVICES INC.
A company incorporated under the laws of Canada, ("BFF")

WHEREAS the City issued a Request for Proposals, dated November 13, 2008, for the operation of food services at the Peterborough Memorial Centre (the "PMC");

AND WHEREAS BFF carries on the business of providing food service management and submitted a proposal, dated November 13, 2008, to the City for the operation and management of food services at the PMC;

AND WHEREAS the City wishes to accept the said proposal and to appoint BFF to operate such food services and BFF has agreed to accept such appointment all on the terms and conditions herein contained,

NOW THIS AGREEMENT WITNESSETH that in consideration of the mutual covenants contained herein, the parties covenant and agree as follows:

1. Definitions

1.1. “Accounting Period” means one of twelve periods of either four or five weeks utilized by BFF in making up its fiscal year.

1.2. “Annual Statement" is defined in Article 10.1.

1.3. “Catering Services” means food and beverage services provided at the Premises or Event Location for a reception, meeting, buffet or sit-down meal setting on a catered, non-retail basis and does not include Concession Services or Restaurant Services.

1.4. “Client” means any person or entity that, from time to time, licenses space within at the Premises or Event Location for an event or meeting.

1.5. “Concession Services” means over-the-counter sales at all fixed and mobile food and beverage areas, kiosks, stands and carts at the Premises or Event Location.

1.6. “Equipment” means the furniture, fixtures, equipment and any Shared Equipment owned by the City as shown on the attached Schedule “A”, as may be amended from time to time.

1.7. “Event” means a City-organized activity or rental that includes the use of the Premises.

1.8. “Fiscal Year” means each period of twelve (12) consecutive Accounting Periods ending on the closest to the last day in May.

1.9. “Gross Revenue” is defined in Article 9.4.

1.10. “Other Persons” means any and all persons, excluding Clients, including but not limited to visitors, patrons, attendees, tenants, contractors, and employees of the PMC.
1.11. “Premises” means such areas throughout the PMC, designated by the City from time to time to be used by BFF in providing the services set out in this Agreement, and includes BFF’s offices, concessions, bars, kitchens, preparation areas, refrigerator/freezers areas, receiving areas, restaurant, temporary food service and temporary seating areas, and storage areas. The Premises, except for temporary food service and temporary seating areas, are identified in the attached Schedule “A”.

1.12. “Event Location” means such facilities and or properties, apart from the PMC, owned and operated by the City Of Peterborough, at which BFF could be providing food and/or beverage service, at City organized events. Such facilities could include Morrow Park, Evinrude Centre, and Del Crary Park etc.

1.13. “Reporting Period” means one of the twelve accounting periods utilized by BFF in each fiscal year, comprising either four or five weeks.

1.14. “Restaurant Event” occurs when the restaurant opens or remains open outside the hours of an Event. Restaurant Events can be organized by the City or by BFF in conjunction with the City.

1.15. “Restaurant Services” means table service, buffet service or counter service food and beverage retail sales in the restaurant facilities shown on Schedule “A”.

1.16. “Services” means the Catering Services, Concession Services, Restaurant Services, and all other food and beverage service as outlined herein in accordance with the terms of this Agreement.

1.17. “Shared Equipment” means equipment negotiated and purchased through a separate agreement between BFF and the City.

1.18. “Sub-contractor Concession Income” means commissions and/or other amounts paid or payable by third parties relating to compensation to BFF for the right of third parties to locate specialty food carts or other concessions in the PMC.

1.19. “Trade Fixtures” means the operating equipment, supplies and mobile food and beverage equipment required by BFF in order to perform its services pursuant to this Agreement, but excludes the Equipment. Trade Fixtures include smallwares, cash registers, POS systems and equipment, office equipment and furniture and any other supplies required.

2. Effective Date and Terms

This Agreement shall be effective as of the 1st day of June, 2009, and shall continue in full force until the 31st day of May, 2014 (the “Initial Term”), unless earlier terminated as hereinafter provided. Following the Initial Term, the City shall have the option to renew this Agreement for an additional two (2) years.

3. Services to be provided by BFF

3.1. The City grants to BFF a license to provide the Services at the Premises, in connection with events that are based at the Premises.

3.2. The license shall include the exclusive right, except as otherwise provided herein, to provide Services at the Premises.
3.3. BFF shall at its own expense provide all Trade Fixtures required to perform its services pursuant to this Agreement, and BFF shall maintain all Trade Fixtures in good operating condition and shall perform, or cause to be performed, such maintenance and cleaning as may be required. Upon the termination of this Agreement, all Trade Fixtures shall be removed by BFF failing an agreement with a subsequent foodservice contractor to purchase the Trade Fixtures from BFF. For greater clarity, the City has no obligation to purchase any Trade Fixtures.

3.4. The City grants BFF a licence to provide quotes on Services at other Event Locations owned by the City, for Events organized by the City. BFF agrees that they are not granted exclusive rights to provide Services at other Event Locations.

