

OKANAGAN LAKE NEW CROSSING

CONCESSION AGREEMENT

AMONG

**HER MAJESTY THE QUEEN IN RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA,
AS REPRESENTED BY THE MINISTER OF
TRANSPORTATION**

AND

**BC TRANSPORTATION FINANCING AUTHORITY,
A CORPORATION CONTINUED UNDER THE TRANSPORTATION ACT, S.B.C. 2004,
C. 44**

AND

**OKANAGAN LAKE CONCESSION LIMITED PARTNERSHIP (REG. NO. 05-0399237),
A LIMITED PARTNERSHIP REGISTERED UNDER THE LAWS OF BRITISH
COLUMBIA**

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THIS CONCESSION AGREEMENT (this “Agreement”) is made as of the 30th day of June, 2005

AMONG:

- (1) **HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA**, as represented by the **MINISTER OF TRANSPORTATION** (the “**Province**”)

OF THE FIRST PART

AND

- (2) **BC TRANSPORTATION FINANCING AUTHORITY**, a corporation continued under the *Transportation Act*, S.B.C. 2004, c. 44 (“**BCTFA**”)

OF THE SECOND PART

AND

- (3) **OKANAGAN LAKE CONCESSION LIMITED PARTNERSHIP** (reg. no. 05-0399237), a limited partnership registered under the laws of British Columbia (the “**Concessionaire**”)

OF THE THIRD PART

WHEREAS:

- (A) The Province wishes to replace the existing crossing over Okanagan Lake on Highway 97 between Kelowna and the westside communities with a new crossing and improve the approaches to the crossing.
- (B) The Province invited the private sector to submit proposals to participate in the Project.
- (C) The Province has selected the Concessionaire to carry out the Project in accordance with and subject to the terms and conditions set forth in this Agreement.
- (D) This Agreement is entered into as, and constitutes, a concession agreement under and as defined in the *Transportation Investment Act*.

NOW THEREFORE in consideration of the interests transferred and rights granted to the Concessionaire pursuant to the *Transportation Investment Act*, the mutual promises and agreements

of the Parties herein expressed and for other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged) the Parties hereby covenant and agree as follows:

PART I
GENERAL

1. **DEFINITIONS AND INTERPRETATION**

1.1 Definitions and Interpretation

This Agreement is to be interpreted according to Schedule 1 [Definitions and Interpretation].

1.2 Language

The language of this Agreement is English. All correspondence, drawings, Design Data, test reports, certificates, specifications and information will be entirely in English. All operating and maintenance instructions, name and rating plates, identification labels and other written and printed matter required for the Undertakings will be in English, as will instructions and notices to the public and staff and all other signing and information notices.

1.3 Concessionaire's Proposals

Except for those parts of the proposals submitted by the Concessionaire in response to the RFP or the BAFO Instructions that are incorporated by reference into this Agreement by the Concessionaire Proposal Extracts or by any other express provision hereof and except as otherwise expressly contemplated herein, the Concessionaire's proposals and all requests for information and responses thereto and other communications during the course of the procurement process for the Project are superseded entirely by this Agreement and rendered null and void and will not be relied upon or used by the Concessionaire or anyone else (including anyone pursuant to the Disputes Resolution Procedure or any arbitral tribunal or any Court) in any way whatsoever, including to interpret or qualify the scope of the Undertakings, any obligations or liabilities of the Concessionaire, or anything contained in this Agreement.

1.4 [Not used].

1.5 Assistance, Approval, Audit, Review Etc. by Province

If any assistance, service, approval, audit, inspection, testing, determination, review or examination is provided, performed or made by or on behalf of the Province under, pursuant to or in respect of this Agreement, such action does not, unless otherwise expressly provided herein, relieve or exempt the Concessionaire from, or represent or constitute a waiver of, any requirement, liability, Event of Default, covenant, agreement or obligation under this Agreement or at law or in equity and does not create or impose any requirement, liability, covenant, agreement or obligation on the Province.

1.6 No Fettering of Province's Rights and Authority

Nothing in this Agreement fetters or otherwise interferes with or limits the rights, powers and authority of the Province or any minister, ministry, agency, board, commission, corporation or other entity of the Province (including, for greater certainty, the Minister and BCTFA) to:

- 1.6.1 enact, amend, repeal or replace any enactment or regulation made under any enactment;
- 1.6.2 exercise or refrain from exercising any discretion conferred under Laws and Regulations; or
- 1.6.3 administer, apply and enforce Laws and Regulations,

and, except as otherwise expressly provided for in this Agreement (including Section 42.3), the Concessionaire is not entitled to claim or receive any compensation or other relief whatsoever as a result of anything described in Sections 1.6.1, 1.6.2 and 1.6.3.

1.7 Appropriation

The Concessionaire acknowledges that it is aware of the provisions of subsection 28(2) of the *Financial Administration Act*, R.S.B.C. 1996, c. 138.

1.8 Business Opportunities, Etc.

1.8.1 The Province reserves the right to all commercial and other opportunities for the Existing Highway, the Project Facilities, the Site and the Adjacent Areas ("Business Opportunities"). To encourage the development of Business Opportunities, the Concessionaire may from time to time propose Business Opportunities for the Province's consideration. All such proposals will describe the Business Opportunity in full with the expected financial and other advantages to all Parties. Acceptance of any such proposal will be subject to such reasonable terms and conditions as the Province may require, and the Province will not under any circumstances be required to accept any such proposals.

1.8.2 Unless expressly set out in this Agreement, nothing in this Agreement is intended to allow or does allow the Concessionaire to authorize any person to use or occupy in any manner, including for a commercial purpose, all or any part of the Existing Highway, the Project Facilities, the Site or the Adjacent Areas.

1.9 General Duty to Mitigate

1.9.1 Without limiting and in addition to all other obligations to mitigate required by this Agreement, in all cases where the Concessionaire is entitled to receive from the Province any additional compensation (including for any Compensation Event or for any other increased or additional costs or any other Losses incurred by the

Concessionaire), damages or extension of time, the Concessionaire will have a duty to use all reasonable efforts and all reasonable due diligence to mitigate and reduce (including, for purposes of example only, by way of competitive procurement for expenditures where appropriate in accordance with Good Industry Practice or otherwise required by Laws and Regulations, rescheduling of works and deliveries, and reallocation or redeployment of labour forces and equipment) the amount required to be paid by the Province to the Concessionaire or the length of the extension of time.

- 1.9.2 The Concessionaire will not be entitled to receive those parts of any costs incurred by the Concessionaire or those parts of any additional compensation or extensions of time that the Concessionaire could have mitigated against, reduced or otherwise avoided by the exercise of all reasonable efforts and all reasonable due diligence as required in accordance with the provisions of Section 1.9.1. For greater certainty, any amounts reasonably expended in accordance with Section 1.9.1 will be taken into consideration in calculating any compensation payable to the Concessionaire.
- 1.9.3 Upon request from the Province, the Concessionaire will promptly submit a detailed description, supported by all such documentation as the Province may reasonably require, of the measures and steps taken by the Concessionaire to meet its obligations under Section 1.9.1.

1.10 Information

The Province will make available, upon reasonable request by the Concessionaire, such information within its possession or reasonable control with respect to the Project as the Concessionaire may reasonably request to enable it to perform its obligations under this Agreement, provided that the Province will have no obligation to provide any information with respect to which it is subject to an express obligation of confidentiality or privacy (whether under any Laws and Regulations or contract or otherwise) or which it is otherwise precluded from disclosing under any Privacy Legislation or other Laws and Regulations.

1.11 Province's Property

- 1.11.1 Any property provided by or on behalf of the Province or BCTFA to the Concessionaire as a result of this Agreement is the exclusive property of the Province or BCTFA respectively. The Concessionaire will deliver such property to the Province or BCTFA, as the case may be, forthwith following the Expiry Date.
- 1.11.2 The Province and BCTFA may prior to the Expiry Date give written notice to the Concessionaire requiring the Concessionaire to deliver to the Province and BCTFA their respective property or any part of the property in which event the Concessionaire will forthwith comply with the request. **DELETED**

2. DOCUMENTATION

2.1 Precedence of Documents

In the case of any conflict, ambiguity or inconsistency between or among any of the provisions in this Agreement, the following principles will apply:

- 2.1.1 Subject to Section 2.1.9, the provisions establishing the higher quality, manner or method of performing the Undertakings, using the more stringent standards, will prevail, with the intent that the provisions which produce the higher quality with the higher levels of safety, reliability, durability, performance and service will govern.
- 2.1.2 The provisions of Province Change Confirmations and subsequent amendments in writing to this Agreement signed by the Parties will govern and take precedence only over those specific provisions of this Agreement expressly amended or superseded thereby.
- 2.1.3 In the case of any conflict, ambiguity or inconsistency between the provisions in the main body of this Agreement as read with Schedule 1 [Definitions and Interpretation] and the provisions of any other Schedule, the provisions in the main body of this Agreement as read with Schedule 1 [Definitions and Interpretation] will, unless otherwise expressly provided in the other Schedule, such as is provided in the Direct Agreement, prevail.
- 2.1.4 In the case of any conflict, ambiguity or inconsistency between or among provisions in any of the Construction Output Specifications, the O&M Output Specifications and the Traffic Management Output Specifications, the Province's Representative will, acting reasonably, determine which provisions prevail.
- 2.1.5 In the case of any conflict, ambiguity or inconsistency between the Construction Output Specifications and the Construction Requirements, the Construction Output Specifications will prevail (provided that no such conflict, ambiguity or inconsistency will be deemed to exist with respect to provisions of the Construction Requirements that provide for or require a higher standard of quality or performance or broader scope of work than the Construction Output Specifications, and the Concessionaire's obligations hereunder will include compliance with all such provisions and requirements).
- 2.1.6 In the case of any conflict, ambiguity or inconsistency between the O&M Output Specifications and the O&M Requirements, the O&M Output Specifications will prevail (provided that no such conflict, ambiguity or inconsistency will be deemed to exist with respect to provisions of the O&M Requirements that provide for or require a higher standard of quality or performance or broader scope of work than the O&M Output Specifications, and the Concessionaire's obligations hereunder will include compliance with all such provisions and requirements).

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- 2.1.7 In the case of any conflict, ambiguity or inconsistency between the Traffic Management Output Specifications and the Traffic Management Requirements, the Traffic Management Output Specifications will prevail (provided that no such conflict, ambiguity or inconsistency will be deemed to exist with respect to provisions of the Traffic Management Requirements that provide for or require a higher standard of performance than the Traffic Management Output Specifications, and the Concessionaire's obligations hereunder will include compliance with all such provisions and requirements).
- 2.1.8 In the case of any conflict, ambiguity or inconsistency between the Construction Output Specifications, the O&M Output Specifications or the Traffic Management Output Specifications and any document(s) incorporated by reference therein, the Construction Output Specifications, O&M Output Specifications or Traffic Management Output Specifications (as the case may be) will prevail, except insofar as any such document incorporated by reference contains a legally binding statutory requirement, in which case the document incorporated by reference will, to the extent necessary to comply with such legally binding statutory requirement, prevail.
- 2.1.9 In determining whether a conflict, ambiguity or inconsistency exists between the Concessionaire Proposal Extracts and any other provisions in this Agreement, the Concessionaire Proposal Extracts shall only have effect in regard to matters addressed in the Concessionaire Proposal Extracts that are not addressed elsewhere in this Agreement, and in those cases to the extent that the Concessionaire Proposal Extracts can reasonably be interpreted as requiring additional items or services than otherwise required the Concessionaire's obligations hereunder will include compliance with all such requirements.
- 2.1.10 In the case of any other conflict, ambiguity or inconsistency between the provisions in the main body of this Agreement as read with Schedule 1 [Definitions and Interpretation] or between the provisions of any of the remaining Schedules, the Province and the Concessionaire will endeavour in good faith to agree upon which provision will prevail and, if the matter has not been resolved to the mutual satisfaction of those Parties within 7 Working Days from the identification of the conflict, ambiguity or inconsistency by either Party, then either Party may refer the matter for resolution in accordance with the Disputes Resolution Procedure.

2.2 Additional Payments and Time

The Concessionaire will not be entitled to any additional payment or extension of time under this Agreement as a result of the existence of any conflict, ambiguity or inconsistency referred to in Section 2.1 [Precedence of Documents] or as a result of giving effect to any resolution of any such conflict, ambiguity or inconsistency pursuant to Section 2.1 [Precedence of Documents] (whether by the terms of Section 2.1 [Precedence of Documents] or by agreement between the Province and the Concessionaire).

2.3 Project Documents

- 2.3.1 Prior to the execution of this Agreement the Concessionaire has provided to the Province copies of final drafts of the following documents, which copies have been initialled by the Parties for the purposes of identification (and will provide copies of the executed documents within 5 days of Financial Close):
- 2.3.1.1 the limited partnership agreement and the certificate of limited partnership constituting the Concessionaire;
 - 2.3.1.2 the Certificate of Incorporation, [Notice of Articles and Articles/Articles of Incorporation and By-laws] of the general partner of the Concessionaire;
 - 2.3.1.3 the Senior Funding Agreements;
 - 2.3.1.4 the Direct Agreement;
 - 2.3.1.5 the Design-Build Contract;
 - 2.3.1.6 the Design Subcontract;
 - 2.3.1.7 the Operating and Maintenance Contract;
 - 2.3.1.8 the Performance Securities; and
 - 2.3.1.9 Collateral Agreements from the Contractor and the Operator.
- 2.3.2 The Concessionaire will (and will use all reasonable efforts to ensure that each Contracting Affiliate will) in all material respects perform its obligations under and observe the terms of the Project Documents to which it is a party, and will not (and will use all reasonable efforts to ensure that no Contracting Affiliate will):
- 2.3.2.1 terminate or permit the termination of any Project Document to which it is a party;
 - 2.3.2.2 make or agree to any material amendment to or material variation of any Project Document to which it is a party;
 - 2.3.2.3 in any material respect depart from, or waive or fail to enforce any rights it may have under, any Project Document to which it is a party, except where it is commercially reasonable to do so and does not increase the Province's liabilities on early termination;
 - 2.3.2.4 enter into any agreement or document which would materially affect the interpretation or application of any Project Document; or

2.3.2.5 except as permitted by Section 2.3.3, enter into any Funding Agreement other than those listed in Section 2.3.1.3,

unless full particulars of the relevant document or proposed course of action have been submitted to the Province's Representative and there has been no objection in accordance with the Review Procedure.

2.3.2A Notwithstanding Section 2.3.2.3, where a Contracting Affiliate departs from any Project Document, the Concessionaire will only be in breach of this Agreement where that departure would otherwise be a breach of this Agreement.

2.3.2B The Concessionaire will use all reasonable efforts to ensure that neither the Contractor nor the Designer will:

2.3.2B.1 terminate or permit the termination of the Design Subcontract;

2.3.2B.2 make or agree to any material amendment to or material variation of the Design Subcontract;

2.3.2B.3 in any material respect depart from, or waive or fail to enforce any rights it may have under, the Design Subcontract except where it is commercially reasonable to do so and does not increase the Province's liabilities on early termination; or

2.3.2B.4 enter into any agreement or document which would materially affect the interpretation or application of the Design Subcontract,

unless full particulars of the relevant document or proposed course of action have been submitted to the Province's Representative and there has been no objection in accordance with the provisions of the Review Procedure.

2.3.3 Notwithstanding Section 2.3.2, the Concessionaire may enter into, terminate, amend, waive rights under or exercise rights under any Funding Agreement if:

2.3.3.1 such action is a Permitted Borrowing;

2.3.3.2 such action is a Qualifying Refinancing which is performed, carried out and implemented only in accordance with and subject to the provisions of Section 59 [Refinancing]; or

2.3.3.3. such action would not:

2.3.3.3.1 constitute a breach of Section 2.3.4A; or

2.3.3.3.2 cause any decrease or cancellation of loan commitments under the Senior Funding Agreements except in accordance with the terms thereof in effect on the date of

Financial Close or any change in the conditions precedent to disbursement of such loans as would materially increase the restrictions on the availability of such loans from the terms in effect on the date of Financial Close; or

2.3.3.3.3 modify or waive any requirement to contribute equity which would have the effect of reducing any equity contribution or permitting an equity contribution to be made later than the date it is required to be made pursuant to the Senior Funding Agreements in effect on the date of Financial Close; or

2.3.3.3.4 take effect as an assignment by a Senior Funder of its rights, interests or title under the Senior Funding Agreements or as a grant by a Senior Funder of a participating interest therein unless such action is a Qualifying Bank Transaction.

2.3.4 Notwithstanding any other provision of this Agreement, no amendment to, or waiver or exercise of a right under any Funding Agreement will have the effect of increasing the Province's liabilities on any early termination of this Agreement unless:

2.3.4.1 the Concessionaire has obtained the prior consent of the Province (which consent may be granted or withheld in the absolute and unfettered discretion of the Province); or

2.3.4.2 it is a Permitted Borrowing.

2.3.4A Notwithstanding any other provision of this Agreement, no amendment to, or waiver or exercise of a right under any Funding Agreement will have the effect of causing any amount to be outstanding or payable by the Concessionaire to any of the Funders that is not a Permitted Borrowing or any other amount expressly contemplated by the provisions of this Agreement unless the Concessionaire has obtained the prior consent of the Province (which consent may be granted or withheld in the absolute and unfettered discretion of the Province).

2.3.5 Without limiting the generality of Section 2.3.2, the Concessionaire will:

2.3.5.1 ensure that each Project Document to which it is a party contains a provision to the same effect as Section 2.3.2 and will use all reasonable efforts to ensure that the Design Subcontract contains a provision to the same effect as Section 2.3.2B;

2.3.5.2 ensure that any Funding Agreement contains provisions which have the same effect as Sections 2.3.3, 2.3.4 and 2.3.4A; and

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- 2.3.5.3 use all reasonable efforts to ensure that each Project Document to which a Contracting Affiliate is a party but the Concessionaire is not, contains a provision to the same effect as Section 2.3.2.
- 2.3.6 The Province's Representative may only object to a document or proposed course of action submitted to the Review Procedure pursuant to Section 2.3.2 or 2.3.2B on the grounds set out in paragraph 3.1 of Part 2 of Schedule 8 [Review Procedure].
- 2.3.7 If at any time any Project Document is terminated, an amendment or variation is made to any Project Document, the Concessionaire or any Contracting Affiliate is granted a waiver or release of any of the obligations under any Project Document, the Contractor or Designer is granted a waiver or release of any of the obligations under the Design Subcontract, any agreement is entered into which would affect the interpretation or application of any of the Project Documents, or any Funding Agreement other than the Senior Funding Agreements is entered into, then the Concessionaire will deliver to the Province a conformed copy of each such document or (if it is not in writing) a true and complete record thereof in writing within 15 Working Days of the date of its execution or creation, certified as a true copy or accurate and complete record (as the case may be) by an officer of the Concessionaire.

2.4 Bonding Obligations

Notwithstanding the Performance Securities obtained or to be obtained under or in connection with or pursuant to the Design-Build Contract, the Design Subcontract and/or the Operating and Maintenance Contract, and in recognition of the requirements of the Funding Agreements, the parties acknowledge that the Concessionaire is not required to deliver in favour of the Province as obligee, either a labour and material payment bond, or a performance bond in connection with the performance of the Concessionaire's obligations under this Agreement.

