

## **2004 BCSECCOM 287**

### **Headnote**

Mutual Reliance Review System for Exemptive Relief Application – consulting, non-competition and employment agreements entered into with three selling security holders who are also senior officers or employees of target company - employment agreement between offeror and CEO of target company – decision that agreement has been entered into for reasons other than to increase the value of the consideration paid to the shareholder and may be entered into despite the prohibition against collateral benefits

### **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C.1996, c. 418, ss. 107 and 114(2)(a)

### **IN THE MATTER OF THE SECURITIES LEGISLATION OF BRITISH COLUMBIA, ALBERTA, SASKATCHEWAN, MANITOBA, ONTARIO, QUÉBEC, NOVA SCOTIA AND NEWFOUNDLAND AND LABRADOR**

**AND**

### **IN THE MATTER OF THE MUTUAL RELIANCE REVIEW SYSTEM FOR EXEMPTIVE RELIEF APPLICATIONS**

**AND**

### **IN THE MATTER OF SLEEMAN BREWERIES LTD.**

### **MRRS DECISION DOCUMENT**

WHEREAS the local securities regulatory authority or regulator (the “Decision Maker”) in each of the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, Nova Scotia and Newfoundland and Labrador (the “Jurisdictions”) has received an application (the “Application”) from Sleeman Breweries Ltd. (“Sleeman”) for a decision under the securities legislation of the Jurisdictions (the “Legislation”) that agreements with certain employees of Unibroue Inc. (“Unibroue”) who own or control multiple voting shares of Unibroue (“MVS”) and subordinate voting shares of Unibroue (“SVS”, and together with the MVS, the “Unibroue Shares”) or options to purchase Unibroue Shares (the “Options”) are being made for reasons other than to increase the value of the consideration paid for those Unibroue Shares that are owned or controlled by such employees and may be entered into notwithstanding the requirements contained in the Legislation which prohibits, in the context of a take-over bid, the entering into of any collateral agreement with any holder or beneficial owner of securities of the offeree issuer that has the effect of providing to the holder or

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owner a consideration of greater value than that offered to holders of the same class of securities (the “Prohibition on Collateral Agreements”);

AND WHEREAS under the Mutual Reliance Review System for Exemptive Relief Applications (the “System”), the Ontario Securities Commission is the Principal Regulator for the Application;

AND WHEREAS unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 Definitions or in Agence nationale d’encadrement du secteur financier Notice 14-101;

AND WHEREAS Sleeman has represented to the Decision Makers as follows:

1. Sleeman is a corporation continued under the federal laws of Canada and has its head office at 551 Clair Road West, Guelph, Ontario N1L 1E9.
2. Sleeman is a reporting issuer in all the provinces of Canada and is not in default of any requirements of the Legislation. Sleeman’s common shares are listed on the Toronto Stock Exchange (the “TSX”).
3. Unibroue is a corporation incorporated under the federal laws of Canada and has its head office at 80 rue Des Carrières, Chambly, Québec J3H 2H6.
4. Unibroue is a reporting issuer in the provinces of Québec and Ontario and is not in default of any requirements of either of these jurisdictions. The SVS are listed on the TSX. The MVS are not listed on the TSX or any other market.
5. The authorized capital of Unibroue consists of an unlimited number of MVS, an unlimited number of SVS and an unlimited number of first-ranking preferred shares. Based on the public disclosure record of Unibroue, 4,143,254 MVS, 1,715,054 SVS and no first-ranking preferred shares were issued and outstanding as at March 12, 2004 and there were outstanding Options to purchase 166,500 SVS under Unibroue’s stock option plan as at December 31, 2003.
6. Sleeman or its wholly owned subsidiary (collectively, the “Offeror”) proposes to make an offer (the “Offer”) to acquire all of the Unibroue Shares at \$5.25 per Unibroue Share.
7. The Offer will be made by way of a take-over bid circular mailed to all holders of Unibroue Shares and prepared in accordance with the Legislation.

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8. The Offer will be conditional on, among other things, there being validly deposited under the Offer and not withdrawn at the expiry time of the Offer, the greater of: (a) such number of Unibroue Shares as represents at least 66 $\frac{2}{3}$ % of the issued and outstanding SVS (on a fully-diluted basis) after giving effect to the deemed conversion of all MVS; and (b) the number of Unibroue Shares required to ensure minority approval of a subsequent going private transaction involving Unibroue.
9. Sleeman and Unibroue have entered into a support agreement pursuant to which the Offeror has agreed to make the Offer and Unibroue has agreed to, among other things, recommend that its shareholders (the “Unibroue Shareholders”) deposit their Unibroue Shares under the Offer.
10. Sleeman has also entered into a lock-up agreement with André Dion, Andr  e Marcil Dion, Jean-Fran  ois Dion, S  bastien Dion, Robert Charlebois, Laurence Charlebois, J  r  me Charlebois, Victor Charlebois, Serge Racine and their respective controlled entities (collectively, the “Sellers”), pursuant to which the Sellers have agreed to deposit or cause to be deposited all of their Unibroue Shares under the Offer.
11. As an integral part of the transaction: (i) Andr  e Dion, the founder, President and Chief Executive Officer of Unibroue, has entered into a consulting agreement (the “Consulting Agreement”) with Unibroue and Sleeman and a non-competition and non-solicitation agreement (the “Non-Competition Agreement”) with Sleeman; (ii) S  bastien Dion, Unibroue’s Vice President, Finance and Administration, has entered into an employment agreement (the “SD Employment Agreement”) with Unibroue; and (iii) Paul Arnott, Unibroue’s master brewer, has entered into an employment agreement (the “PA Employment Agreement”) with Unibroue.
12. Pursuant to the Consulting Agreement, Andr  e Dion has agreed to assist in the transition of the business to the new ownership for a period of one year for a total fee of \$250,000. The fee is payable quarterly.
13. Pursuant to the Non-Competition Agreement, Andr  e Dion has agreed to certain non-competition and non-solicitation covenants in favour of Sleeman for a period of three years following termination of the Consulting Agreement and, in consideration therefore, Sleeman will pay to Andr  e Dion the sum of \$250,000 for, and payable at the beginning of, each such year.
14. Pursuant to the SD Employment Agreement, S  bastien Dion has agreed to continue his employment with Unibroue for a period of two years at a salary of \$100,000 per year. In addition, S  bastien Dion will be entitled to receive a