3.5. BFF’s rights to provide the Services, on an exclusive or non-exclusive basis as the case may be, shall not restrict the City from allowing the following:

3.5.1. **Free Samples.** Notwithstanding anything herein to the contrary, free samples of food and beverages or other items may be given away at selective events by or on behalf of any Client or Other Persons at the discretion of the City. Such samples shall be in containers or packages no larger than 2 oz that allow for a taste test of the product by a consumer and shall not be regular or retail sized containers or packages, unless mutually agreed by both parties;

3.5.2. **Sales of Food and Beverage Products.** BFF acknowledges and agrees that specific Clients, as identified in Article 6.2, shall be permitted to sell food and beverage products at their event. In the event of a trade show, such items must be either sold in bulk or packaged with the intent that such products are not to be consumed on the premises during the event. Products shall be considered to be intended for off-premise consumption if they are sold in packages of not less than 500 grams if by weight or two litres if by volume. These specific clients will be required to meet the requirements as outlined in Article 6.2 of this Agreement;

3.5.3. **Subcontracting of Services.** Services or functions to which BFF has a right under this Agreement may be assigned to subcontractors in accordance with this Agreement, subject to the City’s prior approval of the subcontractor, and the form and content of the proposed contract between BFF and the subcontractor, which approval may not be unreasonably withheld. No such assignment or subcontract shall relieve BFF of its obligation to provide any service or perform any function in accordance with this Agreement.

3.6. BFF recognizes and agrees that the quality of the food and beverage services provided at the Peterborough Memorial Centre is a matter of highest concern and is the essence of this Agreement. BFF shall provide first class Catering Services, Concession Services, Restaurant Services, and all other food and beverage services to meet the needs of the City, Clients and Other Persons.

3.6.1. **Menus and Pricing.** BFF shall regularly and at the City’s request throughout the Term, plan, prepare and implement new menus for restaurants, catering, permanent concessions and other foodservices areas, subject to approval by the City. After agreeing on menu prices prior to the start of operation, BFF shall not increase the prices for the first year of operation, unless commodity prices fluctuate in an amount greater than 10%, at which time BFF may adjust prices with mutual consent of the City. Menu price increases will be based on market pricing for comparable venues. National Brand menu prices, if applicable, will be based on “street pricing” and shall be mutually agreed by the City and BFF, provided that approval of price adjustment shall not be unreasonably withheld by the City;
3.6.2. **Products.** All food and beverages and other items sold or kept for sale at the Peterborough Memorial Centre shall be fresh and high quality. The City reserves the right, from time to time, to prohibit the sale of any product;

3.6.3. **Compliance with Applicable Laws and Regulations.** All food and beverages served by BFF shall conform in all respects to all applicable federal, provincial, regional and municipal legislation, by-laws, ordinances and regulations.

3.7. The Services shall include the following:

3.7.1. the planning of menu patterns and the development of all formulae combining high standards of food quality and presentation;

3.7.2. the purchasing of all food and other supplies, maintenance of adequate inventories and the production and processing of all goods, utilizing proven formulae and exacting food preparation controls;

3.7.3. the cash flow to maintain an adequate inventory of food and other supplies as necessary;

3.7.4. hiring, training, supervising and disciplining of the personnel necessary for efficient service delivery;

3.7.5. providing and maintaining, at all times, an adequate number of trained on-duty staff for efficient service delivery;

3.7.6. the cash flow to pay the salaries, wages and benefits of the persons employed by BFF;

3.7.7. the application of sanitary procedures and controls in keeping with public health regulations and the Medical Officer of Health for the City of Peterborough;

3.7.8. the routine daily cleaning of kitchen and servery equipment;

3.7.9. the routine daily cleaning of kitchen, concession, pantry and restaurant floors, and restaurant carpeted areas;

3.7.10. BFF shall not discharge any grease into the City’s sewer system, and shall place grease in proper containers for disposal;

3.7.11. BFF shall arrange and be responsible for all fees for proper containers, for the storage of used cooking oils, and for the periodic disposal of such cooking oils;

3.7.12. the taking of all reasonable measures to prevent waste or damage to supplies, material and premises, and the safe operation of tools, equipment and other operating facilities at the Premises, and informing the City of all required repairs and replacements;

3.7.13. the disposal of all garbage and any other waste material, and any associated costs, arising out of its operation of the Premises and Event Locations and shall coordinate its disposal methods with those of the City, in order to reduce cost and maximize efficiency;
3.7.14. BFF shall operate the Premises in such a manner as to minimize the occurrence of pests of all forms, and agrees that the City’s authorized pest control service provider will provide control services in all food service/preparation areas, under control of BFF, as an integral element of its pest control program. BFF agrees to pay City for an amount equal to 25% of the annual invoice for such service;

3.7.15. the provision of single-serve containers for all venues other than luxury suites and the restaurant;

3.7.16. the provision of mobile food and beverage equipment, other than the Equipment, additional to the existing inventory;

3.7.17. the provision of hospitality services, including being responsible for all billings, and policies thereto, as mutually agreed by both parties;

3.7.18. the provision of, and any associated costs, of any necessary internet services;

3.7.19. complying with the City of Peterborough’s Municipal Alcohol Policy and other relevant regulations;

3.7.20. complying with all applicable municipal, provincial and federal by-laws, statutes and regulations regarding the use and storage of hazardous materials, including but not limited to propane, cleaning supplies and chemicals of all sorts. A list of all such materials will be provided to the City upon commencement of the Agreement and will be updated as required;

3.7.21. repairing any damage to the Premises or the property of the City, any Client or Other Person if such damage was caused by BFF or its employees, agents, sub-contractors or contractors.

3.8. Security at the PMC is composed of two categories: (a) paid duty police officers, and (b) security staff trained and retained by BFF for their exclusive use concerning the restaurant.