3. THE PROJECT

3.1 Design, Construction, Operation, Maintenance and Rehabilitation

Subject to and in accordance with the provisions of this Agreement the Concessionaire will:

- 3.1.1 design, construct, complete, commission and test the Works;
- 3.1.2 operate, maintain and rehabilitate the Project Facilities, the Site and the Adjacent Areas following Substantial Completion;
- 3.1.3 perform the Decommissioning;
- 3.1.4 conduct the other Undertakings during the Contract Period; and
- 3.1.5 finance the activities referred to in Sections 3.1.1 to 3.1.4,

at its own cost and risk without recourse to public funds (other than as expressly provided in this Agreement) or Province guarantees.

3.2 Improvements and Changes in Use

The Concessionaire will not make any changes or improvements to all or any part or parts of the Project Facilities, the Existing Bridge, the Site and the Adjacent Areas or any changes in uses of all or any part or parts of the Project Facilities, the Existing Bridge, the Site and the Adjacent Areas except as expressly required or permitted by, and subject to and in accordance with, the provisions of this Agreement, including Section 11.4 [Concessionaire Changes], Section 14.6 [Maintenance and Other Works], Section 36.3 [Subsequent Schemes] and Part 1 of Schedule 14 [Subsequent Schemes], and Section 36.4 [Improvements] and Part 2 of Schedule 14 [Improvements].

3.3 Public Use

3.3.1 At all times after Substantial Completion the Concessionaire will keep the Concession Highway open for public use except for Lane Closures or detours of traffic flow:

3.3.1.1 by the Concessionaire in accordance with the provisions of the Traffic Management Requirements and Section 15.3 [Lane Closures];

3.3.1.2 by the Minister under the *Transportation Act* or any other Laws and Regulations;

3.3.1.3 by the Police or fire, ambulance or other emergency services authorities; and

3.3.1.4 by any other Governmental Authority pursuant to any Legal Requirement.

3.3.2 Except as may otherwise be expressly provided in this Agreement (including in the provisions relating to Compensation Events, Province Change and/or Force Majeure and/or in the definition of Excepted Closure), the Concessionaire does not have any Claim whatsoever against the Province, BCTFA, the Police or any other Governmental Authority for or in respect of any Lane Closure or detour, including any Lane Closure or detour referred to in Section 3.3.1, or as a result of the exercise of any other rights or powers or the discharge of any other duties or functions by the Province, BCTFA, the Police or any other Governmental Authority affecting the Project Facilities, the Site and the Adjacent Areas or the Graving Dock Site or any part thereof.

3.3.3 All Undertakings will be carried on so as not to interfere unnecessarily with, and so as to minimize any necessary interference with, the convenience of the public and the access to and use of any of the Connecting Roads or any other public or private

roads or highways, whether under the control or in the possession of the Province or any other person.

3.3.4 The Concessionaire may not charge tolls (which term as used in this Section has the meaning given in the *Transportation Investment Act*) or any other user charges for the use of the Concession Highway. As at the Commencement Date no arbitrators have been appointed under the *Transportation Investment Act* and therefore there is no requirement for the Concessionaire to contribute to the matters set out in Section 3(i) of that Act. A Change in Law pursuant to which the Province levies tolls:

3.3.4.1 specifically on Users for the use of some or all of the Concession Highway by a vehicle travelling on the Concession Highway; or

3.3.4.2 for the use of any of the Connecting Roads by a vehicle travelling on those Connecting Roads;

will be deemed to constitute a Relevant Change in Law for purposes of this Agreement.

3.4 Standard of Performance

3.4.1 The Concessionaire will ensure that the Undertakings and the Services are at all times performed:

3.4.1.1 in a safe manner and in accordance with Good Industry Practice and the Quality Documentation;

3.4.1.2 in a manner that is not injurious to health and does not cause damage to property or the environment, unless permitted by law;

3.4.1.3 in such manner as to enable the Province to exercise its rights and powers and discharge its duties and functions as highway authority and so as not to prevent the Province or any other Governmental Authority from exercising any other rights and powers or discharging any other lawful duties and functions;

3.4.1.4 in compliance with all applicable Laws and Regulations;

3.4.1.5 in accordance with all Technical Requirements; and

3.4.1.6 in accordance with all other provisions of this Agreement;

provided that, for greater certainty, performance which exceeds any standard or requirement mentioned above will, for these purposes, amount to performance in accordance with such standard or requirement.

3.4.2 Without prejudice to Section 3.4.1, in the performance of the Undertakings, the Concessionaire will not, and will ensure that its contractors or subcontractors of any tier will not, knowingly do, omit or permit anything to be done or omitted that might reasonably be expected to materially detract, or that the Province gives notice to the Concessionaire would materially detract, from the image and reputation of the Province as highway authority.

3.5 Permits, Licences and Approvals

3.5.1 The Concessionaire will at its sole cost:

3.5.1.1 obtain all Permits, Licences and Approvals (other than Province Permits, Licences and Approvals, but including, for greater certainty, all permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorizations and all consents, approvals and agreements from third parties required under or pursuant to any Province Permits, Licences and Approvals);

3.5.1.2 renew or extend, as applicable, all Permits, Licences and Approvals (including Province Permits, Licences and Approvals unless otherwise indicated in Part 5 of Schedule 5 [List of Permits, Licences and Approvals]); and

3.5.1.3 comply with and maintain in good standing each Permit, Licence and Approval (including each Province Permit, Licence and Approval) in accordance with its terms including complying with all requirements and obligations in respect of Province Permits, Licences and Approvals set forth or referred to in Part 5 of Schedule 5 [List of Permits, Licences and Approvals], other than those identified in Schedule 12 [Concessionaire's Environmental Obligations] as being the responsibility of the Province.

3.5.2 Where Permits, Licences and Approvals required to be obtained by the Concessionaire have requirements that may impose any conditions, liabilities, obligations or costs on the Province or BCTFA, the Concessionaire will not obtain such Permits, Licences and Approvals without the prior consent of the Province or BCTFA (as the case may be) (such consent not to be unreasonably withheld or delayed) and the Concessionaire will indemnify and hold the Province or BCTFA (as the case may be) harmless in respect of, the satisfaction and performance of all such conditions, liabilities and obligations and for the payment of all such costs; provided, however, that neither the Province nor BCTFA will be responsible for obtaining or for the failure of the Concessionaire to obtain any such Permit, Licence or Approval.

3.5.3 Each of the Province and BCTFA will at the Concessionaire's cost provide all information and administrative assistance as the Concessionaire may reasonably request and it may reasonably be able to provide in connection with the application

for or the renewal or extension of any Permit, Licence and Approval, and, if requested, will execute such applications as are required to be in its name, to assist the Concessionaire in obtaining, renewing or extending the Permit, Licence or Approval. The Concessionaire, notwithstanding any such assistance provided by the Province or BCTFA, but subject to paragraphs (t) and (u) in the definition of Compensation Event in Schedule 1 [Definitions and Interpretation], will indemnify and hold the Province and BCTFA harmless in respect of all reasonable costs of obtaining, renewing or extending and complying with any Permits, Licences and Approvals required to be obtained, renewed or extended by the Concessionaire whether obtained, renewed or extended in the name of the Concessionaire (or any of its agents, contractors or subcontractors of any tier) or in the name of the Province or BCTFA or in the names of both the Concessionaire (or any of its agents, contractors or subcontractors of any tier) and the Province or BCTFA.

- 3.5.4 The Concessionaire at its expense will provide such information, documentation and administrative assistance as may be requested by the Province and as the Concessionaire may reasonably be able to provide and, if requested, will execute such applications as are required to be in its name, to enable the Province or BCTFA to apply for, obtain and (where applicable) renew or extend, and (without limiting the Concessionaire's obligations under Section 3.5.1) to comply with and demonstrate compliance with requirements and obligations under, Province Permits, Licences and Approvals.
- 3.5.5 Where a delay is anticipated and/or occurs in the obtaining of any Permit, Licence or Approval and such delay or anticipated delay, as the case may be, was not caused by any wrongful act or omission of the Concessionaire, the Province, at the request of the Concessionaire, will immediately use all reasonable efforts (but bearing no responsibility for success or failure) to expedite the Concessionaire obtaining such Permit, Licence or Approval.
- 3.5.6 Without limiting any of its other obligations hereunder, the Concessionaire acknowledges and agrees to observe and comply with the DFO Initial Authorization including at its cost providing any mitigation measures or paying any compensation, other than those terms and conditions of the DFO Initial Authorization set out in Schedule 12 [Concessionaire's Environmental Obligations] and identified as being the responsibility of the Province, and the standards and practices described therein and with any other standards, practices and requirements applicable from time to time in connection with any authorizations obtained or required to be obtained (whether in the name of the Concessionaire, the Province or both of them) under sub-section 35(2) or any other provisions of the *Fisheries Act (Canada)* in respect of the Works and the Decommissioning and any other works carried out as part of the Undertakings.

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- 3.5.7 The Concessionaire will indemnify and hold the Province and BCTFA harmless in respect of any and all Losses and Claims which the Province or BCTFA may suffer or incur arising out of:
- 3.5.7.1 the performance by the Concessionaire of this Agreement not in accordance with, or any breach by the Concessionaire of the requirements of, any Permits, Licences and Approvals, (including any Province Permits, Licences and Approvals), Laws and Regulations or requirements of Governmental Authorities, except to the extent that such failure to perform or breach by the Concessionaire was caused by or arose as a result of any breach of the terms of any of the Permits, Licences and Approvals by the Province and/or BCTFA or those for whom the Province and/or BCTFA is responsible at law;
 - 3.5.7.2 any failure of the Concessionaire to obtain and, as applicable, renew or extend all necessary Permits, Licences and Approvals (other than any Province Permits, Licences and Approvals) required by applicable Laws and Regulations in accordance with its obligations under Section 3.5.1, except to the extent that such failure was caused by or arose as a result of any breach of the terms of any of the Permits, Licences and Approvals by the Province and/or BCTFA or those for whom the Province and/or BCTFA is responsible at law;
 - 3.5.7.3 any inability of the Province or BCTFA to obtain or, as applicable, renew or extend any Province Permit, Licence and Approval or any increased cost to the Province or BCTFA of obtaining or, as applicable, renewing or extending any Province Permit, Licence and Approval as a result of a Concessionaire Change, or any act or omission of the Concessionaire or any of its agents, contractors or subcontractors of any tier or the employees of any of them; and /or
 - 3.5.7.4 any cost to the Province or BCTFA of complying with any condition(s) included in any Province Permit, Licence and Approval to the extent that such condition(s) were included in the relevant Province Permit, Licence and Approval as a result of a Concessionaire Change or any act or omission of the Concessionaire or any of its agents, contractors or subcontractors of any tier or the employees to any of them.

3.6 Agreements with Governmental Authorities

- 3.6.1 Without limiting any other provision of this Agreement, the Concessionaire, subject to Sections 3.6.1A, 3.6.1B, 3.6.1C and 3.6.2, will enter into or cause to be entered into any agreement with any Governmental Authority or other person required in connection with the Project or to enable the Concessionaire to perform the Undertakings in accordance with the terms of this Agreement (excluding, for the avoidance of doubt, any of the Permits, Licences and Approvals, the provisions

relating to which are contained in Section 3.5 of this Agreement), provided that if the Province or BCTFA will be bound or affected in any way by any such agreement, the Concessionaire will obtain the approval of the Province or BCTFA (as the case may be) before entering into the agreement (such approval not to be unreasonably withheld).

- 3.6.1A Within 30 days of the execution of this Agreement, the Parties shall develop a list of all agreements to be entered into with any Governmental Authority or other person required in connection with the Project or to enable the Concessionaire to perform the Undertakings. To the extent such agreements cannot be specifically identified within such time frame, the list will identify the general nature of all such anticipated agreements. Such list will set out in reasonable detail the relevant time periods which the Parties contemplate will be required to obtain the execution of the relevant agreement from the Governmental Authority or other person and identify a date by which each such agreement will be entered into by such Governmental Authority or other person. The list will also detail the costs of obtaining each such agreement and of the Concessionaire performing its obligations thereunder.
- 3.6.1B **DELETED**.
- 3.6.1C If the costs of obtaining such agreement or of the Concessionaire performing its obligations thereunder are in excess of the amounts detailed in the list referred to in Section 3.6.1A, **DELETED**.
- 3.6.2 Notwithstanding Section 3.6.1, if the Province determines in its absolute and unfettered discretion that it is appropriate in the circumstances for the Province and/or BCTFA to be a party or parties to any agreement mentioned in Section 3.6.1, the Concessionaire will assist the Province and/or BCTFA (as the case may be) in entering into such agreement.
- 3.6.3 Where the Province determines pursuant to Section 3.6.2 that it and/or BCTFA should be a party or parties to any agreement mentioned in Section 3.6.1 and that agreement is not essential to the design, construction, operation and/or maintenance of the Project Facilities, the Site and/or the Adjacent Areas, the design and completion of the Decommissioning or to the Graving Dock Site, the Province's determination will be treated as a Province Change and the provisions of Part 2 of Schedule 13 [Province Changes] shall apply.
- 3.6.4 Wherever reasonably requested by the Concessionaire, each of the Province and BCTFA will at their own cost provide such information and administrative assistance as the Concessionaire may reasonably request and it may reasonably be able to provide to assist the Concessionaire in entering into any agreement referred to in this Section 3.6.

3.7 Concessionaire Proposal Extracts

Without limiting the obligations of the Concessionaire to comply with any other provisions of this Agreement or the other obligations of the Concessionaire under this Agreement, the Concessionaire will comply with the provisions set out in Schedule 23 [Concessionaire Proposal Extracts].

3.8 Payment of Accounts

Without limiting any of its other obligations under this Agreement or any Laws and Regulations and to the extent that such account is not in dispute, the Concessionaire will pay or provide for the payment when due and will ensure that all of its contractors and subcontractors of any tier (including the Contractor and the Operator) pay or provide for the payment when due of all accounts (other than any accounts which are in dispute) in connection with the performance of the Undertakings (including all accounts for the supply of labour, materials and services in connection with the construction of the Works and the Decommissioning and any other works carried out in the course of the Undertakings) failing which the Province, without limiting any other rights or remedies it may have, will have the right, subject to giving not less than 30 days' prior notice to the Concessionaire, to pay or provide for the payment of any such account which is not in dispute and to deduct the amount so paid together with any associated costs and expenses from amounts at any time owing by the Province to the Concessionaire under this Agreement.

4. TRANSFER OF TITLE

- 4.1 Title to all materials, supplies, equipment and other tangible personal property acquired by the Concessionaire and incorporated into, installed or permanently affixed to real property comprised in the Site, the Adjacent Areas or the Project Facilities will pass to the Province or BCTFA (as the case may be) at (and not before) the later of Substantial Completion and the time the relevant items are incorporated into, installed or permanently affixed to the real property.
- 4.2 Title to all materials, supplies, equipment and other tangible personal property acquired by the Concessionaire and intended to form or forming part of the Project Facilities (other than materials and tangible personal property referred to in Section 4.1 and, for greater certainty, excluding Construction Plant) will pass to the Province or BCTFA (as the case may be) upon the later of Substantial Completion and the delivery thereof to the Site or the Adjacent Areas.
- 4.3 Title to any other property (whether real or personal) that is transferred to or acquired by the Province or BCTFA from the Concessionaire pursuant to the terms of this Agreement will pass to the Province or BCTFA (as the case may be) at the time of the transfer or acquisition as contemplated by this Agreement.
- 4.4 For clarity, the Concessionaire will retain title to and will be fully responsible for risk of loss and damage to all materials, supplies, equipment and other tangible personal property

that are fabricated or constructed off the Site or the Adjacent Areas and which are intended to form part of the Project Facilities until the later of Substantial Completion and the time when such materials, supplies, equipment or tangible personal property are delivered to the Site or the Adjacent Areas.

5. **FINANCIAL BASE CASE**

- 5.1 A copy of the Financial Base Case, certified by a knowledgeable senior officer or director of the Concessionaire as being a true and correct copy of the final Financial Model, accompanied by a copy of any financial model audit report issued in respect of the final Financial Model, is attached as Part 1 of Schedule 2 [Financial Base Case]. The Concessionaire will further deposit the Financial Model with the Province on or prior to the signing of this Agreement, and the Province and the Concessionaire will initial the Financial Model for purposes of identification.
- 5.2 The Concessionaire hereby grants to each of the Province and BCTFA an irrevocable, worldwide, royalty-free perpetual, non-exclusive and transferable licence, including the right to grant sublicences, to use the Financial Base Case, any revised Financial Base Case, the Financial Model and any revised Financial Model for the purposes of this Project, the Project Facilities, Site and the Adjacent Areas or any part thereof, whether during or after the Contract Period. The Province will only transfer such licence or grant such sub-licence to a person to whom the Province may novate, assign or otherwise transfer its rights or obligations under this Agreement under Section 45.6 [Assignment by Province and BCTFA]. The Province acknowledges that the Financial Base Case, any revised Financial Base Case, the Financial Model and any revised Financial Model are Confidential Information in accordance with and subject to the provisions of Section 50 [Confidentiality].