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bonus of \$15,000 on July 1, 2005 for his assistance in the transition of the business to new ownership and to participate in Sleeman's group health benefit plan and annual incentive plan which may entitle him to receive an additional annual bonus of \$20,000 provided all performance targets are met.

15. Pursuant to the PA Employment Agreement, Paul Arnott has agreed to continue his employment with Unibroue until September 1, 2006 at a salary of \$105,000 per year. In addition, Paul Arnott will be entitled to receive the same bonus and participate in the same benefit and incentive plans as Sébastien Dion.
16. André Dion personally owns 39,500 SVS and controls 2,862,176 MVS held by Gestion André Dion Ltée. ("Holdco"). André Dion holds a 60% voting and equity interest in Holdco. Sébastien Dion personally owns 1,000 SVS and holds a 20% voting and equity interest in Holdco. Paul Arnott does not beneficially own or control any of the outstanding Unibroue Shares, but holds Options to acquire 15,000 Unibroue Shares.
17. The value of the collateral benefit to each of André Dion, Sébastien Dion and Paul Arnott (the "Key Personnel") pursuant to their respective agreements is minimal in comparison to the value that each is entitled to receive under the Offer.
18. André Dion has agreed to the Consulting Agreement, and Sébastien Dion has agreed to the SD Employment Agreement, to ensure the integration of Unibroue into Sleeman's Québec operations and that the continuation of the combined Québec operations will be as successful as possible following completion of the Offer.
19. The Non-Competition Agreement with André Dion is of significant value to Sleeman. Sleeman believes that it is important to the success and growth of its Québec business that André Dion does not compete with Sleeman for the term of the Non-Competition Agreement.
20. The purpose of entering into the Consulting Agreement, the Non-Competition Agreement, the SD Employment Agreement and the PA Employment Agreement is to provide incentives to certain Unibroue employees to continue their involvement with the business of Unibroue and thereby improve the performance of the Unibroue business after its acquisition by the Offeror and assist in managing and expanding the Sleeman business in Québec, which business includes Unibroue following the acquisition.

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21. Sleeman required the Key Personnel to enter into the Consulting Agreement, the Non-Competition Agreement, the SD Employment Agreement and the PA Employment Agreement as a precondition to the making of the Offer because each of them has been critical to the successful operation of the business of Unibroue to date and will be critical in the transition of the business to its new ownership.
22. The terms of the Consulting Agreement, the Non-Competition Agreement, the SD Employment Agreement and the PA Employment Agreement have been negotiated with the applicable parties at arm's length and are on terms and conditions that are commercially reasonable.
23. Each of the payments under the Consulting Agreement, the Non-Competition Agreement, the SD Employment Agreement and the PA Employment Agreement is commensurate with the total annual compensation of employees of Sleeman with similar level of seniority and/or responsibility.
24. Sleeman believes that it was a prudent and commercially reasonable business decision on its part to insist on a non-competition agreement with André Dion. In other transactions in which Sleeman has acquired businesses, it has been Sleeman's practice to obtain non-competition covenants from the vendors of the business, and Sleeman believes that other purchasers of businesses in this industry would similarly require such non-competition covenants from sellers.
25. The Consulting Agreement, the Non-Competition Agreement, the SD Employment Agreement and the PA Employment Agreement have been made for valid business reasons unrelated to the Key Personnel's holdings of Unibroue Shares or Options and not for the purpose of conferring an economic or collateral benefit that the other Unibroue Shareholders do not enjoy or to increase the value of the consideration to be paid to such employees for their Unibroue Shares tendered under the Offer.
26. The receipt by the Key Personnel of compensation pursuant to the terms of the Consulting Agreement, the Non-Competition Agreement, the SD Employment Agreement and the PA Employment Agreement is not conditional upon their support of the Offer.
27. Full particulars of the material terms of the Consulting Agreement, the Non-Competition Agreement, the SD Employment Agreement and the PA Employment Agreement will be disclosed in the take-over bid circular of Sleeman and the directors' circular of Unibroue.

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AND WHEREAS under the System, this MRRS Decision Document evidences the decision of each Decision Maker (collectively, the “Decision”);

AND WHEREAS each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the Decision has been met;

THE DECISION of the Decision Makers in the Jurisdictions under the Legislation is that, in connection with the Offer, entering into of the Consulting Agreement, the Non-Competition Agreement, the SD Employment Agreement and the PA Employment Agreement with the Key Personnel is being made for reasons other than to increase the value of the consideration paid for the Unibroue Shares or Options that are owned or controlled by the Key Personnel and may be entered into notwithstanding the Prohibition on Collateral Agreements.

DATED this 14<sup>th</sup> day of May, 2004.

Paul M. Moore

Paul K. Bates