3.8.1. Because BFF will be serving alcoholic beverages, it acknowledges and agrees that it has a responsibility to uphold applicable laws and act in accordance with the liquor license issued to the City by the Alcohol and Gaming Commission of Ontario. Therefore, BFF shall share the cost of Event security where alcohol is served in accordance with the following formula: hourly rate of three paid duty officers times the number of hours of Event divided by three. Number of hours means the Event hours plus one hour prior to time of Event;

3.8.2. In the event the restaurant opens, or remains open, for business outside the hours of an Event, such business shall be deemed to be a Restaurant Event. BFF shall provide and pay 100% of the security costs for such Restaurant Event until the restaurant is closed for business, save and accept when the City has provided its prior written agreement to share the cost of such additional security.
4. Facilities and Services to be provided by the City

4.1. The City shall provide the following:

4.1.1. the Equipment, as identified in Schedule A, for the exclusive use of BFF, including repair or replacement as needed;

4.1.2. adequate means of garbage storage;

4.1.3. arrangements and associated costs for a scheduled collection of grease from grease traps and associated maintenance. BFF will be notified of such schedule;

4.1.4. arrangements for the City’s authorized pest control contractor, to provide pest control services, in all food service/preparation areas under control of BFF, as an integral element of its pest control program, and invoice BFF for an amount equal to 25 % of the associated costs of the regular annual pest control contract to a maximum of $400.00 annually;

4.1.5. four annual parking passes for BFF’s use in the PMC suite parking area, during event nights, in addition to the two parking passes that come with the suite lease arrangement;

4.1.6. heat, light, power, natural gas, hot and cold water, sanitary sewer and storm sewer sufficient to meet sanitary standards for dish and pot washing, food preparation and service, permanent or temporary, together with outlets and connections, and any upgrades or changes thereto, that arise at the Premises, mutually agreed necessary, for the provision of Services (collectively “Utilities”);

4.1.7. maintenance, decoration and repair of the Premises as the City considers reasonably necessary, all at times and in a manner that will not unreasonably interfere with the operation of Services;

4.1.8. maintenance of the Equipment, ceilings, walls, light fixtures; plumbing, drainage and sewage systems; filters, hoods, canopies, and fire suppression systems in the Premises, as well as scheduled deep cleaning of the floors and carpet in the kitchen, concessions and restaurant;

4.1.9. washroom facilities including the provision of paper towels, hand soap and garbage bags;

4.1.10. telephone service, excluding long distance calls, to each permanent food and beverage outlet, and cable television to all television locations that are existing at the time of original Agreement;

4.1.11. adequate storage facilities to permit the maintenance of appropriate product inventory;

4.1.12. adequate access to the Premises;

4.1.13. appropriate ushers and ticket-taking staff for each Event; the City shall use its best efforts to ensure that ushers are trained in Smart Serve;

4.1.14. an annual Event schedule;

4.1.15. its best attendance estimate for each Event;
4.1.16. the use of the normal food service preparation areas that BFF would use to service an Event at the Premises, and for the provision of services at an Event held at the Event Location;

4.1.17. to allow BFF to provide catering services other than to the City, providing the provision of the said catering service does not adversely affect the provision of services at the PMC. The City will allow the use of the normal food service preparation areas that BFF would use to service an Event at the Premises, for the provision such catering service;

4.1.18. inspect the Facilities, and take any reasonable remedial steps, prior to BFF assuming its responsibilities under this agreement to ensure that the Facilities are in an acceptable condition.

5. **Hours of Operation**

Services and point of sale cash points shall be provided to various events as mutually agreed by both Parties, based on the average anticipated attendance for each Event. Should BFF determine that it cannot agree to provide services for a particular Event, and notwithstanding Article 6 of this Agreement, the PMC retains the right to provide services to the Event, either directly or through a third party, in such locations as the PMC deems appropriate.

BFF shall provide appropriate professionally produced signage, for use at mutually agreed upon locations throughout the Premises, to temporarily direct patrons to the open service areas, during Events that do not require the use of all serviced areas. Signage will also include a listing of the products that will be available at the serviced areas.

6. **Exclusivity**

6.1. While this Agreement is in force and effect, BFF shall have the exclusive right to provide all food and beverage services, except vending, to the patrons of the Peterborough Memorial Centre. The number of machines, ten (10), currently in place shall not be expanded and prices must not be less than those charged in the concession for the same or similar products, without mutual consent.

6.2. The City reserves the right to permit specific events, held in the PMC to provide some or all of their own food and beverage services, and BFF acknowledges these events will be granted this right. Details surrounding these specific events will be discussed with BFF in advance. Permission will be limited to the following events:

- The Guild of Arts and Crafts - Craft Show and Sale
- The Festival of Trees Annual Charity Fundraiser
- Shrine Circus
- Food & Beverage Trade Shows
The PMC will ensure the following items have been satisfied before permitting food and beverage services to be provided by the specific events:

- the food provider for the event must be a licensed food vendor or show proof of application for a Special Event Food Vendor Permit from the Peterborough County-City Health Unit.
- the food provider for the event must show proof of inspection of their on-site and/or off-site operations.
- the PMC reserves the right to inspect and/or have the food providers operations inspected and will be required to meet the standards of the Peterborough County-City Health Unit and the PMC.
- the food provider must provide a product inventory list for all products brought on the premises and this list is to include the manufacturer of each product.

The specific event food provider must comply with all the above requirements or permission will not be granted.

No compensation shall be paid to BFF where outside organizations are allowed to provide services within the PMC. BFF agrees to cooperate with the City and event organizers to ensure the effective staging of such events. Such events shall not be entitled to use of the food service facilities under the control of BFF. The parties agree that these events by their specific nature justify provision of services by others.