PART II
UNDERTAKINGS

6. SITE AND ADJACENT AREAS

6.1 Site Inspection and Investigations

Without limitation to any other provision of this Agreement (including Section 38.2 [Disclaimer]), the Concessionaire represents and warrants to and in favour of the Province and BCTFA that, prior to executing this Agreement, it has:

6.1.1 inspected and examined to its satisfaction the Project Facilities, the Existing Highway, the Site, the Adjacent Areas and the Graving Dock Site and their surroundings and, where applicable, the existing structures, improvements and works in, on, over or under the Site, the Adjacent Areas and the Graving Dock Site;

6.1.2 satisfied itself as to the nature of the geotechnical, climatic, hydrological, ecological, environmental and general conditions of the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site, the nature of the ground and subsoil, the form and nature of the Project Facilities, the Site and the Adjacent Areas, the Graving Dock Site, the risk of injury or damage to property adjacent to or in the vicinity of the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site and to occupiers of such property, the nature of the materials (whether natural or otherwise) to be excavated, and the nature of the design, work, plant and materials necessary for the execution of the Project;

6.1.3 has satisfied itself as to:

6.1.3.1 the means of access to and through the Project Facilities, the Existing Highway, the Site and the Adjacent Areas, the accommodation it may require and the adequacy and sufficiency of the rights of access set out in Section 8.1 [Access for Concessionaire over the Site and the Adjacent Areas] for the purposes of performing the Undertakings;

6.1.3.2 the possibility of lawful interference by third parties with access to or use of the Project Facilities, the Site and the Adjacent Areas, with particular regard to the Requirements of Interested Parties;

6.1.3.3 the precautions and times and methods of working necessary to minimize any nuisance or interference, whether public or private, being caused to any third parties in the performance of the Undertakings;

6.1.3.4 [Not used];

6.1.3.5 any other contingencies, restrictions, conditions or constraints which would or might interfere with, limit or affect the ability of the

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- Concessionaire to carry out the Project which could be ascertained through the exercise of reasonable due diligence; and
- 6.1.3.6 all aspects of the design, construction, completion, commissioning and testing of the Works and the design and completion of the Decommissioning and all information necessary to perform the Works and the Decommissioning, including the conditions of the Project Facilities, the Existing Highway, the Site, the Adjacent Areas and the Graving Dock Site, and the labour and material to be provided;
- 6.1.4 thoroughly examined, checked and satisfied itself as to the adequacy, correctness and suitability of all Design Data made available to the Concessionaire by or on behalf of the Province prior to the execution of this Agreement, including all Design Data which the Concessionaire has relied upon, adopted or made use of in the Construction Requirements, the Traffic Management Requirements or the O&M Requirements or which the Concessionaire intends to rely on, adopt or make use of;
- 6.1.5 reviewed and satisfied itself with respect to:
- 6.1.5.1 the terms of the DFO Initial Authorization, the Water Act Approval, the NWPA Approvals and the Concessionaire's Environmental Obligations;
- 6.1.5.2 the Construction Output Specifications, the Construction Requirements, the O&M Output Specifications, the O&M Requirements, the Traffic Management Output Specifications and the Traffic Management Requirements and any other Technical Requirements;
- 6.1.5.3 the nature and extent of the Causeway Fill and Preload as set out in the Causeway Fill and Preload Contract and the impact of the Causeway Fill and Preload as set out in the Causeway Fill and Preload Contract on the carrying out of the Project; and
- 6.1.5.4 the terms of the Kelowna Agreement and the impact of the Kelowna Agreement on the carrying out of the Project;
- 6.1.6 conducted its own analysis and review of all materials, documents and data referred to in Section 38.2.1 which bear on any of the matters referred to in Sections 6.1.1 to 6.1.5 inclusive;
- 6.1.7 obtained for itself all necessary information as to:
- 6.1.7.1 the risks, contingencies and all other circumstances which may influence or affect the Construction Requirements, the Traffic Management Requirements and the O&M Requirements or its obligation to carry out the Project in accordance with the provisions of this Agreement; and

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- 6.1.7.2 all other factors which would affect its decision to enter into this Agreement or the terms on which it would do so; and
- 6.1.8 investigated and satisfied itself of all conditions affecting the design, construction, completion, commissioning and testing of the Works and the design and completion of the Decommissioning and the operation, maintenance and asset preservation of the New Highway that the Concessionaire considers appropriate, necessary or relevant and the Concessionaire acknowledges and agrees that any conclusions reached in its investigation are based on its own examination, knowledge, information and judgment and not upon any statement, representation or information produced or provided by the Province or BCTFA or their respective advisors.
- 6.2 The representation and warranty given in Section 6.1 [Site Inspection and Investigations] will not constitute an actionable warranty by the Concessionaire in favour of the Province or BCTFA or give rise to a right of termination on the part of the Province or BCTFA, but either or both of the Province and BCTFA may rely on such warranty for the purpose of defending or contesting any action brought against either or both of them or any claim by the Concessionaire for damages, extension of time, additional compensation or any other relief. Provided that such representation and warranty, as it relates to the matters referred to in Sections 6.1.2, 6.1.4, 6.1.6 and 6.1.8, may not be relied upon as a defence against an otherwise valid claim by the Concessionaire pursuant to Section 38.2.5 or 38.2.6 or an otherwise valid claim by the Concessionaire in respect of a Compensation Event referred to in paragraph (g) of the definition of Compensation Event in paragraph 1 of Schedule 1 [Definitions and Interpretation].
7. **[NOT USED]**
8. **LAND**
- 8.1 **Access for Concessionaire over the Site and Adjacent Areas**
- Without prejudice to but subject to the provisions of Sections 8.2 [Duration], 8.3 [Limitations], 8.15 [MOT Section Works] and 10 [Security Of The Site], the Province, in consideration of the Concessionaire paying for all costs associated with the construction of the Works and the Decommissioning together with all costs relating to Capital Works, grants, pursuant to the *Transportation Investment Act*, or will cause to be granted to the Concessionaire, for itself and its contractors, subcontractors, agents and employees, a non-exclusive licence or sub-licence for the periods referred to in Section 8.2 [Duration] to have access to and use of so much of the Site and the Adjacent Areas as may be required from time to time for the sole purpose of carrying out of the relevant part of the Undertakings, in each case the grant shall be subject to the provisions of this Agreement and to:
- 8.1.1 all rights of public passage or access (including any rights of navigation) existing over or under any part of the Project Facilities, the Existing Highway, the Site and the Adjacent Areas;

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- 8.1.2 subject to the provisions of Section 14.4.2, the right of any Governmental Authority under any Laws and Regulations or pursuant to any Legal Requirement to have access to the Site or the Adjacent Areas;
- 8.1.3 the rights of Users to use the Concession Highway or any part or parts thereof and of the public to use any Connecting Roads or other private roads and public roads or highways, including the Existing Highway;
- 8.1.4 the rights of access referred to in Section 14.4.1;
- 8.1.5 the right of any relevant highway authority to have access for the execution on or near the Project Facilities, the Existing Highway, the Site or the Adjacent Areas of any work in fulfilling any function of such highway authority under any Laws and Regulations;
- 8.1.6 the Concession Highway Encumbrances;
- 8.1.7 the terms and conditions of any Rights in respect of land comprising any part or parts of the Site and the Adjacent Areas; and
- 8.1.8 the terms of the Permits Relating to Land and the Requirements of Interested Parties.
- 8.1A Without derogating from the Province's rights hereunder, the Province acknowledges that in respect of the Works the Concessionaire requires and shall have access to the Site and the Adjacent Areas without obstruction by the Province or any of its agents, contractors and subcontractors of any tier and employees of each of them. For greater certainty, during the Original Service Period the Concessionaire may designate certain areas of the Site and the Adjacent Areas as construction zones and, subject to maintaining the use of the Existing Highway as a public highway, may exclude the public and Users from access to those areas.
- 8.1B Notwithstanding anything herein contained, if the Concessionaire has, in good faith and using all reasonable efforts, attempted to seek injunctive relief or other judicial remedies from a Court of first instance and such Court has refused to grant such relief or remedies primarily as a result of such Court finding that the Concessionaire does not have the necessary standing to exclude, enforce and/or maintain an action for the exclusion of any person from all or specific portions of the Site and the Adjacent Areas, **DELETED**
- 8.2 Duration
- 8.2.1 Subject to Section 8.3 [Limitations], 8.8 [Boundaries of Land] and Sections 26.5 [Province's Remedial Rights] and 43.1 [Step-in Rights] the commencement and duration of the Licence will be from the Licence Commencement Date until the end of the Contract Period.

8.2.2 The Province acknowledges and agrees that except as otherwise expressly provided in Section 43 [Effect of Termination], no breach by the Concessionaire of this Agreement will result in the suspension, cancellation or termination of the Licence.

8.3 Limitations

8.3.1 The Licence will subsist for the purposes of carrying out the Undertakings and for no other purposes. The rights of access and use given or caused to be given under Section 8.1 [Access for Concessionaire over the Site and Adjacent Areas] are by way of non-exclusive licence or sub-licence for the particular activity only and do not grant and will not be construed as granting any legal estate or other interest in land. The Licence includes the right to grant sub-licences on the same terms and conditions and subject to the same limitations for the purpose of carrying out the Undertakings and for no other purpose.

8.3.2 Without limiting the generality of Section 8.3.1, where any land or Rights in respect of land forming part of the Site or the Adjacent Areas has been acquired:

8.3.2.1 by Expropriation Order for any specific purpose; or

8.3.2.2 subject to any restriction relating to the use of such land for any specific purpose,

such land or Rights in respect of land will not be used by the Concessionaire otherwise than for activities which are necessary for, or ancillary to, the achievement of such purpose, and the rights of access and use granted by the Province in respect of such land will be limited accordingly.

8.4 Additional Access

Without prejudice to the Concessionaire's right to refer any matter to the Minister in accordance with section 7(1) of the *Transportation Investment Act* in the circumstances described therein and subject to Section 8.6 [Acquisition of Land by Concessionaire], the Concessionaire at its expense will obtain, and will bear all costs and charges in respect of and all Losses or Claims arising from, any access to and use of any land outside the Site and the Adjacent Areas required to enable the Concessionaire to perform its obligations under this Agreement additional to that required to be provided or caused to be provided by the Province pursuant to Section 8.1 [Access for Concessionaire over the Site and Adjacent Areas]. The Concessionaire will bear all costs, charges and expenses in respect of and all Losses or Claims arising from any action taken by the Minister as a result of any reference by the Concessionaire to the Minister pursuant to section 7(1) of the *Transportation Investment Act*. Prior to obtaining any access to or rights to use any land outside the Site and the Adjacent Areas pursuant to this Section, the Concessionaire will provide the Province with evidence satisfactory to the Province that the acquisition of such access or rights and the use of such land for the purpose of enabling the Concessionaire to perform its obligations under this Agreement will not require any amendment, cancellation or

reconsideration of any Environmental Authorization, or trigger any assessment pursuant to Environmental Laws. If the Concessionaire requires access to or use of any land outside the Site and the Adjacent Areas in order to comply with or otherwise as a result of any Province Change, or by reason of the occurrence of any Compensation Event or Force Majeure event, then the costs and other consequences (including any consequences relating to any Environmental Authorizations or Environmental Laws) of obtaining such access or use of land outside the Site and the Adjacent Areas shall be taken into account in calculating any compensation or other payment, extension of time or other relief to be granted pursuant to the terms of this Agreement.

8.5 Off-Site Works

Subject to Section 10.1.2, to the extent that any part of the Off-Site Works or the Decommissioning is required to be carried out on land or highways in the control or ownership of a highway authority other than the Province and such highway authority has not within a reasonable time following a request by the Concessionaire given the Concessionaire access to the areas required to carry out the Off-Site Works or the Decommissioning, then and during any such period when such access is not available:

8.5.1 the Concessionaire, provided it has taken and so long as it continues to take all reasonable steps to obtain and to satisfy any conditions or requirements for obtaining such access, will not be required to carry out the Off-Site Works or the Decommissioning, as applicable, relating to such area **DELETED** and

8.5.2 the Province will not be required to make available to the Concessionaire access to such area, but the Concessionaire will notify the Province of the situation as soon as the Concessionaire becomes aware of it and will provide all such information as will enable the Province to understand the circumstances which have given rise to the situation and such other information relating thereto as the Province may reasonably require,

and the Concessionaire will carry out the Off-Site Works or the Decommissioning, as applicable, relating to such area at the earliest opportunity after such access is obtained.

8.6 Acquisition of Land by Concessionaire

8.6.1 Neither the Concessionaire nor any Unitholder or other Affiliate of the Concessionaire will acquire any land or Rights in respect of land to be added to the Concession Highway, or used directly for the purposes of the Concession Highway, or otherwise essential to the performance of the Undertakings, without the prior consent of the Province (which consent may be withheld in the absolute and unfettered discretion of the Province if the proposed acquisition is of less than the full freehold estate in the subject land or if the proposed acquisition requires any amendment, cancellation or reconsideration of any Environmental Authorization, or triggers any assessment pursuant to Environmental Laws, but otherwise will not be unreasonably withheld).

8.6.2 Without prejudice to paragraph 2.5.7 of Part 1 of Schedule 14 [Subsequent Schemes], if the Concessionaire or any Unitholder or other Affiliate of the Concessionaire proposes to acquire any land or Rights in respect of land with the consent of the Province as provided in Section 8.6.1, the Province will have the option to require the Concessionaire to direct, or cause such Unitholder or Affiliate of the Concessionaire to direct, the transfer of such land or Rights in respect of land directly to the Province or BCTFA without compensation payable by the Province or BCTFA (as the case may be) and without any Encumbrances which would impede its use by the Province and BCTFA for the purposes for which it is being acquired or otherwise for the purposes of the performance of the Province's highway functions, and such land or Rights in respect of land will, upon the completion of such transfer, be deemed to be part of the Site or the Adjacent Areas, as applicable, for the purposes of construing the Concessionaire's obligations under this Agreement and the obligation of the Province to provide access under this Section 8 [Land] and the provisions of Section 10 [Security of the Site]. If the Province exercises such option, the Concessionaire will bear all costs and expenses (including any transfer taxes) payable in connection with the transfer to the Province or BCTFA (as the case may be) and, under the supervision and direction of the Province, will manage the acquisition process and do or cause to be done everything necessary to effect the transfer, including preparation of all documents (including reference or other plans) and obtaining the execution of the necessary plans and documentation by all relevant Governmental Authorities and other persons, required in connection with the transfer and to allow for the land to be duly established as public highway under applicable Laws and Regulations (including section 107 of the *Land Title Act*).

8.6A Graving Dock Site

- 8.6A.1 The Province will obtain an option to lease for the Graving Dock Site in favour of the Province (the "Option to Lease") on or before the Commencement Date.
- 8.6A.2 The Concessionaire acknowledges that the Province will not be able to exercise the Option to Lease unless and until all of the conditions precedent set out in the Option to Lease have been satisfied in accordance with the terms set out therein.
- 8.6A.3 The Province and the Concessionaire will use all reasonable efforts to satisfy the conditions precedent set out in the Option to Lease as soon as possible after the Commencement Date.
- 8.6A.4 Following satisfaction of all of the conditions precedent in the Option to Lease the Concessionaire may cause the Province to exercise the Option to Lease by giving at least 2 Working Days' prior written notice to the Province that it requires the Province to exercise the Option to Lease. Such notice may be delivered to the Province prior to the expected date of satisfaction of the conditions precedent in the Option to Lease and must be delivered to the Province by no later than 300 days after the day upon which all of the conditions precedent in the Option to Lease have been satisfied. Once the Graving Dock Lease has been granted pursuant to the

Option to Lease, which will be evidenced by both the Province and the Owner having executed the Graving Dock Lease and having delivered signed copies to one another (the Province undertaking to execute the Graving Dock Lease within 2 Working Days of receipt of notice from the Owner that all the conditions precedent in the Option to Lease have been satisfied), the Concessionaire will forthwith be provided with access to the Graving Dock Site subject to the following terms and conditions:

- 8.6A.4.1 save and except for the payment of basic rent and any compensation which may have to be paid to the Owner for any disruption of the Owner's use of the Graving Dock Site (which shall be paid by the Province), the Concessionaire will carry out, at its sole expense, all the obligations of the tenant under the lease that will be created on the exercise of the Option to Lease (the "Graving Dock Lease") and it will not do or omit to do any act in or around the Graving Dock Site which would cause a breach of the Province's obligations as tenant under the Graving Dock Lease;
 - 8.6A.4.2 once the Graving Dock Lease has been granted in favour of the Province, the Province covenants that it will not grant access over the Graving Dock Site to any person, other than the Owner, as will be provided for in the Graving Dock Lease, and the Concessionaire; and
 - 8.6A.4.3 the Concessionaire will not be liable for any acts or omissions which may be carried out in or upon the Graving Dock Site by the Owner or any other person which has been granted access over the Graving Dock Site by the Province.
- 8.6A.5 The provisions of this Agreement shall apply to the activities of the Concessionaire relating to the Project at the Graving Dock Site, the Parties acknowledging that the Graving Dock Site is not part of the Site or the Adjacent Areas.
- 8.6A.6 The provisions of Section 26.1 as they relate to notice shall apply to any breach by the Concessionaire of the terms of this Section 8.6A, save that the Province must serve a Default Notice on the Concessionaire pursuant to Section 26.1.2 before any breach of the terms of this Section 8.6A can become an Event of Default.
- 8.6A.7 If, due to a breach by the Concessionaire of any of the terms of this Section 8.6A, the Owner exercises its right to terminate the Graving Dock Lease or re-enters and takes possession of the Graving Dock Site, the Concessionaire acknowledges and agrees that the Province will not be considered to be in breach of this Agreement or be liable to the Concessionaire in any way as a result of such termination or re-entry and in particular, such termination or re-entry by the Owner will not be considered to be a Compensation Event or a Concessionaire Termination Event.

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- 8.6A.8 Provided that the Concessionaire is not in default under the Graving Dock Lease, the Concessionaire may request the Province to extend the Graving Dock Lease for an additional term of one year by providing the Province with a written request for such extension by no earlier than 120 days and no later than 60 days prior to the expiration of the then current term of the Graving Dock Lease.
- 8.6A.9 Provided that the Concessionaire is not in default under the Graving Dock Lease, the Concessionaire may require the Province to extend the Graving Dock Lease for a further additional term of one year by providing the Province with a written request for such extension by no earlier than 120 days and no later than 60 days prior to the expiration of the then current term of the Graving Dock Lease.
- 8.6A.10 The Concessionaire acknowledges that the Province will only be obligated to extend the Graving Dock Lease for a maximum of two additional one year terms pursuant to this Section.
- 8.6A.11A If the Concessionaire is not given access to the Graving Dock Site in accordance with Section 8.6A.4 on or before July 4, 2005 the Scheduled Substantial Completion Date and the Scheduled Completion Date will be extended by the period of any delay caused by the lack of access only. The Concessionaire will not be entitled to any compensation for the delay and the delay will not be an event of Force Majeure, Eligible Force Majeure, a Compensation Event or a Province Change.
- 8.6A.11B If the Concessionaire is not given access to the Graving Dock Site in accordance with Section 8.6A.4 on or before July 31, 2005 and the Concessionaire has used all reasonable efforts to satisfy the conditions precedent set out in the Option to Lease, including agreeing the terms of the lease with the Owner, agreeing the terms of the Owner's access rights to the Graving Dock Site, satisfying the reasonable requirements of the Central Okanagan Regional District with respect to its boat launch and parking lot and satisfying any other reasonable requirements of the Owner, **DELETED**.
- 8.6A.12 If the Province has not obtained the Option to Lease as set out in Section 8.6A.1 and the necessary consents from the Parks and Protected Areas Branch of the Ministry of the Environment to allow the grant of the Option to Lease and the construction of pontoons (for greater certainty, not including any consent from that Branch or Ministry for access to the Graving Dock Site through Bear Creek Park or for any other use of Bear Creek Park) on or before the Commencement Date, **DELETED**

8.7 Observance by Concessionaire

The Concessionaire will observe and comply with the terms and conditions of all Rights in respect of land relating to or benefiting the Site and the Adjacent Areas.

8.8 Boundaries of Land

- 8.8.1 The boundaries of the Site are as reflected in the drawing attached to and identified as Part 8 of Schedule 4 [Site] and the boundaries of the Adjacent Areas are as reflected on the drawing attached to and identified as Part 5 of Schedule 4 [Adjacent Areas], and the Concessionaire confirms that it is satisfied as to the adequacy and sufficiency thereof for the purposes of the Decommissioning and the preliminary design of the Works as shown in the Construction Requirements on the date of execution of this Agreement.
- 8.8.2 Within 90 days after issuance of the Completion Certificate, the Concessionaire will by notice to the Province identify all areas of land within the boundaries of the Site and the Adjacent Areas as referred to in Section 8.8.1 which are not required for the Undertakings. The Province will be entitled in its absolute and unfettered discretion to remove any such area of land from the Site or the Adjacent Areas (as the case may be).
- 8.8.3 If the Province exercises the right referred to in Section 8.8.2 in respect of any area of land, then such area of land will be excluded from the definition of the Site or the Adjacent Areas (as the case may be) with effect from the effective date of such exercise and the Province may thereafter retain for its own purposes or otherwise deal with such area of land as it sees fit in its absolute and unfettered discretion. The Parties will use their reasonable efforts to agree on any revisions to the drawings referred to in Section 8.8.1 necessary to reflect such exclusion and, if they are unable to reach agreement within 90 days of the effective date of such exercise, then either the Concessionaire or the Province may refer the Dispute for resolution under the Disputes Resolution Procedure.
- 8.8.4 For greater certainty, if and so long as the Province does not exercise the right referred to in Section 8.8.2 in respect of any such area of land, then such area will remain part of the Site or the Adjacent Areas (as the case may be) and the Concessionaire will remain subject to the terms of this Agreement in respect of such area of land.
- 8.8.5 Upon the issuance of the Completion Certificate, the Province may in its absolute and unfettered discretion change all or any part of that portion of the Site shown cross-hatched on the drawing set out in Part 8 of Schedule 4 [Site] to become part of the Adjacent Areas.

8.9 Site Materials

The Concessionaire may only excavate, extract, dispose of, exploit or otherwise deal with Site Materials and any components of the Existing Bridge:

- 8.9.1 in accordance with applicable Laws and Regulations and the terms of any relevant agreement or Expropriation Order;

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- 8.9.2 if and to the extent that, in the case of excavation or extraction of Site Materials, such excavation or extraction is necessary for the purpose of the construction, completion, commissioning and testing of the Works or the completion of the Decommissioning in accordance with the Construction Output Specifications and the Construction Requirements;
- 8.9.3 subject to the rights of all third parties, whether being rights in or to the Site Materials, Rights in respect of land or otherwise;
- 8.9.4 subject to all limitations, restrictions and conditions, whether pursuant to Laws and Regulations or otherwise, that would apply to or affect the right of the Province to undertake any such excavation, extraction, disposal, exploitation or other dealing if the Province were undertaking the same; and
- 8.9.5 in a manner that does not contravene any provision of any Environmental Authorization or the representations or undertakings made or given in the application to obtain any Environmental Authorization, and in accordance with all applicable Permits, Licences and Approvals including those obtained by the Concessionaire to permit such excavation, extraction, disposal of, exploitation or dealing with the Site Materials.
- 8.10 [Not used]
- 8.11 Ministry of Forests Protocol Agreement

In the course of carrying out the Undertakings the Concessionaire will have regard to all relevant provisions of the Ministry of Forests Protocol Agreement and will not do or omit or permit to be done or omitted anything which is inconsistent with the terms thereof. If compliance with the terms of any amendment, supplement or replacement of the Ministry of Forests Protocol Agreement effected after the Commencement Date (other than any pending amendment, supplement or replacement disclosed in the Data Room) would require the Concessionaire to perform any additional obligations or to incur any additional costs which it would not otherwise have been obliged to perform or would not otherwise have incurred in performing its obligations under this Agreement (including its obligations under this Section prior to such amendment, supplement or replacement), the onus of establishing which will be on the Concessionaire, the Concessionaire will not be in breach of this Section for failing to perform such additional obligations or failing to incur such additional costs unless the Province initiates a Province Change in accordance with the provisions of Part 2 of Schedule 13 [Province Changes] in respect of the terms of such amendment, supplement or replacement giving rise to such additional obligations or additional costs.

8.11A Provincial Statutory Emergency Powers

For greater certainty, the exercise by the Province of rights, powers or authorities provided for under any enactment to compel the provision of facilities, equipment and/or employees to respond to emergency events, including under the *Forest Practices Code of British*

Columbia Act, R.S.B.C. 1996, c. 159, will not give rise to any Claim or entitlement on the part of the Concessionaire for any compensation, extension of time or other relief under this Agreement, although the Concessionaire will be relieved from liability under this Agreement to the extent that it is not able to perform its obligations under this Agreement as a result of such compulsion.

8.12 Cutting of Trees or Logging

8.12.1 The Concessionaire will not cut down or remove trees or timber grown on or make any use of forested lands comprised in the Site or the Adjacent Areas except in accordance with all applicable Laws and Regulations and Permits, Licences and Approvals and any applicable provisions of any Environmental Authorization and, in the case of cutting or removal of trees or timber, where:

8.12.1.1 the Concessionaire, acting reasonably, determines that certain trees must be removed for bona fide construction or safety reasons or in order to comply with any of its other obligations under this Agreement; or

8.12.1.2 the prior approval of the Province and BCTFA is obtained.

8.12.2 The Concessionaire will pay all costs and be responsible for all Claims and Losses arising from or in connection with the cutting or removal of trees or timber, and will obtain at its expense all required Permits, Licences and Approvals in connection therewith.

8.12.3 The Concessionaire will not sell or otherwise dispose of or deal with any trees or timber cut or removed from the Site or the Adjacent Areas except in accordance with directions received from the Province and BCTFA and, if applicable, in accordance with the *Forest Act*, R.S.B.C. 1996, c. 157. The Concessionaire will promptly pay to the Province and BCTFA the net proceeds from all such sales, dispositions or dealings with any such trees or timber.

8.13 Environmental Obligations of the Province and the Concessionaire

8.13.A Notwithstanding any other provision of this Agreement or Schedule 12 [Concessionaire's Environmental Obligations], the Province will be responsible for the costs of remediating any Existing Contamination in accordance with Section 8.18.12 and for the costs of remediating any Third Party Contamination. For greater certainty, while the Concessionaire may be obligated to perform certain actions pursuant to Section 8.18.11 or Section 8.18.12, the Concessionaire shall not be responsible for, or have any liability with respect to the costs of, remediating Existing Contamination and/or any Release of Existing Contamination or Third Party Contamination.

8.13.1 During the Contract Period the Concessionaire at its expense will satisfy and perform the Concessionaire's Environmental Obligations.

8.13.2 The Concessionaire will observe and comply with, and cause all of its agents, contractors and subcontractors of any tier and employees of each of them to observe and comply with all Environmental Laws, all Permits, Licences and Approvals required by Environmental Laws and any Environmental Authorization and the Concessionaire will not in the course of exercising its rights or performing the Concessionaire's Environmental Obligations take or omit to take or permit to be taken or omitted any action that would breach any of the provisions of or requirements contained in any Environmental Authorization or Environmental Laws.

8.13.3 Without limiting Section 8.13.1, prior to commencing any construction of the Works or the Decommissioning, the Concessionaire will obtain as necessary all Permits, Licences and Approvals required by Environmental Laws, other than the Province Permits, Licences and Approvals.

8.14 Works under Kelowna Agreement

8.14.1 The Concessionaire will coordinate its Undertakings with works that are contemplated in the Kelowna Agreement ("Kelowna Agreement Works") to ensure safety and minimize disruption to the carrying out of the Undertakings and to such works.

8.14.2 The Concessionaire will consult the City of Kelowna and coordinate its activities with the Kelowna Agreement Works and will carry out its activities pursuant to this Agreement (including with respect to the Works and the Decommissioning) so as not to prevent or unnecessarily hinder the Kelowna Agreement Works and so that, to the extent reasonably possible, the Works, the Decommissioning and the Kelowna Agreement Works may be proceeded with in a co-ordinated and efficient manner with a minimum of disruption to the flow of traffic on the Existing Highway and the Concession Highway. The Province will use all reasonable efforts to cause the City of Kelowna to consult and co-ordinate its activities with those of the Concessionaire for the same purposes. The Concessionaire will not in any event take or omit to take any action, or permit any of its employees, agents, contractors or subcontractors of any tier or employees of any of them to take or omit to take any action, that results in the Province being in breach of any of its obligations under the Kelowna Agreement. Neither the Province nor BCTFA will be in breach of this Agreement or any of its obligations hereunder, and except as otherwise expressly provided herein (including in the provision relating to Compensation Events, Province Change and/or Force Majeure and/or in the definition of Excepted Closure), the Concessionaire will not have any Claim against the Province or BCTFA, as a result or arising out of, any term or condition contained in the Kelowna Agreement or any exercise of rights (whether proper or improper) or default by the City of Kelowna under the Kelowna Agreement.

8.14.3 The Province agrees to use all reasonable efforts so that, to the extent reasonably possible, the Kelowna Agreement Works do not prevent or unnecessarily hinder the Works and the Decommissioning.

8.15 MOT Section Works

8.15.1 The Concessionaire acknowledges that the MOT Section Contractor will continue performing the MOT Section Works after the Commencement Date and until completion of the MOT Section Works. For greater certainty, it is understood that the MOT Section Contractor will be responsible for traffic management on the MOT Section during the carrying out of the MOT Section Works.

8.15.2 The Concessionaire will consult and coordinate its activities with the MOT Section Contractor and will carry out its activities pursuant to this Agreement (including with respect to the Works and the Decommissioning) so as not to prevent or unnecessarily hinder the MOT Section Contractor from performing and completing the MOT Section Works and so that, to the extent reasonably possible, the Works, the Decommissioning and the MOT Section Works may be proceeded with in a co-ordinated and efficient manner with a minimum of disruption to the flow of traffic on the Existing Highway and the Concession Highway. The Province will use all reasonable efforts to cause the MOT Section Contractor to consult and co-ordinate its activities with the Concessionaire for the same purposes and will include a provision in the MOT Section Contract to this effect. The Concessionaire will not in any event take or omit to take any action, or permit any of its agents, contractors or subcontractors of any tier or employees of any of them to take or omit to take any action, that results in the Province being in breach of any of its obligations under the MOT Section Contract. Neither the Province nor BCTFA will be in breach of this Agreement or any of its obligations hereunder, and except as otherwise expressly provided herein (including in the provisions relating to Compensation Events, Province Change and/or Force Majeure and/or in the definition of Excepted Closure), the Concessionaire will not have any Claim against the Province or BCTFA, as a result or arising out of any term or condition contained in the MOT Section Contract or any exercise of rights (whether proper or improper) or default by the MOT Section Contractor thereunder. For greater certainty, it is acknowledged that the right of the Concessionaire to effect any Scheduled Closure in accordance with the provisions of this Agreement will not, except as provided for in the Traffic Management Output Specifications, be affected by any Closure on the MOT Section effected by the MOT Section Contractor.

8.15.3 In the event of any disagreement or dispute between the Concessionaire and the MOT Section Contractor with respect to the co-ordination of their respective activities under this Agreement and the MOT Section Contract, respectively, the disagreement or dispute will be resolved by the Province, acting in good faith having due regard to the rights and interests of all parties and the decision of the Province with respect to any such matter will not be subject to challenge under the Disputes Resolution Procedure.

8.16 Concession Highway Encumbrances

8.16.1 The Concessionaire will perform the Undertakings such that:

- 8.16.1.1 the Concessionaire performs all obligations under all Concession Highway Encumbrances as if the Concessionaire were the owner of the Project Facilities, the Site and the Adjacent Areas and a party to such Concession Highway Encumbrances as such;
- 8.16.1.2 all Undertakings performed by or on behalf of the Concessionaire are performed and provided in a manner which does not breach any of the provisions of the Concession Highway Encumbrances; and
- 8.16.1.3 there will be no action or omission to act by the Concessionaire or any of its agents, contractors or subcontractors of any tier or employees of any of them which gives rise to a right for any person to obtain title to or any interest in the Project Facilities, the Existing Highway, the Site or the Adjacent Areas or any part thereof, except in accordance with the express terms of this Agreement.

8.16.2 Except with the prior consent of the Province (in the case of land or other assets owned by the Province) or BCTFA (in the case of land or other assets owned by BCTFA) which consent may be granted or withheld in the absolute and unfettered discretion of the Province or BCTFA (as the case may be) the Concessionaire will not create, incur or (to the extent within its control to prevent the same) permit any Encumbrance to be filed, issued or registered against the Project Facilities, the Existing Highway, the Site or the Adjacent Areas or any part thereof. If the Project Facilities, the Site or the Adjacent Areas or the Existing Highway or any part thereof becomes subject to any Encumbrance which has not been consented to by the Province or BCTFA (as the case may be), other than an Encumbrance resulting from any act or omission of the Province or BCTFA, the Concessionaire will immediately take all necessary steps to remove such Encumbrance. If the Concessionaire fails to remove any such Encumbrance within 14 days (or such longer period as may reasonably be required in the circumstances provided the Concessionaire is proceeding with all due diligence to remove the same) of its coming into existence then, without prejudice to any other rights or remedies the Province or BCTFA may have, the Province or BCTFA will be at liberty to take whatever steps it deems necessary and appropriate to remove the Encumbrance, including payment of any amount owing or claimed thereunder, and to seek immediate recovery of the amount of any such payment and any associated costs, including legal costs, from the Concessionaire. The Concessionaire will on demand reimburse all such payments and costs to the Province or BCTFA (as the case may be).

8.16A Permits Relating to Land

8.16A.1 The Concessionaire will perform the Undertakings such that:

8.16A.1.1 the Concessionaire complies with and performs all obligations under the Permits Relating to Land as if the Concessionaire were the owner of the Project Facilities, the Site and the Adjacent Areas and a party to and/or bound by such Permits Relating to Land as such;

8.16A.1.2 all Undertakings performed by or on behalf of the Concessionaire are performed in a manner which does not breach any of the provisions of the Permits Relating to Land.

8.16A.2 The Concessionaire will obtain all New Permits and all renewals, extensions, modifications, substitutions or replacements of or for existing Permits Relating to Land as may be required from time to time in connection with the Undertakings.

8.17 Liens

8.17.1 The Concessionaire will notify the Province and BCTFA of all liens affecting the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site or any part thereof promptly after the Concessionaire becomes aware of such lien.

8.17.2 Without limiting the generality of Section 8.16 [Concession Highway Encumbrances] or any of the Concessionaire's other obligations under this Agreement, the Concessionaire will use all reasonable efforts to conduct the Undertakings in such a way as not to cause any liens to be registered against or exist on the Project Facilities, the Existing Highway, the Site, the Adjacent Areas and the Graving Dock Site or any part thereof, and if any such liens are registered, the Concessionaire will post security in favour of the Province in an amount and in a form and on conditions satisfactory to the Province to ensure that such lien or liens are discharged within 30 days of written notice from the Province to do so. If the Concessionaire fails to so vacate or remove a lien, the Province or BCTFA may, but without any obligation to do so, vacate or remove the lien by paying money into a court of competent jurisdiction or posting security with the court. The Concessionaire will, on demand, reimburse the Province or BCTFA (as the case may be) all amounts so paid or attributable to or drawn under the security so posted together with all related costs (including legal costs) and expenses.

8.17.3 The Concessionaire will comply with and cause all of its agents, contractors and subcontractors of any tier and employees of any of them to comply with any applicable provisions of the *Builders Lien Act*, S.B.C. 1997, c. 45 with respect to work done on and materials supplied to and in respect of the Project Facilities, the Existing Highway, the Site, the Adjacent Areas and the Graving Dock Site and will provide evidence of such compliance to the Province upon request.

8.18 Environmental Matters

8.18.1 The Concessionaire represents and warrants that the Concessionaire is not currently, and has not in the past five years been subject to any charge, investigation,

conviction, ticket, notice of defect or non-compliance, work order, pollution abatement order, pollution prevention order, remediation order or any other order or proceeding under any Environmental Laws that might reasonably be expected to have a material adverse effect on the performance by the Concessionaire of its obligations under this Agreement. The Concessionaire acknowledges that the Province and BCTFA have relied on such representation and warranty in entering into this Agreement.

- 8.18.2 Without prejudice to Section 8.18.12, the Concessionaire acknowledges that neither the Province nor BCTFA has made any representation or warranty with respect to the environmental condition of the Project Facilities, the Existing Highway, the Site, the Adjacent Areas or the Graving Dock Site. The Concessionaire waives the requirement, if any, for the Province or BCTFA to provide a site profile for the Project Facilities, the Existing Highway, the Site, the Adjacent Areas or the Graving Dock Site under the *Environmental Management Act*, S.B.C. 2003, c. 53.
- 8.18.3 Except to the extent that the Province normally conducts or permits such activities in the case of Comparable Controlled Access Highways, in the conduct of the Undertakings the Concessionaire will not use or permit to be used the Project Facilities, the Existing Highway, the Site or the Adjacent Areas or any part thereof for the sale, storage, manufacture, disposal, handling, treatment, generation, use, transport, refinement, processing, production, remediation or Release of, or any other dealing with, any Hazardous Substance without the prior approval of the Province (which approval may be granted or withheld in the Province's absolute and unfettered discretion), and then only in compliance with all Environmental Laws and the Environmental Authorizations.
- 8.18.4 Without prejudice to the obligations of the Province or BCTFA under Section 8.18.12, the Concessionaire will from the date of the Concessionaire taking occupation of such relevant portion of the Project Facilities, the Site and/or the Adjacent Areas, as the case may be, deal with all Hazardous Substances on such portion of the Project Facilities, the Site and the Adjacent Areas in accordance with all Environmental Laws and Environmental Authorizations and will otherwise at all times comply with and cause all persons for whom the Concessionaire is in law or under the terms of this Agreement responsible to comply with all Environmental Laws and Environmental Authorizations in respect of the Project Facilities, the Site and the Adjacent Areas and the conduct of the Undertakings. For greater certainty, the Province will be responsible for the costs of remediating any Existing Contamination in accordance with Section 8.18.12 and for any delay (and any costs associated with such a delay caused by the Province carrying out, or procuring the carrying out of, any remediation works in relation to Existing Contamination) and for the costs of remediating any Third Party Contamination.
- 8.18.4A Without prejudice to the obligations of the Province or BCTFA under Section 8.18.12, the Concessionaire will after the Site Occupation Date deal with all

Hazardous Substances on any part of the Existing Highway that it is in occupation of in the course of carrying out the Undertakings in accordance with all Environmental Laws and the Environmental Authorizations and will otherwise at all times comply with and cause all persons for whom the Concessionaire is in law or under the terms of this Agreement responsible to comply with all Environmental Laws and Environmental Authorizations in respect of any such part of the Existing Highway. For greater certainty, the Province will be responsible for the costs of remediating any Existing Contamination in accordance with Section 8.18.12.

- 8.18.5 Without prejudice to Sections 8.18.4 or 8.18.4A, in the course of carrying out the Undertakings, the Concessionaire will have regard to the provisions of the Best Management Practices for Highway Maintenance Activities, and will not do or omit or permit to be done or omitted anything which is inconsistent with the practices described therein. If compliance with the terms of any amendment, supplement or replacement of the Best Management Practices for Highway Maintenance Activities effected after the Commencement Date would require the Concessionaire to perform any additional obligations or to incur any additional costs which it would not otherwise have been obliged to perform or would not otherwise have incurred in performing its obligations under this Agreement (including its obligations under this Section prior to such amendment, supplement or replacement), the onus of establishing which will be on the Concessionaire, the terms of any such amendment, supplement or replacement giving rise to such additional obligations or additional costs **DELETED**.
- 8.18.6 The Concessionaire will promptly provide the Province and BCTFA with copies of all environmental site assessments, audits, reports and test results relating to the Project Facilities, the Site and the Adjacent Areas conducted by or on behalf of or coming into the possession of the Concessionaire at any time whether before or after the Commencement Date. If, from time to time, there are reasonable grounds to believe that Hazardous Substances or other Contamination (except any Existing Contamination) are present on the Project Facilities, the Site or the Adjacent Areas, the Province or BCTFA may require the Concessionaire to obtain from an independent environmental consultant approved by the Province or BCTFA (as the case may be) acting reasonably an environmental site assessment of the Project Facilities, the Site and the Adjacent Areas (or any part or parts thereof) or an environmental audit of the Undertakings, which includes any additional investigations recommended by the environmental consultant. Where the environmental site assessment or environmental audit reveals the presence of Contamination or Hazardous Substances (other than any Existing Contamination or any Contamination or Hazardous Substance brought onto the Project Facilities, the Site or the Adjacent Areas by the Province, BCTFA, any Governmental Authority or any Third Party Contractor) in excess of permissible levels under any applicable Environmental Laws such environmental site assessment or environmental audit shall be for the cost of the Concessionaire. **DELETED** The Concessionaire will not less frequently than annually, provide the Province and BCTFA with a certificate of

a knowledgeable senior officer of the Concessionaire certifying that the Concessionaire has (to the best of the knowledge, information and belief of the officer signing the certificate, having made reasonable inquiries) complied in all material respects with all Environmental Laws and with all of its obligations under this Agreement in respect of environmental matters and that (to the best of the knowledge, information and belief of the officer signing the certificate, having made reasonable inquiry) no adverse environmental occurrence has taken place, nor is expected to take place, on or at or affecting the Project Facilities, the Site or the Adjacent Areas (or, if any such non-compliance or occurrence has taken place, providing full and complete particulars thereof and all documentation in connection therewith).