6.3. BFF shall be identified as the caterer for the PMC in all relevant promotional material.

7. **Suiteholder Agreements**

7.1. The City acknowledges that BFF may enter into agreements with Suiteholders respecting the provision of and payment for the Services, so long as such agreements are not inconsistent with the City’s Suiteholder agreements.

7.2. BFF acknowledges that procedures which may allow suiteholders the privilege of purchasing food and beverage outside the suite area, but still within the PMC, will be upon mutual agreement of the City and BFF.

8. **Product Exclusivity**

BFF acknowledges that the City has entered into exclusive supplier agreements with Pepsi Bottling Group (Canada) Co. and Molson Canada and BFF agrees that it shall conduct its purchasing practices in accordance with those aforementioned exclusive supplier agreements. In the event the City desires to enter into new exclusive supplier agreements with other third party suppliers, it shall consult with BFF prior to tendering for such other exclusive supplier. Nothing contained in Article 8 shall limit or restrict the City from extending or renegotiating either existing exclusive supplier agreement without consulting with BFF.

9. **Financial Arrangements**

9.1. **Collection and Remittance of Sales Tax.** BFF shall be responsible for the collection and remittance of the Goods and Services Tax, the Provincial Sales Tax, all employee withholdings and any other taxes that are levied on the operation of the business. Proof of such collection and remittance will be furnished to the City if requested;

9.2. **Recording of Transactions.** All sales transactions in the concessions, kiosks, restaurant, Club Lounge and Suites shall be recorded in a point of sale system approved by the City and provided by BFF. POS systems will have, as an absolute minimum, sufficient PLUs for all menu items offered in the outlet and a sealed cumulative total. The City and BFF may agree on an inventory control system, in lieu of POS, for certain mobile applications.
9.3. **Basis of Agreement.** BFF agrees to provide the Services on a profit and loss basis.

9.4. **Gross Revenue, and Additional Gross Revenue.** For the purposes hereof, "Gross Revenue" means the aggregate of the actual selling price of all products and services sold, whether by BFF or subcontractor(s) and whether or not such sales are made or such services are performed in the PMC or from the PMC,

a) Without limiting the generality of the foregoing, Gross Revenue includes:
   
i) the amounts received or receivable for the sale of products and services at the Premises or Event Locations; as costs involved in catering to Event Locations will be quite higher, commission rates for catering to Event Locations will be determined by mutual agreement on a case by case basis;
   
ii) all deposits not refunded for orders for products and services;
   
iii) Sub-contractor Concession Income;
   
iv) service charges including service charges on bar sales;
   
v) any tips collected by BFF not remitted to BFF’s hostesses, servers and/or kitchen staff; and
   
vi) all other receipts and receivables whatsoever;

b) Additional Gross Revenue includes

i) the amounts received or receivable for the sale of products and services catered by BFF, to patrons at venues other than the Premises or Event Locations, where such sales are produced and serviced from the normal food service preparation area at the Premises;


c) Gross Revenue and Additional Gross Revenue excludes:

i) sales of products and services for which cash has been refunded, but only to the extent of such refund, provided that the selling price of such products and services was previously included in Gross Revenue;

ii) third party charges such as equipment rental or entertainment that are paid by BFF on behalf of the Client, where such charges are not generally included in the price for food and beverage service and where such charges are passed on to the Client without mark up;

iii) sales of products and services by BFF at other venues, where such sales are in no way connected with the operations at PMC;

iv) the amount of any provincial sales tax, goods and services tax, and any other applicable tax shown separately from the selling price, imposed directly on sales and collected on behalf of taxing authorities;

v) tips and gratuities actually remitted to BFF’s hostesses, servers, and/or kitchen staff; and

vi) service charges which are applied directly to labour costs.
d) **Treatment of Royalties Payable on National Brands**

i) Royalties payable on products obtained from any nationally recognized food and/or beverage purveyor, (E.g. Tim Horton's, McDonalds, Subway etc.) save and except Pizza Pizza, shall be negotiated by BFF but, prior to BFF entering a contract with such nationally recognized food and/or beverage purveyor, BFF shall obtain the consent of the City to such contract and to the accounting treatment of royalties in relation to Gross Revenue.

9.5. **Minimum Annual Commission.** If by 31 May 2010, BFF has not made commission payments to the City totaling a minimum amount of $50,000.00, then BFF shall make such additional payment to the City as is necessary to satisfy its requirement to make a minimum annual commission payment of $50,000.00.

9.6. **Commission.** BFF shall pay to the City the following commissions, on or before the 30th day following the end of each Accounting Period during each fiscal year:

a) 12% of Gross Revenues up to $700,000.00, less the Minimum Annual Commission; and

b) 25% of Gross Revenues from $700,000.01 to $800,000.00; and

c) 30% of Gross Revenues in excess of $800,000.00; and

d) 5% of Additional Gross Revenues.

9.7. **Utilities.** BFF will pay to the City, on the last day of each Accounting Period, commencing in June 2009, a fixed amount of $1,666.00 ($20,000.00 annually) towards the cost of heat, hydro, gas, water and sewage.

9.8. **Marketing.** In addition to the annual Suite purchase, (Article 9.11), and the temporary signage issues (Article 5), BFF will commit to fully utilizing the potential in the current illuminated signs, available at the concessions, with the production of and display of appropriate promotional signage. In addition, BFF agrees to annually produce and utilize any other promotional and marketing it deems necessary to promote their business during the Agreement term, and will meet with the City regularly to discuss utilization of the annual marketing budget.