- 8.18.7 Without prejudice to any of its other obligations under this Agreement, the Concessionaire will maintain all environmental site assessments, audits, reports and test results and other environmental documents and records (including all Permits, Licences and Approvals relevant to environmental matters) relating to the Project Facilities, the Site and the Adjacent Areas and the Undertakings (“Environmental Documents”) in strict confidence and will not disclose their terms or existence to any person except:
- 8.18.7.1 as required by applicable Laws and Regulations;
 - 8.18.7.2 to the Concessionaire’s advisors or insurers or to the Funders and their advisors and insurers on a need-to-know basis and then only on their undertaking to keep the Environmental Documents in strict confidence and not to disclose their terms or existence; or
 - 8.18.7.3 with the prior approval of the Province and BCTFA, which approval may be granted or withheld in the absolute and unfettered discretion of the Province and BCTFA.
- 8.18.8 Except for those retained in the possession of the Province or BCTFA, the Concessionaire will maintain at the location established by the Concessionaire pursuant to Section 25.1 [Required Records] all Environmental Documents, all of which may be reviewed and inspected by the Province and BCTFA and their respective authorized representatives at any reasonable time on the giving of reasonable notice.
- 8.18.9 The Concessionaire will promptly on request provide the Province and BCTFA with such written authorizations as the Province or BCTFA may require from time to time in order to make inquiries of any Governmental Authorities regarding the Concessionaire or the Concessionaire’s compliance with Environmental Laws and the Environmental Authorizations. The Concessionaire will promptly forward to the Province and BCTFA a copy of any report or other document relating to environmental matters on or at or affecting the Project Facilities, the Site or the Adjacent Areas that is filed or lodged with or otherwise provided by the

Concessionaire or any of its agents, contractors or subcontractors of any tier or employees of any of them to any Governmental Authority. The Province will promptly forward to the Concessionaire a copy of any report or other document relating to environmental matters on or at the Project Facilities, the Site or the Adjacent Areas that is filed or lodged with or otherwise provided by the Province or any of its agents, contractors or subcontractors of any tier or employees of any of them to any Governmental Authority, provided that the Province may withhold any part of any such report that relates to any area other than the Project Facilities, the Site or the Adjacent Areas, provided that the Province will have no obligation to provide such report or document with respect to which it is subject to an express obligation of confidentiality or privacy (whether under any Laws and Regulations or contract or otherwise) or which it is otherwise precluded from disclosing under any Privacy Legislation or other Laws and Regulations.

- 8.18.10 The Concessionaire will forthwith, and in any event within 24 hours of becoming aware of the same (in the case of a matter referred to in Section 8.18.10.1) and within 48 hours of becoming aware of the same (in the case of a matter referred to in Section 8.18.10.2 or 8.18.10.3), notify the Province and BCTFA of:
- 8.18.10.1 any Release of a Hazardous Substance or any other occurrence or condition at or affecting the Project Facilities, the Site or the Adjacent Areas that would cause Contamination of the Project Facilities, the Site or the Adjacent Areas or any other areas in their vicinity or subject the Concessionaire, the Province or BCTFA or the Minister to any fines, penalties, orders, investigations or other proceedings under any Environmental Laws, together with full particulars of such Release, occurrence or condition including the location, time, agencies involved, damages suffered or caused and remedial action taken;
 - 8.18.10.2 all charges, orders, investigations or notices of violation or non-compliance issued against the Concessionaire or relating to the conduct of the Undertakings or the Project Facilities, the Site and the Adjacent Areas under any Environmental Laws and in any such case received by the Concessionaire; and
 - 8.18.10.3 any notice, claim, action or other proceeding by any person against the Concessionaire or relating to the conduct of the Undertakings or the Project Facilities, the Site or the Adjacent Areas concerning the Release or alleged Release of any Hazardous Substance at or from the Project Facilities, the Site or the Adjacent Areas or the environmental condition of the Project Facilities, the Site or the Adjacent Areas or the conduct of the Concessionaire's business as it relates to environmental matters and in any such case received by the Concessionaire.

The Concessionaire will promptly:

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- (a) provide the Province and BCTFA with all information, notices, reports and other documents the Concessionaire from time to time possesses or controls regarding such Release and any action taken; and
 - (b) notify the relevant Governmental Authorities of any Release of any Hazardous Substance at or from the Project Facilities, the Site or the Adjacent Areas if required to do so in accordance with Environmental Laws, failing which the Province or BCTFA may, but will not be obliged to, notify the relevant Governmental Authorities of such occurrence.
- 8.18.11 Without limiting the obligations of the Concessionaire under Sections 8.18.4 or 8.18.4A, on the Expiry Date, or at any time if requested by the Province or BCTFA or any other Governmental Authority pursuant to Environmental Laws, the Concessionaire will, subject to Section 8.13.A, promptly at its own cost and in accordance with Environmental Laws and Environmental Authorizations remove from the Project Facilities, the Site and the Adjacent Areas, and remediate any and all Hazardous Substances, and remediate by removal any Contamination of the Project Facilities, the Site or the Adjacent Areas or any other lands or water in their vicinity resulting from such Hazardous Substances, in either case brought onto, used at or Released at or from the Project Facilities, the Site or the Adjacent Areas by the Concessionaire or any person for whom the Concessionaire is in law or under the terms of this Agreement responsible. The Concessionaire will provide the Province and BCTFA with full information with respect to any remedial work performed pursuant to this Section and will comply with the reasonable requirements of the Province and BCTFA with respect to such work. If the Province or BCTFA reasonably determines that it or any of its property or the Concession Highway or public safety is placed in any serious jeopardy by the requirement for any remedial work contemplated in this Section 8.18.11 or Sections 8.18.4 or 8.18.4A, the Province or BCTFA may, but will be under no obligation to, undertake such work or any part thereof (including by the use of its own labour forces, including day labour retained by the Province, or by a third party contractor retained by the Province) to the same level and standard of performance as would be applicable if the Concessionaire carried out such work and at the cost of the Concessionaire.
- 8.18.12 Upon the discovery of any Existing Contamination, the Concessionaire will immediately inform the Province's Representative and will comply with all applicable Laws and Regulations and Legal Requirements in respect thereof at the Province's cost pursuant to Section 8.13.A. If the Province or BCTFA wishes the Concessionaire to perform actions in respect of any such Existing Contamination that are in addition to any required pursuant to applicable Laws and Regulations and Legal Requirements, then the Province's Representative will issue an instruction to the Concessionaire specifying what action the Province or BCTFA requires the Concessionaire to take in relation to such discovery and the Concessionaire will promptly and diligently comply with all such instructions at

the Province's cost pursuant to section 8.13.A. If any Laws and Regulations or Legal Requirements or any such instruction issued by the Province's Representative requires the Concessionaire to perform remediation work as a result of Existing Contamination, then such remediation work to the extent arising from the Existing Contamination, **DELETED**.

- 8.18.13 Notwithstanding any Laws and Regulations to the contrary, all Hazardous Substances and materials, goods or other items containing Hazardous Substances brought onto or used and/or thereafter Released at or from the Project Facilities, the Site or the Adjacent Areas by the Concessionaire or any person for whom the Concessionaire is in law or under the terms of this Agreement responsible will be and remain the sole and exclusive property of the Concessionaire and will not become the property of the Province or BCTFA, notwithstanding their incorporation into or affixation to the Project Facilities, the Site or the Adjacent Areas and notwithstanding any termination or expiration of the Contract Period. This Section supersedes any other provision in this Agreement to the contrary. For greater certainty, the Province will be responsible for the costs of remediating any Existing Contamination Released by the Concessionaire in carrying out the Undertakings.
- 8.18.14 The Concessionaire's obligations under this Section (including its obligation to remove and remediate Hazardous Substances and its confidentiality obligations) survive the expiry or any earlier termination of the Contract Period. The obligations of the Concessionaire under this Section are in addition to, and do not limit, the obligations of the Concessionaire contained in any other provisions of this Agreement.

8.19 First Nations

- 8.19.1 The Province acknowledges that, subject to Sections 8.19.3 and 8.19.4, the Province retains sole responsibility for any and all consultation and accommodation pertaining to aboriginal rights and title and other related issues in relation to the decisions or actions (past, present or future) of the Province, including the decision to proceed with the Project.
- 8.19.2 Nothing in this Agreement will be interpreted as making the Concessionaire responsible for resolving First Nations Claims (whether past, present or future) or as accepting risks in relation to First Nations challenges of decisions of any Governmental Authority based on the alleged failure by such Governmental Authority to fulfill consultation and accommodation obligations.
- 8.19.3 The Concessionaire shall, to the extent required by law and in accordance with any policy of general application to the Province of British Columbia established from time to time by the Province, discuss with First Nations issues with respect to the Project.

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- 8.19.4 The Concessionaire shall work with the Province and First Nations to try to address the potential impact of performing the Undertakings on the First Nations.
- 8.19.5 The Concessionaire shall within 15 days of becoming aware of any First Nation claim in respect of the Project Facilities, Site and Adjacent Areas or the Graving Dock Site or the Project, provide written notice to the Province of such claim along with full written particulars of any such claim.
- 8.19.6 The Concessionaire will, in good faith and at all times, cooperate with the Province and its counsel in any and all investigations, settlements and judicial determinations of any First Nation Claims made in respect of First Nations matters and will not take any actions or seek any remedies against any First Nation or member of a First Nation in respect of First Nations Claims without the prior approval of the Province.

9. **HEALTH AND SAFETY**

9.1 Defined Terms

- 9.1.1 For purposes of this Section 9 [Health and Safety], unless otherwise expressly set out:
- 9.1.1.1 “No Work Sections” means the lands comprising the Project Facilities, the Site and the Adjacent Areas that may be designated as “No Work Section lands” by the Province from time to time on prior notice to the Concessionaire for the purposes of separating work sites for health and safety purposes;
- 9.1.1.2 “Notice of Project” means the notice of project described in the *Occupational Health and Safety Regulations*;
- 9.1.1.3 “Prime Contractor” means a “prime contractor” as defined and described in the *Workers Compensation Act* and the *Occupational Health and Safety Regulations*, respectively;
- 9.1.1.4 “Qualified Coordinator” means a person qualified within the contemplation of the *Workers Compensation Act* and the *Occupational Health and Safety Regulations* to discharge the responsibilities of a “qualified coordinator” as described in the *Workers Compensation Act* and the *Occupational Health and Safety Regulations*;
- 9.1.1.5 “Safety Program” means an occupational health and safety program as described in Section 9.4 [Health and Safety Program]; and

any other words having initial uppercase letters will have the meanings given to them in Schedule 1 [Definitions and Interpretation].

9.2 Site Safety and Security

- 9.2.1 The Concessionaire will from the Site Occupation Date until the Expiry Date have full regard for the safety of all persons (including Users and Marine Users) on the Site and the Adjacent Areas (whether lawfully or not) and will keep the Site and the Adjacent Areas in a manner and in an orderly state that ensures the safety of such persons and that is appropriate to the avoidance of danger to such persons.
- 9.2.2 Without limiting Section 10 [Security Of The Site] or Section 30.3 [Conduct of Claims Against Third Parties], the Concessionaire will, take such measures in respect of the Site and the Adjacent Areas and the Graving Dock Site as are reasonably required, including fencing where appropriate, to prevent the trespass of any persons not entitled to be there or of any creatures including wildlife and livestock.
- 9.2.3 The Concessionaire will give the Province's Representative 10 Working Days' notice of its intended Site Occupation Date.
- 9.2.4 The Concessionaire will have full regard to the safety of all persons on the Graving Dock Site (whether lawfully or not) and will keep the Graving Dock Site in a manner and in an orderly state that ensures the safety of such persons and that is appropriate to the avoidance of danger to such persons.

9.3 Occupational Health and Safety

- 9.3.1 By entering into this Agreement, the Concessionaire agrees that from the Site Occupation Date it is the Prime Contractor for the Site and the Adjacent Areas.
- 9.3.1A By entering into this Agreement, the Concessionaire agrees that from the Commencement Date it is the Prime Contractor for the Graving Dock Site.
- 9.3.2 By not later than 30 days after the Commencement Date in the case of the matters referred to in Section 9.3.2.1 to 9.3.2.3 (inclusive) and not later than 60 days after the Commencement Date in the case of the matter referred to in Section 9.3.2.4, and in any event before the commencement of the Works, the Concessionaire will:
- 9.3.2.1 designate a Qualified Coordinator;
 - 9.3.2.2 deliver to the Province written notice of the Qualified Coordinator;
 - 9.3.2.3 deliver to the Province a copy of the Notice of Project required under the *Workers Compensation Act* and the *Occupational Health and Safety Regulations*; and
 - 9.3.2.4 deliver to the Province written notice confirming that the Safety Program has been initiated and is readily available in accordance with the *Workers Compensation Act* and the *Occupational Health and Safety Regulations*.

9.4 Health and Safety Program

9.4.1 Notwithstanding any limitation in the *Occupational Health and Safety Regulations* regarding the number of workers in any work force, the Concessionaire will prepare and during the Contract Period maintain in respect of the Site and the Adjacent Areas and, while it is in occupation of the same, the Graving Dock Site a formal health and safety program, satisfactory to the Province, that:

9.4.1.1 complies with Good Industry Practice and all applicable Laws and Regulations (including all applicable specifications and standards in the *Workers Compensation Act* and the *Occupational Health and Safety Regulations*);

9.4.1.2 satisfies the requirements of section 3.3 of Part 3 of the *Occupational Health and Safety Regulations*;

9.4.1.3 is designed to prevent injuries and occupational diseases within the contemplation of the *Workers Compensation Act* and the *Occupational Health and Safety Regulations*; and

9.4.1.4 provides for the establishment and maintenance of a system or systems and a process or processes to ensure compliance with the *Workers Compensation Act* and the *Occupational Health and Safety Regulations*.

9.5 General

9.5.1 The Concessionaire will during the Contract Period in respect of the Site and the Adjacent Areas and, while it is in occupation of the same, the Graving Dock Site:

9.5.1.1 post the name of the Qualified Coordinator, and a site drawing showing the boundaries of the Site and the Adjacent Areas and, while it is in occupation of the same, the Graving Dock Site, with project layout, first aid locations, emergency transportation provisions and the evacuation marshalling points relating to the Site and the Adjacent Areas and, while it is in occupation of the same, the Graving Dock Site;

9.5.1.2 implement and maintain the Safety Program throughout the Site and the the Adjacent Areas and, while it is in occupation of the same, the Graving Dock Site;

9.5.1.3 ensure a copy of the Safety Program, the written construction procedures designed to protect health and safety of workers at the Site and the Adjacent Areas and, while it is in occupation of the same, the Graving Dock Site, and the *Occupational Health and Safety Regulations* are readily available at convenient locations within the Site and the Adjacent Areas and, while it is in occupation of the same, the Graving Dock Site;

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- 9.5.1.4 deliver and post any and all Notices of Project as may be required by the *Workers Compensation Act* and the *Occupational Health and Safety Regulations*;
- 9.5.1.5 when conditions or activities at any location or locations in the Site and the Adjacent Areas and, while it is in occupation of the same, the Graving Dock Site affect the workers of more than one employer or where there are overlapping or adjoining work activities by two or more employers, ensure that the Qualified Coordinator coordinates the occupational health and safety activities throughout the Site and the Adjacent Areas and, while it is in occupation of the same, the Graving Dock Site and that the Qualified Coordinator alerts all workers to all reasonably foreseeable hazards to which they are likely to be exposed;
- 9.5.1.6 immediately notify all employers, workers, suppliers and subcontractors and any other persons throughout the Site and the Adjacent Areas and, while it is in occupation of the same, the Graving Dock Site of any hazard created by overlapping or adjoining work activities of two or more employers and ensure that the hazards are addressed throughout the duration of such activities;
- 9.5.1.7 immediately deliver to the Province the name of any employer who does not cooperate with, assist or comply with the requirements of the Qualified Coordinator regarding coordination of health and safety activities throughout the Site and the Adjacent Areas and, while it is in occupation of the same, the Graving Dock Site;
- 9.5.1.8 ensure that no person, including any person employed or otherwise engaged directly or indirectly by the Concessionaire (which for greater certainty includes any person employed or otherwise engaged by the Concessionaire, the Contractor, the Operator or any other subcontractor of any tier) in respect of the Undertakings, is permitted to enter upon or otherwise allowed access (other than as a User or a Marine User) to any part or parts of the Site and the Adjacent Areas and, while it is in occupation of the same, the Graving Dock Site in respect of which there is for the time being any part of the Undertakings being carried out unless such person complies with the requirements of the Safety Program and all applicable health and safety requirements under applicable Laws and Regulations; and
- 9.5.1.9 be and fulfill all functions and duties of the Prime Contractor in compliance with all Laws and Regulations including the *Workers Compensation Act* and the *Occupational Health and Safety Regulation*.
- 9.5.2 The Concessionaire will at all times throughout the Contract Period:

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- 9.5.2.1 ensure that the Qualified Coordinator is qualified under the *Workers Compensation Act* and the *Occupational Health and Safety Regulations*, including by having a combination of training, education and experience;
- 9.5.2.2 observe and comply with, and will ensure that the performance of the Undertakings and the Works and the Decommissioning (including by conducting worker safety orientations, health and safety meetings, safety inspections and accident and incident investigations) at all times complies with all Laws and Regulations relating to occupational health and safety, including the *Workers Compensation Act* and the *Occupational Health and Safety Regulations*;
- 9.5.2.3 ensure that all assessments, levies, penalties, fees and fines which may be made under any and all Laws and Regulations relating to occupational health and safety, including the *Workers Compensation Act* and the *Occupational Health and Safety Regulations* are punctually paid as they become due;
- 9.5.2.4 be qualified to fulfill all functions and duties of the Prime Contractor as required under all Laws and Regulations including the *Workers Compensation Act* and the *Occupational Health and Safety Regulations*;
- 9.5.2.5 establish and maintain a joint health and safety committee and ensure that that committee fulfills its functions under the *Workers Compensation Act* and the *Occupational Health and Safety Regulations*;
- 9.5.2.6 ensure that the activities of employers, workers and other persons relating to occupational health and safety are coordinated;
- 9.5.2.7 upon the request of the Province, deliver to the Province evidence of implementation and maintenance of the Safety Program and that a system or systems or a process or processes have been put into place to ensure compliance with the *Workers Compensation Act* and the *Occupational Health and Safety Regulations*;
- 9.5.2.8 in the event of an accident or incident that requires notification to the Workers' Compensation Board, at the same time as providing such notification to the Workers' Compensation Board, deliver a copy of such notice to the Province, and provide ongoing information to the Province on the progress of any investigation resulting from such notice, accident or incident; and
- 9.5.2.9 record, collect and retain all occupational health and safety documentation, including notices, reports, directives and assessments and, on request of the Province, make these available, including by providing copies of such notices, reports, directives and assessments, to

the Province. Such notices, reports, directives and assessments will include the following:

- 9.5.2.9.1 notices which the Concessionaire is required to provide to the Workers' Compensation Board,
 - 9.5.2.9.2 summaries of remedial actions taken to reduce occupational health and safety hazards within the Site and the Adjacent Areas and, while it is in occupation of the same, the Graving Dock Site,
 - 9.5.2.9.3 directives and inspection reports issued by or through the Workers' Compensation Board in connection with the Site, the Adjacent Areas, and the Graving Dock Site, the Project, the Works or the performance of the Undertakings,
 - 9.5.2.9.4 reports and investigations on incidents and accidents which are required by the Worker's Compensation Board or any other government agency under any Laws and Regulations relating to health and safety, including the *Workers Compensation Act* and the *Occupational Health and Safety Regulations* to be investigated;
 - 9.5.2.9.5 records, including minutes, of safety meetings; and
 - 9.5.2.9.6 evidence that instruction and health and safety orientation and training for workers within the Site, the Adjacent Areas and the Graving Dock Site is being conducted in accordance with any Laws and Regulations relating to health and safety, including the *Workers Compensation Act* and the *Occupational Health and Safety Regulations*.
- 9.5.4 If the Workers Compensation Board of British Columbia refuses to recognize or accept the Concessionaire at any time as the "Prime Contractor" for the Site and the Adjacent Areas and, while it is in occupation of the same, the Graving Dock Site, then the Concessionaire will not be relieved of any such obligations, duties and liabilities, but will be responsible to the Province and BCTFA and to those for whom the Concessionaire would have been responsible if the Concessionaire had been designated as the "Prime Contractor", for fulfilling all obligations, duties and liabilities imposed on the Province or BCTFA or any of the Province's or BCTFA's agents, contractors or subcontractors of any tier or employees of any of them pursuant to the *Workers Compensation Act* and the *Occupational Health and Safety Regulations* in the same manner and to the same extent and for the same purposes as if the Concessionaire undertook the obligations of a "Prime Contractor" for the Site and the Adjacent Areas and, while it is in occupation of the same, the Graving Dock Site. For greater certainty, the liabilities for which the Concessionaire is responsible

under this Section 9.5.4 include the liability for any assessments, levies, penalties, fees or fines assessed, levied or charged from time to time against the Concessionaire or against the Province or BCTFA based on the number of employees employed in relation to the Project or otherwise.