9.9. **Investment and Ownership of Trade Fixtures.** BFF shall make an investment of TWO HUNDRED THOUSAND DOLLARS ($200,000.00) over the term of this Agreement in order to purchase such Trade Fixtures as are required to satisfactorily perform its services under this Agreement. Without limiting the generality of the term, “Trade Fixtures”, such Trade Fixtures include POS systems and equipment, cash registers, smallwares, computers and other incidental items as outlined in Article 1.19. The City acknowledges and agrees that the ownership of any and all Trade Fixtures purchased by BFF pursuant to this clause shall be vested in BFF and not in the City.

9.10. **Investment in Trade Fixtures and Shared Equipment.** BFF shall, prior to each anniversary of entering into this Agreement, disclose to the City the annual investment in Trade Fixtures for use in the PMC (the “Trade Fixture Investment”). The City and BFF shall annually review Concession Services and Equipment in order to decide if it would be desirable to negotiate a separate agreement regarding the purchase of Shared Equipment (E.g. a deep fryer and fire
suppression equipment) for use in the PMC.

9.11. **Purchase of Suite.** BFF agrees to purchase a Suite in each year of the Agreement. Suite prices will be firm for the term of this Agreement, and total Suite and ticket charge shall not exceed $12,000.00 annually. The parties shall enter into a Suiteholder agreement upon the execution of this agreement.

10. **Reporting**

10.1. **Reporting.** BFF shall report, in such form and detail satisfactory to the City, the following reports:

10.1.1. **Weekly statement of estimated Gross Revenues** in respect of each and every event and the following revenue categories:
- 9.1.1.1 Concessions
- 9.1.1.2 Restaurant
- 9.1.1.3 Suite Sales
- 9.1.1.4 Skybox (group lounge) Sales
- 9.1.1.5 Banquet Sales
- 9.1.1.6 Sub-contractor Sales
And divided by food (including non-alcoholic beverages) and alcoholic beverages, within seven (7) days of the end of the previous week;

10.1.2. Within 45 days of the end of each Accounting Period, a statement of Gross Revenues itemized as in Article 10.1.1, together with a Fiscal Year-to-Date statement identifying total Gross Revenue associated with the operation of the Premises and provision of services;

10.1.3. **Food and Beverage Sales.** Until such time as the City and the Peterborough Petes Limited (the “Petes”) have renegotiated the terms of the agreement between the City and the Petes concerning sharing gross food and beverage sales, BFF agrees that it shall co-operate with and assist the City in satisfying the Petes concerning the annual amount of net food and beverage sales. In the event the Petes are entitled to a percentage of food and beverage sales, whether based on gross or net food and beverage sales, the City acknowledges and agrees that BFF has no obligation to pay any or all such percentage of food and beverage sales to the Petes.

10.2. **Annual Plans.** BFF shall provide to the City at the commencement of the first Fiscal Year, and thereafter no later than thirty (30) days prior to the end of each Fiscal Year, an estimate by Accounting Period of the Gross Revenue for the following Fiscal Year, in such detail as is satisfactory to the City.

10.3. **Records and Right to Audit.** BFF shall prepare and maintain, and shall preserve for at least six (6) years from the date of their preparation, full, complete, true and accurate books, records, and financial statements in accordance with generally accepted accounting principles. BFF shall maintain such accounting records on a Fiscal Year basis. BFF and all other persons conducting business in or from the Premises or the PMC pursuant to this Agreement, will record at the time of the sale, in the presence of the customer, all receipts from sales, charges, services or other transactions whether for cash or credit, in a cash register or registers having a sealed cumulative total and any other control features that are required by the City relating to the sale of products and services and Gross Revenue. BFF warrants the accuracy of its financial settlements, reports and billings such that the City may rely upon them for any purpose as being complete and accurate.
10.4. **Right to Audit.** The City and its designated agents shall have the right at all reasonable times to examine and copy, at its expense, all of the books and records of BFF relating to the Services, and at any time upon reasonable notice to BFF, conduct or have conducted an independent audit of the books of BFF relating to providing the Services, and such right shall survive the expiry or earlier termination of this Agreement.

10.4.1. If an inspection or audit, including reasonable reconstruction of the books and records of BFF to reflect Gross Revenue, should reveal that any Gross Revenue hereunder has been understated, then the City shall immediately adjust the amounts due to be based on the restated Gross Revenues, and such obligation shall survive the expiry or earlier termination of this Agreement;

10.4.2. Further, if an inspection or audit discloses an understatement of Gross Revenue of three percent (3%) or more, BFF shall, in addition, reimburse the City for all costs and expenses connected with such inspection or audit, and such right shall survive the expiry or earlier termination of this Agreement.

The foregoing remedies shall be in addition to any other remedies the City may have, and shall survive the expiry or earlier termination of this Agreement.

11. **Compliance with Governmental and Other Regulations**

11.1. BFF shall comply with all applicable health, W.H.I.M.S., sanitary and other laws, regulations and directions of any competent governmental authority relating to the actual operation of the Premises and of the personnel employed by it (including the Workplace Safety and Insurance Act); and agree to medical examinations of any or all persons employed by BFF in the provision of the Services, if and when required at the expense of the City.

11.2. The City acknowledges that it is responsible for compliance with all Federal, Provincial and Municipal Health and Safety regulations with respect to the Premises.