9.5.5 At the Province's request from time to time the Concessionaire will provide the Province with evidence satisfactory to the Province of compliance by the Concessionaire with its obligations under this Section 9 [Health and Safety], including where applicable compliance of the Concessionaire and its agents, contractors and subcontractors of any tier (including the Contractor and the Operator) and its or their directors, officers, employees and workers in relation to the Project with the *Workers Compensation Act* and the *Occupational Health and Safety Regulations*, including being registered, in good standing and current in respect of all assessments, levies, penalties, fees and fines thereunder.

9.6 Other Prime Contractors

9.6.1 The Province may, from time to time, on prior written notice to the Concessionaire, appoint a person other than the Concessionaire as the Prime Contractor with respect to the *Workers Compensation Act* and the *Occupational Health and Safety Regulations* in connection with works and activities that may be undertaken and performed at any location or locations in the Site, the Adjacent Areas and the Graving Dock Site, for a period of time, and such works and activities, location(s), and period(s) of time will be specified and defined by the Province in the written notice.

9.6.2 The Concessionaire agrees that on receipt of such written notice the Concessionaire will not be the Prime Contractor in such specified location or locations for the specified period of time and will at all times in good faith and at the cost of the Concessionaire:

9.6.2.1 coordinate with and comply with the occupational health and safety requirements, including requirements to coordinate health and safety activities, of the person identified by the Province in the written notice as the Prime Contractor;

9.6.2.2 ensure compliance to the Safety Program of the Prime Contractor identified by the Province under Section 9.6.1 by the Concessionaire and its agents, contractors and subcontractors of any tier and employees of any of them, including by developing a system to ensure such compliance; and

9.6.2.3 upon the request of the Province deliver to the Province evidence that the system referenced in Section 9.6.2.2 is in place and is being adhered to.

9.6.3 The Province may on conclusion of the works and activities referenced in Section 9.6.1, deliver written notice to the Concessionaire of the conclusion of such works and activities and the Concessionaire agrees that upon receipt of such notice the Concessionaire will be and will fulfill the responsibilities of the Prime Contractor as set out in this Section 9 [Health and Safety] at the applicable location or locations.

9.7 Notice of Failure to Comply

9.7.1 In this Section 9.7 [Notice of Failure to Comply] the terms “employer” and “workers” do not include the Concessionaire or any of its contractors or subcontractors of any tier or the employees of any of them.

9.7.2 If the Concessionaire determines in its reasonable discretion that any employer or its workers creates an unsafe or harmful condition or does or omits to do something that constitutes an unsafe or harmful act, or has failed to comply with the *Workers Compensation Act*, the *Occupational Health and Safety Regulations*, or the Safety Program, and that on written notice from the Concessionaire to the employer of such condition, act or failure, the employer has failed or refused to take action to correct the condition or act, including any condition or act of a worker, the Concessionaire may issue a notice to the applicable employer stipulating in reasonable detail the basis for the issuance of the notice and the Concessionaire will deliver a copy of the notice to the Province.

9.7.3 On receipt of the Concessionaire’s notice referenced in Section 9.7.2, the Province may take whatever action the Province deems necessary to ensure that any risk to workers is eliminated or minimized, and such action may include suspension of work at the location specified in the Concessionaire’s notice, and suspension of any payment due by the Province to any person, excluding the Concessionaire.

9.7.4 The Province will be deemed to have relied on the terms of and the reasons set out in the Concessionaire’s notice, notwithstanding any subsequent investigation or inquiry of the matter by the Province, which the Province may but will not be obligated to undertake, and the Concessionaire will indemnify and hold the Province and BCTFA, and either of them, harmless in connection with any and all Losses or Claims arising in connection with the issuance of the Concessionaire’s notice referenced in Section 9.7.2 and any acts or omissions of the Province in reliance on such Concessionaire’s notice.

9.7.5 On rectification of the condition, act, or failure set out in the Concessionaire’s notice the Concessionaire will withdraw the Concessionaire’s notice referenced in Section 9.7.2 by endorsing on a copy thereof confirmation of the rectification and the Concessionaire will deliver a copy of the endorsed notice to the applicable employer and to the Province.

9.7.6 On receipt of a copy of the endorsed notice referenced in Section 9.7.5, the Province will if the Province suspended work or payments under Section 9.7.3, issue an order to resume work or release any payments, as the case may be.

10. **SECURITY OF THE SITE**

10.1 **Responsibility for Protesters and Trespassers**

10.1.1 Except as otherwise expressly provided herein, neither the Province nor BCTFA will be responsible for the presence on or around or entry onto or around the Project Facilities, the Site, the Adjacent Areas or the Graving Dock Site of, or any other interference with or affecting the Project Facilities, the Site, the Adjacent Areas or the Graving Dock Site or the vicinity of them or the Undertakings by or caused by, any Protester or Trespasser nor for any act, omission or default of any such person (in any such case whether before or during the Contract Period). The presence on or around or entry onto or around the Project Facilities, the Site, the Adjacent Areas or the Graving Dock Site of, or any other interference with or affecting the Project Facilities, the Site, the Adjacent Areas or the Graving Dock Site or the vicinity of them or the Undertakings by or caused by, any Protester or Trespasser and any lawful or unlawful activities of any such person will not be a breach of the obligations of the Province under Section 8 [Land] to permit the Concessionaire to have access to the Site and the Adjacent Areas or the Graving Dock Site, nor a breach of any other obligation or representation or warranty of the Province or BCTFA under this Agreement.

10.1.2 The Concessionaire will not be relieved by Section 8.5 [Off-Site Works] of any requirement to carry out Off-Site Works if the failure referred to in that Section of the relevant highway authority to give the Concessionaire access to areas required to carry out the relevant Off-Site Works is the result of the presence on or around or entry onto or around the relevant areas of, or any other interference with or affecting the relevant areas or the vicinity of them by or caused by, any Protester or Trespasser or any lawful or unlawful activities of any such person (in any such case whether before or during the Contract Period).

10.1.3 The management of any Protest Action and/or Trespassers on the Project Facilities, the Site, the Adjacent Areas or the Graving Dock Site will be the responsibility of the Concessionaire. If any part of the Project Facilities, the Site, the Adjacent Areas or the Graving Dock Site is occupied by Protesters and/or Trespassers at any time during the Contract Period, then as soon as reasonably practicable the Concessionaire will notify the Province of such occurrence and of the action which the Concessionaire proposes to take to deal with the Protesters and/or Trespassers. The Concessionaire may exercise any legal remedies available to it to remove Protesters and/or Trespassers (including the obtaining of injunctions and enforcement orders in respect thereof), provided that the Concessionaire will give the Province's Representative reasonable (and in any event not less than 24 hours) notice prior to commencing any legal proceedings for that purpose.

10.1.4 The Concessionaire may request the assistance of the Province (at the cost of the Concessionaire) to remove Protesters and/or Trespassers where the Concessionaire demonstrates to the Province's reasonable satisfaction that it has exercised all legal remedies available to it to seek injunctive relief or other judicial remedies from a Court of first instance and to enforce any injunction or other remedy granted by the Court to remove the Protesters and/or Trespassers (provided that for this purpose the Concessionaire may but will not be obligated to prosecute injunctive or other judicial remedies beyond the Court of first instance) and that the continued presence of the Protesters and/or Trespassers is having an adverse effect on the conduct of the Undertakings. Following such request, the Province will notify the Concessionaire whether the Province can lawfully provide any assistance in relation to the removal of Protesters and/or Trespassers that is not independently available to the Concessionaire and, to the extent that such assistance can be lawfully provided, the Province will provide such assistance to the extent it is, in the absolute and unfettered discretion of the Province, reasonable and appropriate in the circumstances to do so.

10.1.5 If a Compensation Event of the type described in paragraph (q) of the definition of Compensation Event in Schedule 1 [Definitions and Interpretation] has occurred and continues for a period of more than **DELETED** and if the Province is continuing to compensate the Concessionaire in respect of such Compensation Event, then so long **DELETED**

10.2 Concessionaire to Bear Loss

Subject to the provisions of Section 10.1.5, as between the Province and the Concessionaire, the Concessionaire will bear, without recourse to the Province, any Loss suffered by the Concessionaire, its agents, contractors or subcontractors of any tier or employees of any of them which is caused by any Protester and/or Trespasser up to the maximum amount specified in paragraph (q) of the definition of Compensation Event in Schedule 1 [Definitions and Interpretation].

10.3 No Payments to Protesters

Except as part of an appropriate legal settlement with such Protester or Trespasser or with the consent of the Province, such consent not to be unreasonably withheld or delayed, the Concessionaire will not give directly or indirectly to any Protester or Trespasser any material inducement, monetary or otherwise, with a view to avoiding, limiting or influencing the manner of protest activities by that Protester or Trespasser or by other Protesters or Trespassers.

11. DESIGN AND CONSTRUCTION

11.1 Responsibility

11.1.1 The Concessionaire will be responsible for the design, construction, completion, commissioning and testing of the Works and the design and completion of the Decommissioning, which will be carried out in strict accordance with the Construction Requirements (subject to Section 11.4 [Concessionaire Changes] and Part 2 of Schedule 13 [Province Changes]), the Design and Certification Procedure and the Review Procedure and in such a manner as to ensure satisfaction of the Construction Output Specifications.

11.1.2 The Concessionaire will ensure that the Detailed Design is prepared under the supervision of the Designer and that the Detailed Design is prepared by a duly qualified professional engineer or other such professional as appropriate to the nature of the Design, lawfully authorized to practice within British Columbia.

11.1.3 The Concessionaire:

11.1.3.1 will ensure that the Works and the Decommissioning are completed in a manner such that they are fit and suitable for the intended purpose of the Project as that intended purpose is described in this Agreement; and

11.1.3.2 acknowledges and agrees that it has the obligation to the Province to have the Works and the Decommissioning completed in a manner that is fit and suitable for the intended purpose of the Project as that intended purpose is described in this Agreement.

11.2 Design and Certification Procedure

11.2.1 The Concessionaire will ensure that:

11.2.1.1 the Designer prepares or supervises the preparation of all Design Data in respect of the Works and the Decommissioning (including the Detailed Design) in accordance with the Construction Output Specifications and the Construction Requirements (subject to Section 11.4 [Concessionaire Changes] and Part 2 of Schedule 13 [Province Changes]) and complies with the Design and Certification Procedure;

11.2.1.2 without prejudice to Section 11.2.1.1, where in accordance with paragraph 4 of Part 3 of Schedule 5 [Design and Certification Procedure] Design Data is prepared by a registered professional engineer employed by the Contractor, the Contractor will ensure that such Design Data is prepared in accordance with the Construction Output Specifications and the Construction Requirements (subject to Section 11.4 [Concessionaire

Changes] and Part 2 of Schedule 13 [Province Changes]) and complies with the Design and Certification Procedure;

11.2.1.3 the Contractor undertakes all management, coordination and supervision necessary to properly perform the construction works necessary to complete, commission and test the Works and to complete the Decommissioning; and

11.2.1.4 the Concessionaire undertakes all supervision, inspection and monitoring necessary to ensure that the design, construction, completion, commissioning and testing of the Works and the design and completion of the Decommissioning are properly performed.

11.2.2 The Concessionaire will ensure that all certification procedures referred to in the Design and Certification Procedure are complied with by the appropriate persons referred to therein, including the Design Team, the Designer and any independent team or engineer within the Designer, as the case may be, and that such persons are at all relevant times duly authorized and qualified to carry out such procedures and to sign the relevant Certificates.

11.2.3 The Concessionaire will ensure that the checking and reviewing procedures referred to in the Design and Certification Procedure are complied with by the appropriate persons referred to therein, including the Checking Team, the Reviewer, the Audit Team and any independent team or engineer within the Designer, as the case may be, and that such persons are at all relevant times duly appointed and qualified to carry out such procedures.

11.2.4 Without prejudice to Section 51.3 [Concessionaire Responsibility], any failure by any person referred to in the Design and Certification Procedure, including the Design Team, the Designer, the Checking Team, the Reviewer, the Audit Team, the Contractor and any independent team or engineer within the Designer, to fulfil the obligations required of them under the Design and Certification Procedure will be a breach of the Concessionaire's obligations under this Agreement.

11.2.5 Design Data the subject of a Certificate that has been submitted to the Province's Representative in accordance with the Design and Certification Procedure will not be departed from otherwise than pursuant to a Concessionaire Change or a Province Change.

11.3 Review Procedure

11.3.1 The Concessionaire will not commence or permit the commencement of the construction of any part of the Works (including any Temporary Works) or the Decommissioning unless and until there has been no objection under the Review Procedure to all Design Data and relevant Certificates required in respect of such part of the Works or the Decommissioning and all other checking and design review

requirements under this Agreement have been satisfied in respect thereof. Relevant Certificates will include Design Certificates, Road Safety Audit Certificates and Alternative Concept Certificates as appropriate under the Design and Certification Procedure.

11.3.2 The Concessionaire will not commence or permit the commencement of any work to be carried out under the Construction Staging Plan, the Decommissioning Plan, the New Crossing Erection Plan, the Graving Dock Construction Facility Plan or the Demolition Plan unless and until there has been no objection under the Review Procedure (on the grounds set out in paragraph 3.8A of Part 2 of Schedule 8 [Review Procedure]) to the relevant Plan.

11.4 Concessionaire Changes

11.4.1 If the Concessionaire proposes to vary or amend the design, quality or scope of the Works or the Decommissioning, including making additions, omissions, substitutions, alternations in design and/or variations in the Construction Requirements, or any of the Construction Staging Plan, the Decommissioning Plan, the New Crossing Erection Plan, the Graving Dock Construction Facility Plan or the Demolition Plan, such proposal together with all supporting Design Data and an explanation of the reasons for the proposed change (including if appropriate the Designer's comments) will be submitted in accordance with the Review Procedure as a proposed Concessionaire Change. The Concessionaire will not proceed to implement a proposed Concessionaire Change unless and until there has been no objection in accordance with the Review Procedure (on the grounds set out in paragraph 3.2 of Part 2 of Schedule 8 [Review Procedure]) and the relevant Concessionaire Change Certificate has been issued by the Concessionaire's Representative and duly countersigned by the Province's Representative in accordance with paragraph 7 of Part 2 of Schedule 8 [Review Procedure]. A Concessionaire Change pursuant to this Section 11.4.1 will not in any way qualify or relieve the Concessionaire of its primary responsibility to comply with and satisfy the Construction Output Specifications notwithstanding any review of or failure to object to the proposed Concessionaire Change by the Province's Representative. For greater certainty, except to the extent provided in Part 3 of Schedule 13 [Concessionaire Changes], no additional payment to the Concessionaire or adjustment to the Performance Payment will be made as a consequence of implementation of a Concessionaire Change.

11.4.2 If the Concessionaire becomes aware that any element of the Construction Requirements does not comply with and satisfy the Construction Output Specifications, the Concessionaire will so notify the Province's Representative and as soon as reasonably practicable, and in any event within 30 days of becoming aware of such matter, the Concessionaire will propose (in accordance with Section 11.4.1) a Concessionaire Change to amend the Construction Requirements so that they comply with and satisfy the Construction Output Specifications.

11.4.3 For greater certainty and notwithstanding any other provision of this Agreement (including Part 2 of Schedule 8 [Review Procedure]), no Concessionaire Change proposed by the Concessionaire which amends or varies or, if implemented, would have the effect of amending or varying the Construction Output Specifications will be implemented or effective unless the Concessionaire Change is consented to by the Province's Representative in its absolute and unfettered discretion.

11.5 Breaches

11.5.1 If the Concessionaire becomes aware (including by way of notice from the Province's Representative) of a breach by the Concessionaire of any of Sections 11.1 [Responsibility] to 11.4 [Concessionaire Changes] (both inclusive), the Concessionaire will:

11.5.1.1 as soon as practicable and in any case within 7 days after it becomes aware of such breach notify the Province's Representative of the fact of such breach and the subject matter thereof; and

11.5.1.2 as soon as reasonably practicable make a submission in respect of such breach to the Review Procedure, including in such submission:

11.5.1.2.1 a full statement of the circumstances in which such breach took place together with a full explanation of the reasons for such breach and, if appropriate, for any delay in providing notification under Section 11.5.1.1;

11.5.1.2.2 a full statement of the measures, if any, which the Concessionaire proposes to adopt in order to rectify such breach and/or to preclude or mitigate the consequences thereof (if any); and

11.5.1.2.3 if such breach relates to a variation in the design, quality or scope of the Works or the Decommissioning, an application for a Concessionaire Change.

11.5.2 The Province's Representative will deal with a submission pursuant to Section 11.5.1 as soon as reasonably practicable. The Province's Representative will be entitled to make comments in respect of such a submission in its absolute and unfettered discretion, but in deciding upon the appropriate response to such submission the Province's Representative will have regard to all the circumstances, including:

11.5.2.1 whether the breach is inadvertent on the part of the Concessionaire or the Contractor or any person referred to in Section 11.2.4;

11.5.2.2 whether there has been culpable delay in making the relevant notification under Section 11.5.1.1 or submission under Section 11.5.1.2; and

11.5.2.3 whether similar breaches occurred previously and, if so, the gravity of such breaches and the measures, if any, adopted by the Concessionaire to prevent their re-occurrence.

11.5.3 The provisions of this Section 11.5 [Breaches] are without prejudice to and do not limit or restrict any other rights or remedies available to the Province in respect of any breach by the Concessionaire.

11.6 Province's Design Data

Except as otherwise expressly provided in this Agreement (for greater certainty, including Section 38.2.5), the Concessionaire will not seek to recover from the Province or the Province's employees, agents, contractors or consultants, and will indemnify and hold the Province and the Province's employees, agents, contractors and consultants harmless in respect of, any Loss or Claim which may arise from the adoption, use or application by or on behalf of the Concessionaire, the Designer, the Reviewer, the Contractor, the Operator or any other person for whom the Concessionaire is responsible in the design, construction, testing, operation, maintenance and rehabilitation of the Project Facilities or the Decommissioning of any Design Data and other data and documents made available to it or its representatives in connection with the Project by or on behalf of the Province whether before or after the execution of this Agreement.

11.7 Access and Facilities for Province's Representative

Without prejudice to Section 14.4 [Access], the Concessionaire will ensure that:

11.7.1 subject to complying with all relevant safety and site security procedures, the Province's Representative will have unrestricted access at all reasonable times (other than to the extent that restriction may be necessary to satisfy health and safety requirements) to any site, workshop or fabrication shop where materials are being manufactured for the Works or the Decommissioning for the purposes of general inspection, auditing and attending any test or investigation being carried out in respect of the Works or the Decommissioning;

11.7.1A the Province's Representative is provided with an office at the Graving Dock Site and at the Site which is serviced to the same extent as the offices of the Concessionaire at the Graving Dock Site and the Site, as the case may be;

11.7.2 the Province's Representative will have the right to attend monthly site and other similar progress meetings and the Concessionaire will give the Province's Representative timely notice of such meetings;

11.7.3 there are kept on site one copy of all drawings for construction and of all specifications, and that the same are at all reasonable times available for inspection and use by the Province's Representative and by any other person authorized by the Province's Representative; and

11.7.4 two copies and electronic versions of all drawings, numbered appendices, specifications and schedules are, following any modification thereto by the Concessionaire as a consequence of the Review Procedure, issued to the Province's Representative prior to the commencement of any Undertaking to which the drawings, numbered appendices, specifications and schedules relate.

11.8 Traffic Management During Construction

11.8.1 The Concessionaire will manage traffic on the Existing Highway and the New Highway during construction of the Works and Decommissioning (including with respect to notice, timing, predictability and duration of Closures and with respect to detours) in accordance with the terms of this Agreement (including the Traffic Management Requirements) and in such a manner as to ensure compliance with and satisfaction of the Traffic Management Output Specifications.

11.8.2 The Concessionaire may at any time hereafter submit to the Province's Representative in accordance with the Review Procedure any proposed revision to the Traffic Management Requirements (as previously revised in accordance with this Section 11.8.2) or any part thereof. If there is no objection to such proposed revision in accordance with the Review Procedure, then the Traffic Management Requirements as so revised will, subject to Section 11.8.3, be the Traffic Management Requirements for the purposes of this Agreement, subject to any further revision in accordance with this Section 11.8.2 to which there is no objection in accordance with the Review Procedure. A revision to the Traffic Management Requirements pursuant to this Section 11.8.2 will not in any way qualify or relieve the Concessionaire of its primary responsibility to comply with, satisfy and perform the Traffic Management Output Specifications notwithstanding any review of or failure to object to the proposed revision by the Province's Representative.

11.8.3 If the Concessionaire becomes aware that any element of the Traffic Management Requirements does not comply with and satisfy the Traffic Management Output Specifications, the Concessionaire will so notify the Province's Representative and as soon as reasonably practicable, and in any event within 15 days of becoming aware of such matter, the Concessionaire will propose (in accordance with Section 11.8.2) a revision to the Traffic Management Requirements so that they comply with and satisfy the Traffic Management Output Specifications.

11.8.4 The provisions of Sections 15.3.6, 15.3.7 and 15.3.8 will apply with respect to Lane Closures provided for in the schedule of Lane Closures included in the Traffic Management Requirements.

11.9 Province Access and Monitoring

11.9.1 Without limiting the Concessionaire's obligations under Section 11.7 [Access and Facilities for Province's Representative] or under any other provision of this Agreement, the Concessionaire acknowledges and agrees that, subject to complying with all relevant safety and site security procedures and any reasonable directions with regard to site safety that may be issued by or on behalf of the Concessionaire's Representative from time to time, the Province and its representatives will have unrestricted access at all reasonable times during working hours (other than to the extent that restriction may be necessary to satisfy health and safety requirements) to view the Works and the Decommissioning at the Site and the Adjacent Areas or at the Graving Dock Site; provided that the Province's exercise of such access rights will not limit or restrict the Concessionaire's responsibilities or obligations hereunder. The Province and its representatives will also have unrestricted access (other than to the extent that restriction may be necessary to satisfy health and safety requirements) to the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site:

11.9.1.1 at all reasonable times during normal working hours in relation to the matters described in Sections 8.18.10 and 8.18.12 and Section 18.2 [Items of Geological, Historical or Archaeological Interest or Value]; and

11.9.1.2 in an emergency as the Province, acting reasonably, considers suitable in the circumstances.

11.9.2 If following any viewing, visit or inspection made pursuant to Section 11.9.1 or otherwise it is discovered that there are defects in the Works or the Decommissioning or that the Concessionaire has failed to comply with any of the requirements of this Agreement pertaining to the design, construction, completion, commissioning and testing of the Works or the design and completion of the Decommissioning, the Province may, without prejudice to any other right or remedy available to it, by notice to the Concessionaire increase the level of its monitoring (to an extent reasonable in the circumstances) of the Concessionaire and the performance of the design, construction, completion, commissioning and testing of the Works and the design and completion of the Decommissioning until such time as the Concessionaire shall have demonstrated to the satisfaction of the Province, acting reasonably, that it is capable of performing and will perform all of its obligations under this Agreement in respect of those Works and/or the Decommissioning. The Concessionaire will compensate the Province for all direct costs incurred by the Province as a result of such increased level of monitoring unless the Concessionaire refers the matter to the Disputes Resolution Procedure and it is determined pursuant to the Disputes Resolution Procedure that no such defect or failure to comply existed to justify the increased level of monitoring in which event the Province will compensate the Concessionaire for its costs associated with the increased level of monitoring.

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- 11.9.3 The Concessionaire will ensure that the Province's Representative is afforded advance notice of and a full opportunity to witness inspection and test activity in accordance with the Inspection and Test Plan included or referenced in the Construction Quality Management Plan and the witness points and hold points specified by the Province's Representative in connection with its review of such Inspection and Test Plan, failing which the Concessionaire will at the request of the Province's Representative uncover any relevant part of the Works which has been covered up or otherwise put out of view or any works relating to the Decommissioning or remove any part of the Works that has been proceeded with in order to permit the Province's Representative to witness the relevant inspection or test activity. The Concessionaire will bear all costs of any such uncovering or removal, regardless of whether or not any defect is discovered in the relevant Works or Decommissioning.
- 11.9.4 The Province's Representative will have the right at any time prior to the Completion Date to request the Concessionaire to open up and inspect any part or parts of the Works or works relating to the Decommissioning where the Province's Representative (following consultation with the Concessionaire) reasonably believes that such part or parts of the Works or works relating to the Decommissioning is or are defective or that the Concessionaire has failed to comply with the requirements of this Agreement, and the Concessionaire will comply with such request. If the Province's Representative exercises its rights under this Section it will consult with the Concessionaire as to the timing of the opening up and inspection of the relevant part or parts of the Works or works relating to the Decommissioning with a view to avoiding or, if unavoidable, minimizing any delay caused to the conduct of the remaining Works and the remainder of the Decommissioning.
- 11.9.5 Subject to Section 11.9.5A, if any inspection, including pursuant to Section 11.9.3 or Section 11.9.4, shows a defect or defects in the relevant part or parts of the Works or works relating to the Decommissioning or that the Concessionaire has failed to comply with the requirements of this Agreement, the Concessionaire will:
- 11.9.5.1 without limiting the Concessionaire's obligation to bear the costs of any uncovering or removal pursuant to Section 11.9.3, bear the cost of such inspection; and
 - 11.9.5.2 rectify all such defects and non-compliances diligently and in a timely manner,
- and the Concessionaire will bear all cost and consequences of such inspection and rectification and will not be entitled to any additional compensation or extension of time or other relief in relation thereto.
- 11.9.5A If any inspection pursuant to Section 11.9.4 does not show a material defect or defects in the relevant part or parts of the Works or works relating to the

Decommissioning, the Province will bear all costs and consequences of such inspection and rectification.

11.9.6 The Concessionaire acknowledges that the exercise by the Province or the Province's Representative of the rights under this Section 11.9 [Province Access and Monitoring] is without prejudice to any other rights or remedies of the Province under this Agreement and will in no way affect the obligations of the Concessionaire under this Agreement except as expressly set out in this Section.

12. **SCHEDULE**

12.1 Project Schedule

The Project Schedule sets out the schedule in accordance with which the Concessionaire is to carry out the investigations, design, construction, commissioning, testing, maintenance and related works provided for in the Construction Output Specifications and the Construction Requirements.

12.2 Variations to Project Schedule

12.2.1 If in the opinion of the Province's Representative or the Concessionaire at any time the actual progress of the design, construction, completion, commissioning and testing of the Works or the design and completion of the Decommissioning does not conform with the Project Schedule then, within 21 days of being so required by the Province's Representative or (if earlier) becoming aware of the same, the Concessionaire will:

12.2.1.1 provide the Province's Representative with a report identifying the reasons for such non-conformity; and

12.2.1.2 submit to the Province's Representative in accordance with the Review Procedure a revised Project Schedule, which will:

12.2.1.2.1 satisfy all requirements of the Construction Output Specifications and the Construction Requirements;

12.2.1.2.2 provide for the Works and the Decommissioning to be commenced and pursued diligently to Completion in accordance with Section 12.5 [Achievement of Completion]; and

12.2.1.2.3 be in accordance with Good Industry Practice.

The Province's Representative will be entitled to object to the revised Project Schedule submitted by the Concessionaire only on the grounds set out in paragraph 3.3 of Part 2 of Schedule 8 [Review Procedure].

12.2.2 Without prejudice to Section 12.2.1, the Province may at any time by a specific notice require a revision to the Project Schedule to accelerate the performance of the design, construction, completion, commissioning and testing of the Works or the design and completion of the Decommissioning or both or any component thereof (if such acceleration is reasonably possible), provided that if any such revision will result in an increase in the Concessionaire's costs of completing the Works and the Decommissioning, as applicable, then such revision will be deemed to be a Province Change and the provisions of Part 2 of Schedule 13 [Province Changes] will apply accordingly.

12.3 Preparation of Works Schedule

12.3.1 The Concessionaire will prepare:

12.3.1.1 an initial Works Schedule, which will be in all respects consistent with the Project Schedule, and will submit to the Province's Representative, in accordance with the Review Procedure, a copy of the same within 90 days of the Commencement Date;

12.3.1.2 a revised Works Schedule in respect of each revised Project Schedule submitted in accordance with Section 12.2.1, which will be in all respects consistent with the revised Project Schedule, and will submit to the Province's Representative, in accordance with the Review Procedure, a copy of the revised Works Schedule at the same time as the revised Project Schedule is submitted in accordance with Section 12.2.1; and

12.3.1.3 a revised Works Schedule in respect of each revision to the Project Schedule required by the Province pursuant to Section 12.2.2, which will be in all respects consistent with the revised Project Schedule, and will submit to the Province's Representative, in accordance with the Review Procedure, a copy of the revised Works Schedule as soon as practicable following notification of the change to the Project Schedule required by the Province.

12.3.2 Other than in the circumstances referred to in Section 12.3.1.2 or Section 12.3.1.3, if the Concessionaire wishes to make any material amendment to the Works Schedule or if in the opinion of the Province's Representative or the Concessionaire at any time the actual progress of the design, construction, completion, commissioning and testing of the Works and the design and completion of the Decommissioning does not conform with the Works Schedule in a material respect then, prior to making any such amendment or within 14 days of being so required by the Province's Representative or (if earlier) becoming aware of such non-conformity, the Concessionaire will:

12.3.2.1 provide the Province's Representative with a report identifying the reasons for such amendment or non-conformity; and

12.3.2.2 submit to the Province's Representative in accordance with the Review Procedure a revised Works Schedule, which will be in all respects consistent with the Project Schedule.

12.3.3 The Province's Representative will be entitled to object to the initial Works Schedule or any revised Works Schedule only on the grounds set out in paragraph 3.3 of Part 2 of Schedule 8 [Review Procedure].

12.3.4 Subject to Section 12.4 [Works Schedule], the Works Schedule will be provided for the information of the Province and the Province's Representative. In the event of any conflict between the Project Schedule and the Works Schedule, the Project Schedule will (unless otherwise agreed by the Province in its absolute and unfettered discretion) prevail.

12.4 Works Schedule

The initial Works Schedule and any revised Works Schedule submitted in accordance with Section 12.3 [Preparation of Works Schedule] will:

12.4.1 be in accordance with Good Industry Practice;

12.4.2 satisfy all requirements of the Construction Output Specifications and the Construction Requirements;

12.4.3 without prejudice to Section 12.4.2, be in sufficient detail so as to enable the Province's Representative to resource itself appropriately; and

12.4.4 provide for the design, construction, completion, commissioning and testing of the Works and the design and completion of the Decommissioning to be commenced and pursued diligently to Completion in accordance with Section 12.5 [Achievement of Completion].

12.5 Achievement of Completion

12.5.1 The Concessionaire will commence the design, construction, completion, commissioning and testing of the Works and the design and completion of the Decommissioning promptly following the Commencement Date and pursue them diligently with a view of ensuring that they are performed in accordance with the Project Schedule and in material conformity with the Works Schedule and will use all reasonable efforts to ensure that:

12.5.1.1 completion of the Works to such standard as would require the issue of the Substantial Completion Certificate occurs on or before the Scheduled Substantial Completion Date; and

12.5.1.2 completion of the Works and the Decommissioning to such standard as would require the issue of the Completion Certificate occurs on or before the Scheduled Completion Date.

12.5.2 Without prejudice to Section 12.5.1, the Concessionaire will in any event ensure that:

12.5.2.1 the Works are completed to such standard as would require the issue of the Substantial Completion Certificate by no later than the Substantial Completion Longstop Date; and

12.5.2.2 the Works and the Decommissioning are completed to such standard as would require the issue of the Completion Certificate by no later than the Completion Longstop Date.

12.6 Delay

12.6.1 Without prejudice to Sections 12.2 [Variations to Project Schedule] and 12.3 [Preparation of Works Schedule], the Concessionaire will give notice to the Province's Representative as soon as reasonably practicable after, and in any event within 21 days of, it becoming aware of an event which has caused, or which will or might reasonably be expected to cause material delay or impediment to completion of the Works or Decommissioning or any element of the Works or Decommissioning by the date set out in the Project Schedule for such completion or by the applicable date set forth in Section 12.5.1. Thereafter, but in any event not later than 21 days after such notification, the Concessionaire will give further written details to the Province's Representative which will include:

12.6.1.1 details of the circumstances from which the delay or impediment arises and its expected duration (or the Concessionaire's reasonable estimate of its expected duration);

12.6.1.2 details of the contemporary records which the Concessionaire will maintain to substantiate such delay or impediment;

12.6.1.3 details of the consequences, whether direct or indirect, which such delay or impediment may have on completion of the Works or Decommissioning or any element of either of them and the anticipated costs associated with such delay or impediment, including the extent to which achievement of the Substantial Completion Date by the Scheduled Substantial Completion Date and/or the Substantial Completion Longstop Date and/or achievement of the Completion Date by the Completion Longstop Date is likely to be affected by the delay or impediment; and

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- 12.6.1.4 details of any measures which the Concessionaire has adopted or proposes to adopt to mitigate the consequences of such delay or impediment.
- 12.6.2 The Concessionaire will, following notification of any event pursuant to Section 12.6.1:
- 12.6.2.1 promptly provide such further written information of which it becomes aware or as the Province's Representative may reasonably require regarding the nature and likely duration of such event;
- 12.6.2.2 afford the Province's Representative reasonable facilities for investigating the effect on the Concessionaire or the Project Schedule of such event including on-site and off-site inspection and meetings; and
- 12.6.2.3 promptly take all reasonable efforts necessary and consistent with Good Industry Practice to minimize the delay to completion of the Works and Decommissioning or any element of either of them.
- 12.6.3 If the Concessionaire has failed to comply with the requirements as to the giving of notice within the 21 day period under Section 12.6.1, then the Province's Representative may require the Concessionaire to submit a written explanation of the reasons for such failure. If the Province's Representative has not confirmed that the reasons given by the Concessionaire are satisfactory within 30 days of their receipt, the Concessionaire may refer the matter for resolution under the Disputes Resolution Procedure failing which the Parties will be deemed to have agreed that the failure is not excusable. If the Parties agree or the decision of the Disputes Resolution Procedure is that the failure is not excusable, then subject to any other determination under the Disputes Resolution Procedure, the period of any delay in the giving of such notice will not at any time be taken into account in any calculation to be made where the Concessionaire is entitled to any additional payment or extension of time in any of the circumstances referred to in Section 12.6.5 or Section 12.6.6.
- 12.6.4 The Province's Representative will be entitled, after receipt of written details under Section 12.6.1 or of further particulars under Section 12.6.2, by notice to require the Concessionaire to provide such further supporting particulars as it may consider necessary.
- 12.6.5 In addition to any extension of time to which the Concessionaire may be entitled under Sections 12.6.6 and 12.6.7 and any other compensation payable under the provisions of this Agreement, the Concessionaire shall have a claim for additional payment if completion of any part of the Works is delayed or impeded as a result of:

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- 12.6.5.1 an event of Eligible Force Majeure resulting in uninsured rectification works, in respect of which the provisions of Part 2 of Schedule 13 [Province Changes] will apply;
- 12.6.5.2 a Province Change, in respect of which the provisions of Part 2 of Schedule 13 [Province Changes] will apply; or
- 12.6.5.3 a Compensation Event, in respect of which the provisions of Part 4 of Schedule 13 [Compensation Events] will apply.
- 12.6.6 To the extent that any delay or impediment identified in a notice given by the Concessionaire pursuant to Section 12.6.1 is caused by a Compensation Event, an event of Force Majeure or a Province Change, in addition to any other relief or remedy available to the Concessionaire under this Agreement, the Substantial Completion Longstop Date and/or Completion Longstop Date will each be subject to extension by the applicable Delay Period determined in accordance with Section 12.6.7. For greater certainty, the Concessionaire will have no claim for any extension of any such date as a result of any delay or impediment which is not a Compensation Event, an event of Force Majeure or a Province Change, and any such claim will in any event be subject to the provisions of Section 12.6.3. Notwithstanding the foregoing provisions of this Section 12.6.6 and without limiting the Concessionaire's obligations under Section 12.6.2.3, in the case of any delay or impediment caused by a Compensation Event, an event of Force Majeure or a Province Change, the Concessionaire, to the extent it is reasonably possible to do so, will implement and comply with any instructions given by the Province's Representative to accelerate construction or take other reasonable steps to avoid the delay or impediment or to reduce the period of the delay or mitigate the effect of the impediment, provided that if compliance with such instructions results in an increase in the Concessionaire's costs of completing the Works or Decommissioning (disregarding costs the Concessionaire would otherwise have incurred in performing its obligations under Section 12.6.2.3) the Concessionaire will be entitled to claim compensation in respect of such increased costs therefor in accordance with the provisions of Part 4 of Schedule 13 [Compensation Events].
- 12.6.7 Where the Concessionaire may be entitled to any additional payment as a result of an event referred to in Section 12.6.5 or to an extension of the Substantial Completion Longstop Date and/or Completion Longstop Date as a result of an event referred to in Section 12.6.6, then subject to:
- 12.6.7.1 the Concessionaire putting forward proposals pursuant to Section 12.6.1.4 as to the measures which it intends to adopt in order to mitigate the consequences of any delay or impediment to completion of the Works or Decommissioning by the date set out in the Project Schedule for such completion; and
- 12.6.7.2 the Concessionaire complying with the requirements of Section 12.6.2,

the Province's Representative will, as soon as reasonably practicable, notify the Concessionaire (either prospectively or retrospectively) of its determination in accordance with this Section 12.6.7 of the period of the delay or impediment (if any) to completion of the Works or Decommissioning or relevant element of the Works or Decommissioning (in each case a "Delay Period") which has arisen or will arise as a consequence of the relevant event. If the Province's Representative determines that no Delay Period has arisen or will arise in respect of any such date or the Concessionaire considers a Delay Period so determined to be insufficient, then the Concessionaire may refer the matter to the Disputes Resolution Procedure for determination.