12. **Insurance**

BFF will maintain a policy of insurance indemnifying BFF and the City against all sums that they and either of them shall become obliged to pay by reason of liability imposed by law upon BFF and the City and either of them for:

(a) Loss or damage for bodily injury including damages for care and loss of services resulting from such bodily injury and any sickness or disease or death at any time resulting therefrom sustained by any person by reason of the operation of the said food service under this Agreement or arising out of the consumption, handling, or use of goods or products manufactured, sold, handled or distributed by BFF;

(b) Damage to or destruction of property resulting from the operation of the said food service under this Agreement, subject however to the conditions, limitations and exclusions forming part of the policy, which shall not be inconsistent with this Agreement.
The aggregate limits of such policy shall be $5,000,000 (Five Million Dollars) inclusive coverage for loss or damage resulting from bodily injury, sickness and disease or death sustained by any one or more persons and for damage to or destruction of property from any one accident. In the case of product liability such limits shall be for all occurrences in any one policy year.

This clause shall not be construed as imposing any liability upon BFF herein other than its obligation to maintain a policy of insurance containing agreements to the same or like effect as aforesaid or as a waiver by City of any rights it may have against BFF. City shall obtain and maintain insurance for the Premises, food service Equipment, and utilities against risks covered by standard forms of fire, theft, and extended coverage in such amounts under such policies as appropriate.

The City shall be included as an additional insured on all policies, and BFF shall provide a certificate confirming such insurance policies upon the execution of this Agreement, and annually thereafter.

BFF shall not do or permit to be done any act or thing upon the Premises that may make void or voidable any insurance on the Premises or the PMC.

The above insurance requirements shall not be read to limit the liability of BFF and shall not be deemed a waiver by the City of its right to damages and indemnity from BFF for default under this Agreement or for any loss arising out of or related to the performance or non-performance by BFF of its services under this Agreement.

13. Mutual Indemnification

Each party shall indemnify, defend and hold harmless the other and each of their respective servants, employees and agents from and against all actions, suits, claims, demands, losses, costs, charges, damages and expenses incurred, sustained or claimed, including reasonable legal fees, arising out of or resulting from any negligent or willful act or omissions of such party or persons for whom it is in law responsible in connection with the subject matter of this Agreement, except to the extent caused by the negligent act or omission of the other party, or its employees or agents. Notwithstanding the foregoing, BFF shall not be required to indemnify the City for any claim or action brought by an employee of BFF against the City.

Notification of an event giving rise to an indemnification claim ("Notice") must be received by the indemnifying party within 30 days following receipt of such claim and shall include a brief factual summary of the damage and cause thereof. An indemnification claim is expressly subject to and conditioned upon compliance with the Notice provisions hereunder.

This clause shall survive termination of the Agreement.
14. Termination

14.1. Termination for Cause

Should either party hereto make default in any of its obligations or contravene any provision in this Agreement, the other party may serve written notice of such default or contravention on the party in default. If within ten (10) business days of the date of receipt of such notification the party so notified does not make good the default or cease the contravention, the party not in default may at its option:

i) Remedy such default or contravention at the expense of the other party; or

ii) Terminate this Agreement by giving ten (10) business days' written notice of termination to the other party.

14.2. Default

The occurrence of one or more of the following events shall constitute a default under this Agreement (“Default”):

i) Each and every occurrence of a Payment Default (No waiver, deferral, or compromise of any payment obligations or prior Payment Default shall extend to, or constitute a waiver of, any subsequent or other Payment Defaults or impair any BFF termination rights or remedies at law or in equity);

ii) A party’s breach of any warranty, representation, or covenant under this Agreement.

14.3. Immediate Termination

Either party may terminate this Agreement immediately in the event that the other party:

i) becomes insolvent or unable to pay its debts as they become due;

ii) ceases to do business as a going concern; or

iii) makes an assignment for the benefit of creditors, applies to or petitions any tribunal for the appointment of a custodian, receiver or trustee for itself or any substantial part of its assets, or commences any proceeding with respect to itself under any bankruptcy, reorganization, readjustment of debt, insolvency, receivership, dissolution or liquidation law or statute of any jurisdiction, or if it files any such application or petition, or if such proceeding is commenced against a party. Upon this instance of default, non-defaulting party may terminate Agreement effective immediately.
14.4. **Consequences of Termination**

In the event of the termination of this Agreement, BFF shall furnish the City with the usual statements and other documents as at the date of termination and any monies owing by one party to the other shall be paid within ten (10) business days. Failure of either party to pay any outstanding monies will result in interest charged on the sum, calculated at 5% per annum above the prime rate of the Canadian Imperial Bank of Commerce. In taking such accounts, all credits accruing one to the other shall be included. Neither the City nor BFF shall have any claim against the other for salaries, wages, employee compensation or allowances arising out of the termination of this Agreement, except that, in the event of termination of this contract by the City without cause or completion of the contract, the City shall reimburse BFF for the cost of severance and termination pay incurred. All payments between the parties hereto shall be subject to adjustment after such inspection, verification and audit of BFF’s books of account as the City shall wish to make on its behalf upon termination of this Agreement. Any such inspection, verification and audit shall be made without expense to BFF.

Upon termination of this Agreement, BFF agrees to peaceably surrender the Premises, fixtures and Equipment in good substantial repair and condition provided, however, that BFF shall not be responsible for reasonable wear and tear, damage by fire not caused by negligence of BFF or its employees, lightning, tempests, riots, insurrection, civil commotion, Acts of God or enemies of the state.

15. **Survival of Obligations**

Termination of this Agreement shall not operate to limit, reduce, cancel, or otherwise modify any obligations then accrued or unpaid.

16. **Independent Contractor**

BFF agrees not to hold itself out as a servant or employee of the City or to pledge the credit of the City in any way whatsoever, it being understood that BFF is an independent contractor providing only the food service management on behalf of the City. Neither party intends, and nothing contained in this Agreement shall be construed, to establish a partnership or joint venture between parties. Neither party shall, by reason of any provision herein contained, be deemed to be the partner, agent or legal representative of the other nor to otherwise have the ability, right or authority to assume or create, in writing or otherwise, any obligation of any kind, express or implied, in the name of or on behalf of the other party.
17. **BFF Vendors**

Subject to Article 8, BFF shall purchase inventory, Trade Fixtures and services from various sellers and vendors selected by BFF at its sole discretion (each a “Vendor”). Purchases from Vendors shall be made under such terms BFF deems in its sole discretion as acceptable (“Vendor Terms”). All Vendor Terms are the exclusive obligation and property of BFF. City does not have any right to any Vendor Terms and no Vendor Terms will operate to reduce or otherwise affect the amount or performance of City’s obligations.

18. **Right to Inspect**

BFF agrees to permit an authorized representative of the City to have the right to inspect the premises at reasonable times. The inspection will be conducted in a manner to avoid disruption to the Services.

19. **Licenses and Permits**

BFF shall arrange to acquire all licenses and permits of whatsoever nature required for the operation and maintenance of the food service, except the liquor license which shall be provided by the City and name BFF as the operator of the license. The City shall have the right to prohibit the sale of alcoholic beverages at certain events, or in certain areas of the PMC.

20. **Force Majeure**

In case performance of any terms or provisions hereof shall be delayed or prevented, without limitation, because of compliance with any law, decree, or order of any governmental agency or authority, or because of riots, war, public disturbances, power interruptions, fuel shortages, strikes, lockouts, differences with workmen, fires, floods, Acts of God, or any other circumstance or reason whatsoever which is not within the control of the party whose performance is interfered with and which, by the exercise of reasonable diligence said party is unable to prevent, the party so suffering may at its option suspend, without liability, the performance of its obligations hereunder during the period such cause continues, and extend the term of this Agreement for the period of such suspension of the performance of duties hereunder. The party so prevented, delayed or interrupted shall give notice to the other party of such events or circumstances as soon as reasonably possible and both parties shall use their reasonable best efforts to comply with the terms of this Agreement notwithstanding such prevention, delay, or interruption. Minimum commission shall be pro-rated in the event of a Force Majeure by the number that is equal to $50,000.00 multiplied by a fraction, the numerator of which is the number of days during the Fiscal Year on which the BFF was unable to provide services, and the denominator of which is 364.
21. City Consent

Whenever pursuant to the terms of the Agreement the consent, approval or decision of the City is required, BFF shall be entitled to rely on a letter from an authorized representative stating that such consent, approval or decision has been given by the City and such letter shall not be unreasonably withheld or delayed. Any such consent, approval or decision given by the City shall not, in any way, amend the terms of this Agreement.

22. Removal of Personnel

The City may request removal of any BFF personnel and BFF shall comply, provided such request is lawful, reasonably justified in writing, and BFF is given an opportunity to respond and address such issues consistent with this Agreement and its obligations under the law.

23. Non-solicitation of Employees

The City shall not, during the term of this Agreement nor for a period of twelve (12) months after the termination of this Agreement, employ or allow to be employed or retained, either directly or indirectly, in its food service operations any person who was employed by BFF during the term of this Agreement in a managerial or supervisory capacity unless it has obtained the prior written consent of BFF. If the City violates this Article, then the City agrees to pay an amount equal to two (2) years salary of such personnel, as liquidated damages and not as a penalty. Acceptance of such payment does not constitute a waiver of any other remedies or rights BFF may have either at law or in equity, including temporary restraining orders or injunctive relief.

24. Dispute Resolution

Good Faith Negotiation. In the event of any dispute, controversy, claim, or disagreement arising out of or relating to this Agreement, or the breach, termination, validity, or enforceability of any provision of this Agreement (each a Dispute), the parties shall use their best efforts to resolve and settle any Dispute by consulting and negotiating with each other in good faith and attempting to reach a just and equitable solution satisfactory to both parties.

Binding Arbitration. If the parties fail to reach a solution under this Article within 30 days, then, upon notice by either party to the other, all Disputes shall be settled finally by binding arbitration.

Arbitrators. Each party shall select an arbitrator from a panel of arbitrators submitted to the parties. The two arbitrators so chosen shall, within 10 days of their appointment, select a third neutral arbitrator with similar experience and knowledge. Prior to the commencement of any hearing, each of the arbitrators shall provide an oath or undertaking of impartiality.
Proceedings. The first arbitration hearing shall commence within 120 days of a party’s notice to require arbitration. The arbitration shall be conducted in Toronto, Ontario. The arbitration shall be governed by the substantive laws of Ontario applicable to contracts made and to be performed therein, without regard to conflicts of law rules. The parties expressly agree that this Agreement shall confer no power or authority upon the arbitrators to render any judgment or award that is erroneous in its application of substantive law. Discovery as permitted by the Rules of Civil Procedure for the Province of Ontario will be allowed to the extent consistent with the purpose of arbitration and as allowed by the arbitrators. This Article will not impair the exercise of any termination rights under this Agreement or rights to seek injunctive or other equitable relief.

Awards. The arbitration award to the prevailing party shall include the cost of administering the arbitration and the cost of the arbitrators. The arbitrators are not empowered to award damages in excess of compensatory damages, and each party hereby irrevocably waives any right to recover punitive damages with respect to any Dispute. Judgment upon any award rendered in any arbitration may be entered into a court of competent jurisdiction for judicial acceptance of the award and an enforcement as the law of such jurisdiction may require or allow.

Confidentiality. The arbitration proceedings conducted pursuant hereto shall be confidential. Neither party shall disclose or permit the disclosure of any information about the evidence adduced or the documents produced by any party in the arbitration proceedings or about the existence, contents, or results of the arbitration award without the prior written consent of such other party except as required by order during the course of a judicial or regulatory proceeding or as required by a governmental authority, so long as the party intending to make such disclosure shall give the other party prompt notice of the disclosure request to afford the other party opportunity to protect its interests.

25. Representations, Warranties, and Covenants

The following representations, warranties, and covenants are made by the parties at the time and from the Effective Date hereof and shall survive the termination of this Agreement:

(a) The execution, delivery, and performance by the parties of this Agreement are within their respective powers, have been duly authorized by all necessary action, and do not and will not contravene their respective charters, agreement of partnership, or by-laws. This Agreement constitutes the valid and legally binding obligations of the parties, enforceable in accordance with its terms. The parties’ respective chief executive offices, principal places of business, and the places of record retention are located at the address set forth on the signature page;
(b) The City has no right, title, or interest in, and shall not assert or disturb rights, title, or interest to, any Trade Fixtures, inventory, or other property furnished or installed by BFF on the premises. The City shall not operate, remove, or tamper with such Trade Fixtures, inventory or other property.

26. Notice

All notices to be given under this Agreement shall be in writing and shall be served either personally, by deposit with an overnight courier with charges prepaid, or by prepaid registered post addressed to the City at:

500 George St. N.
Peterborough, ON K9H 3R9

Attention: City Clerk

to BFF at:

Phillip J. Brown
President & CEO
Brown’s Fine Food Services Inc.
844 Division Street
Kingston, ON
K7K 4C3
Marked: URGENT & CONFIDENTIAL

With a copy to:

Don Landon
Vice President of Operations
Brown’s Fine Food Services Inc.
844 Division Street
Kingston, ON
K7K 4C3
Marked: URGENT & CONFIDENTIAL

or such other address as either party may give the other by written notice.

Any such notices shall be deemed to have been given (a) upon delivery in the case of personal delivery, (b) one business day after deposit with an overnight courier, or (c) three business days after deposit in the mail, by signature mail, provided that if such mail service shall be interrupted by strike or other irregularity before the deemed receipt of such notice as aforesaid, then such notice shall not be effective unless delivered in person or by overnight courier. Note that facsimile is not an acceptable method of notification for this purpose.
27. Entire Agreement

This Agreement constitutes the whole and entire Agreement between BFF and the City in connection with the subject matter hereof and supersedes the Proposal and any prior agreements, undertakings, declarations, commitments, representations, written or oral, in respect thereof, and there are no express or implied terms, conditions, agreements, undertakings, declarations, commitments, representations, or warranties between the parties not expressly provided herein. In the event of any conflict between the terms of this Agreement and the said proposal, then the terms of this Agreement shall prevail and the said proposal shall be construed as having been altered to conform with the provisions of this Agreement. It is agreed that if there is any significant variation desired by either party in any of the terms or factors set forth in BFF’s proposal to the City, such variations shall be effected only by the consent of both parties.

28. No Modification

No modification or change to this Agreement shall be binding upon any party unless contained in writing signed by the other party. No course of dealing, course of performance, or trade usage, and no parol evidence of any nature, shall be used to supplement or modify such Agreement and understanding.

29. No Waiver

No waiver or course of dealing between the parties shall extend to, or constitute a waiver of, any subsequent or other Defaults or impair any right consequent thereon. No failure or delay on the part of any party in exercising any right, power, or privilege hereunder and no course of dealing between the parties shall operate as a waiver of any Default or any such right, power, or privilege. No waiver to this Agreement shall be binding unless contained in a writing signed by the waiving party.

30. Severability

Any provisions of this Agreement found upon judicial interpretation or construction to be prohibited by law shall be ineffective to the extent of such prohibition, without invalidating the remaining provisions hereof; so long as the economic and legal substance of the subject matter of this Agreement is not affected thereby in any manner materially adverse to any party.

31. Set-Off

Either party may deduct, set-off, or apply all or part of any such party’s payment obligations against any sums due to such party from the other party.
Assignment

No party may assign this Agreement without the prior written consent of the other party, which consent shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, BFF may assign this Agreement in the event of a majority asset or share sale of BFF or a sale to a subsidiary or affiliate as such terms are defined in the Canada Business Corporations Act without the consent of the City, provided that (1) BFF has notified the City of its intention to assign this agreement (2) the assignee has provided the City with its covenant to be bound by the terms and conditions contained herein and (3) the assignee agrees that the City can, in its absolute discretion, terminate this agreement without cause or recourse, if the assignee fails to comply with the terms and conditions contained herein or make remedy within a specific period set out by the City then the City may forthwith, upon 30 days notice. This Agreement shall be binding upon and enure to the benefit of the successors and assigns of the parties.

IN WITNESS WHEREOF the parties have hereunto attested by the hands of their proper officers duly authorized in that behalf.

THE CORPORATION OF THE CITY OF PETERBOROUGH

Mayor

Clerk

BROWN’S FINE FOOD SERVICES INC.

DATE: ____________________________
NOTE: EQUIPMENT LOCATION NOT NECESSARILY AS SHOWN ON MAP