12.6.8 In determining the period of any delay for the purposes of any of Sections 12.6.5, 12.6.6 and 12.6.7 there will be taken into account, *inter alia*:

12.6.8.1 whether (and if so to what extent), as a consequence of the failure of the Concessionaire to conduct the Undertakings in accordance with this Agreement at all times prior to the occurrence of the event giving rise to the delay, the impact of the event on the timing of the completion of the Works or Decommissioning is greater than it would otherwise have been;

12.6.8.2 (without prejudice to Section 12.6.2.3) the extent to which the delay or impediment ought reasonably to be or to have been mitigated by the Concessionaire by the taking of reasonable steps after its occurrence in accordance with Good Industry Practice.

12.6.9 For greater certainty, in the circumstances set out in Section 12.6.8 there will be deducted from any period of delay claimed by the Concessionaire the period by which the period of delay would have been reduced by such mitigation referred to in Section 12.6.8.2 and the Delay Period will be determined accordingly.

12.6.10 Following the determination of a Delay Period under the preceding Sections, the Concessionaire shall submit to the Province's Representative in accordance with the Review Procedure a revised Project Schedule and a revised Works Schedule.

13. **INSPECTION AND COMPLETION**

13.1A Independent Certifier

13.1A.1 Appointment

The Parties, acting reasonably, agree to appoint an Independent Certifier from the list of potential Independent Certifiers that has been agreed upon between the Parties as at the Commencement Date for the purposes of this Agreement, pursuant to the Independent Certifier Contract.

13.1A.2 Role of Independent Certifier

13.1A.2.1 The general role, obligations and functions of the Independent Certifier are described in Part 9 of Schedule 5 [Form of Independent Certifier Contract].

13.1A.2.2 The Province's Representative and the Concessionaire's Representative are entitled to attend and participate in all meetings attended by the Independent Certifier.

13.1A.3 Changes in Terms of Appointment

13.1A.3.1 Neither the Province nor the Concessionaire will without the other's prior approval (not to be unreasonably withheld or delayed):

13.1A.3.1.1 waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Independent Certifier; or

13.1A.3.1.2 vary the terms of the Independent Certifier Contract or the services performed or to be performed by the Independent Certifier.

13.1A.3.2 Each of the Province and the Concessionaire will perform its respective obligations arising under or in connection with the Independent Certifier Contract.

13.1A.4 Right to Change Appointment

The Parties acknowledge that the Independent Certifier may perform services that relate to matters in connection with the Concessionaire and the Funders and Contractor in addition to the functions of the Independent Certifier under this Agreement, and that either the Province or the Concessionaire may, at its option, acting reasonably, terminate the Independent Certifier Contract upon 30 days' notice to the other and the Independent Certifier. If either the Province or the Concessionaire gives such notice, then the Province and the Concessionaire will pursuant to Section 13.1A.7 appoint a new Independent Certifier to perform the functions of the Independent Certifier under this Agreement. The Province and the Concessionaire agree that, notwithstanding the 30 days' notice of termination, the Independent Certifier will continue on a day-to-day basis thereafter until a new Independent Certifier is appointed.

13.1A.5 Cooperation

The Province and the Concessionaire agree to cooperate with each other generally in relation to all matters within the scope of or in connection with the Independent

Certifier Contract. All instructions and representations issued or made by either the Province or the Concessionaire to the Independent Certifier will be simultaneously copied to the other and both the Province's Representative and the Concessionaire's Representative will be entitled to attend all inspections performed by or meetings involving the Independent Certifier.

13.1A.6 Payment of Independent Certifier

The Province and the Concessionaire will share equally the responsibility for the payment of all fees and costs of the Independent Certifier.

13.1A.7 Replacement

13.1A.7.1 In the event of the Independent Certifier's appointment being terminated otherwise than for full performance, the Province and the Concessionaire will liaise and cooperate with each other in order to appoint a suitably qualified and experienced replacement consultant to act as the Independent Certifier as soon as reasonably practicable. The identity of any such replacement will be as agreed by the Province and the Concessionaire and the terms of his or her appointment will, unless otherwise agreed, be as set out in the Independent Certifier Contract.

13.1A.7.2 In the event the Province and the Concessionaire fail to agree upon a replacement Independent Certifier within 7 days of the original Independent Certifier's appointment being terminated, then a replacement Independent Certifier will be chosen as follows:

13.1A.7.2.1 each of the Province and the Concessionaire will within 7 days thereafter select three suitably qualified and experienced replacements that would be acceptable to that Party, and will provide notice thereof to the other Party, with a ranking of preference for replacements;

13.1A.7.2.2 if the Province and the Concessionaire have both selected a common replacement, then such common replacement will be the Independent Certifier, and if there is more than one common replacement, then the replacement with the highest overall ranking (calculated by adding together the ordinal rank assigned by both Parties) will be selected, and in the event of a tie, the lowest-cost of such tied replacements will be selected; and

13.1A.7.2.3 if the Parties have not selected a common replacement, then the determination of the new replacement will be determined by the British Columbia International Commercial Arbitration Centre.

13.1 Substantial Completion Certificate

- 13.1.1 The Concessionaire will issue to the Independent Certifier and the Province's Representative a notice informing the Independent Certifier and the Province's Representative at least 20 Working Days prior to the date upon which the Concessionaire expects the Works will be Substantially Completed. If the Concessionaire has at any time reason to believe that the said date expected for Substantial Completion as aforesaid will be delayed by more than 5 Working Days, it will issue a fresh notice pursuant to this Section 13.1.1 informing the Independent Certifier and the Province's Representative of the new date expected for Substantial Completion as aforesaid. Upon the Concessionaire notifying the Independent Certifier and the Province's Representative that Substantial Completion as aforesaid has occurred and subject to the delivery to the Independent Certifier and the Province's Representative of a Concessionaire's Substantial Completion Certificate and all other relevant Certificates and supporting documentation in accordance with Part 3 of Schedule 5 [Design and Certification Procedure], the Province's Representative and the Concessionaire will cause the Independent Certifier to commence within 10 Working Days of receipt of such notice an inspection of the Works (and the Concessionaire will not object to any Interested Party, any Public Authority to whom any Temporary Off-Site Facilities are to be handed over and/or any contractors or consultants retained by the Province or any such Interested Party which has a legal obligation or right to inspect the Works or Public Authority participating in such inspection).
- 13.1.2 The Province's Representative and the Concessionaire's Representative will cause the Independent Certifier within 20 Working Days of the commencement of such inspection to either:
- 13.1.2.1 if Substantial Completion has been attained, issue a Substantial Completion Certificate to the Province and the Concessionaire; or
 - 13.1.2.2 if Substantial Completion has not been attained, notify the Concessionaire's Representative and the Province's Representative of its decision not to issue a Substantial Completion Certificate and issue a report detailing the matters that the Independent Certifier considers are required to be performed by the Concessionaire.
- 13.1.3 The Independent Certifier will refuse to issue a Substantial Completion Certificate if:
- 13.1.3.1 the Works have not been Substantially Completed; or
 - 13.1.3.2 satisfactory evidence of compliance with Section 20.1.1.3 has not been provided to the Province.

13.1.4. Where the Independent Certifier has issued a report referred to in Section 13.1.2.2 and the Concessionaire has not referred a dispute in relation thereto for resolution pursuant to the Disputes Resolution Procedure, the Concessionaire shall within 7 days after receipt of such report provide the Independent Certifier and the Province with details of all additional rectification actions that need to be performed as a result of all matters raised in such report, including the following:

13.1.4.1 a detailed list indicating the rectification actions proposed for all matters raised in such report;

13.1.4.2 a schedule for completion of all such rectification actions; and

13.1.4.3 any additional Concessionaire commissioning that needs to be undertaken as a result of the rectification actions,

and the Concessionaires shall perform all such additional rectification actions and Concessionaire commissioning. Upon completion thereof, the Concessionaire may give a further Substantial Completion notice and Section 13.1 shall be repeated until the Substantial Completion Certificate has been issued.

13.2 Completion Certificate

13.2.1 Notwithstanding the issue of a Substantial Completion Certificate, the Concessionaire will promptly complete all outstanding Works and the Decommissioning as soon as practicable and in accordance with Section 12.5 [Achievement of Completion].

13.2.2 The Concessionaire will issue to the Independent Certifier and the Province's Representative a notice informing the Independent Certifier and the Province's Representative at least 20 Working Days prior to the date upon which the Concessionaire expects the whole of the Works and the Decommissioning to be Completed. If the Concessionaire has at any time reason to believe that the said date expected for Completion as aforesaid will be delayed by more than 5 Working Days, it will issue a fresh notice pursuant to this Section 13.2.2 informing the Independent Certifier and the Province's Representative of the new date expected for Completion as aforesaid. Upon the Concessionaire notifying the Independent Certifier and the Province's Representative that Completion as aforesaid has occurred and subject to the delivery to the Independent Certifier and the Province's Representative of a Concessionaire's Completion Certificate and all other relevant Certificates and supporting documentation in accordance with Part 3 of Schedule 5 [Design and Certification Procedure], the Province's Representative and the Concessionaire will cause the Independent Certifier to commence, within 10 Working Days of receipt of such notice an inspection of the Project Facilities, the Site and the Adjacent Areas (and the Concessionaire will not object to the participation in such inspection of any contractors or consultants retained by the Province or any relevant Public Authority to whom any Temporary Off-Site Facilities are to be handed over).

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- 13.2.3 The Province's Representative and the Concessionaire's Representative will cause the Independent Certifier within 20 Working Days of the commencement of such inspection to either:
- 13.2.3.1 issue a Completion Certificate to the Province and the Concessionaire; or
 - 13.2.3.2 notify the Concessionaire's Representative and the Province's Representative in writing of its decision not to issue a Completion Certificate and issue a report detailing the matters that the Independent Certifier considers are required to be performed by the Concessionaire.
- 13.2.4 Any dispute in relation to the Independent Certifier's issue or failure to issue the Completion Certificate may be referred for resolution pursuant to the Disputes Resolution Procedure.
- 13.2.5. Where the Independent Certifier has issued a report in accordance with Section 13.2.3.2 and the Concessionaire has not referred a dispute in relation thereto for resolution pursuant to the Disputes Resolution Procedure, the Concessionaire shall within 7 days after receipt of such report, provide the Independent Certifier and the Province with details of all additional rectification actions and Concessionaire commissioning that needs to be performed as a result of all matters raised in such report, including the following:
- 13.2.5.1 a detailed list indicating the rectification actions proposed for all matters raised in such report;
 - 13.2.5.2 a schedule for completion of all such rectification actions; and
 - 13.2.5.3 any additional Concessionaire commissioning that needs to be undertaken as a result of the rectification actions, and the Concessionaire shall perform all such additional rectification actions and Concessionaire commissioning. Upon completion thereof, the Concessionaire may give a further Completion notice and Sections 13.2.3 and 13.2.4, inclusive, shall be repeated until the Completion Certificate has been issued.
- 13.2.6 The issue of the Substantial Completion Certificate and the Completion Certificate will be without prejudice to:
- 13.2.6.1 the obligation of the Concessionaire to operate, maintain and rehabilitate the Project Facilities subject to and in accordance with this Agreement;
 - 13.2.6.2 any warranties given by the Concessionaire under this Agreement; and
 - 13.2.6.3 Sections 13.3.1.3 and 13.3A.1.3.

13.2A Opinion of Province's Representative and Concessionaire's Representative and Participation in Inspections

- 13.2A.1 The Province's Representative may, at any time following receipt of a notice given by the Concessionaire pursuant to Section 13.1.1 or 13.2.2 and prior to the Independent Certifier issuing or notifying the Concessionaire and the Province's Representative of its decision not to issue the Substantial Completion Certificate or Completion Certificate (as the case may be) pursuant to Section 13.1.2 or 13.2.3 (as the case may be), provide the Independent Certifier and the Concessionaire with the Province's Representative's submissions as to whether the conditions for issuance of the Substantial Completion Certificate or Completion Certificate have been satisfied and, if applicable, any reasons as to why the Province's Representative considers that the Substantial Completion Certificate or Completion Certificate should not be issued, and the Independent Certifier will consider such submissions in determining whether to issue the Substantial Completion Certificate or Completion Certificate.
- 13.2A.2 The Concessionaire's Representative may provide the Independent Certifier with its comments on the submissions made by the Province's Representative under Section 13.2A.1 and the Independent Certifier will consider such comments in determining whether to issue the Substantial Completion Certificate or Completion Certificate.
- 13.2A.3 The Concessionaire's Representative, the Province's Representative and/or any contractors or consultants retained by either of them as may be necessary may participate in any inspection carried out by the Independent Certifier pursuant to Section 13.1 [Substantial Completion Certificate] or Section 13.2 [Completion Certificate].

13.3 Temporary Off-Site Facilities

- 13.3.1 Upon the issue of a Substantial Completion Certificate or a Completion Certificate, in respect of the Temporary Off-Site Facilities to be turned over to a Public Authority upon Substantial Completion or Completion thereof (as applicable):
- 13.3.1.1 such Temporary Off-Site Facilities will be turned over to the relevant Public Authority (subject to Section 13.3.1.3);
- 13.3.1.2 such Temporary Off-Site Facilities will be excluded from the definition of "Off-Site Facilities" and the Temporary Adjacent Areas will be excluded from the definition of the Adjacent Areas for all purposes of this Agreement (save for the purpose of giving effect to the provisions of this Section 13.3 [Temporary Off-Site Facilities]); and
- 13.3.1.3 the Concessionaire will execute all such work of amendment, reconstruction and remedying of defects, shrinkages or other faults as the Independent Certifier may reasonably instruct the Concessionaire's Representative to execute in order to bring or return (reasonable wear

and tear excepted, except in the case of items affecting public safety) such Temporary Off-Site Facilities to the standard required by the Construction Output Specifications and the Construction Requirements, such instruction to be issued in respect of all Temporary Off-Site Facilities during the period of 30 days following the date of issue of the Substantial Completion Certificate or Completion Certificate (as applicable) or within 28 days after the expiration of such period as a result of an inspection made by or on behalf of the Independent Certifier prior to the expiration of such period (and the Concessionaire will not object to the relevant Public Authority and/or any contractors or consultants retained by the Province or such Public Authority participating in such inspection).

- 13.3.2 For greater certainty, all work referred to in Section 13.3.1.3 will be executed by the Concessionaire at its own cost.
- 13.3.3 As soon as practicable following the issue of the Substantial Completion Certificate or Completion Certificate (as applicable), the Concessionaire will vacate the Temporary Adjacent Areas turned over to any Public Authority at that time and leave them clear and free from such debris, construction materials, Construction Plant and the like as shall arise from the execution of the Works in respect of the relevant Temporary Off-Site Facilities to the reasonable satisfaction of the Independent Certifier.
- 13.3.4 The relevant Public Authority who assumes responsibility for the operation, maintenance and rehabilitation of the relevant Temporary Off-Site Facilities in accordance with Section 13.3.1.1 will be entitled to the benefit of any warranties by the Concessionaire under this Agreement to the extent applicable to such Temporary Off-Site Facilities and to the benefit of the undertakings by the Concessionaire under this Section 13.3 [Temporary Off-Site Facilities] to the extent applicable to such Temporary Off-Site Facilities. The Concessionaire will execute such further documents and assurances and do all such other things as may be reasonably requested by the Province or the relevant Public Authority for the purposes of confirming or giving effect to the provisions of this Section 13.3.4.

13.3A Kelowna Land

- 13.3A.1 Upon the issue of the Completion Certificate in respect of the Works on the Kelowna Land to be turned over to the City of Kelowna:
- 13.3A.1.1 the City of Kelowna will assume responsibility for the operation, maintenance and rehabilitation (subject to Section 13.3A.1.3) of the Kelowna Land and the Permanent Works on the Kelowna Land;
- 13.3A.1.2 the Project Facilities on the Kelowna Land will be excluded from the definition of the “Existing Highway”, the “New Highway” and the

“Concession Highway” and the Kelowna Land will be excluded from the definition of the Site for all purposes of this Agreement (save for the purpose of giving effect to the provisions of this Section 13.3A [Kelowna Land]); and

13.3A.1.3 the Concessionaire will execute all such work of amendment, reconstruction and remedying of defects, shrinkages or other faults as the Independent Certifier may reasonably instruct the Concessionaire to execute in order to bring or return (reasonable wear and tear excepted, except in the case of items affecting public safety) the relevant Project Facilities to the standard required by the Construction Output Specifications and the Construction Requirements, such instruction to be issued in respect of the Kelowna Land during the period of 30 days following the date of issue of the Substantial Completion Certificate or Completion Certificate (as applicable) or within 30 days after the expiration of such period as a result of an inspection made by or on behalf of the Independent Certifier prior to the expiration of such period.

13.3A.2 For greater certainty, all work referred to in Section 13.3A.1.3 will be executed by the Concessionaire at its own cost.

13.3A.3 On the issue of the Completion Certificate, the Concessionaire will vacate the Kelowna Land turned over to the City of Kelowna at that time and leave the Kelowna Land in the state required in the Construction Output Specifications and the Construction Requirements.

13.3A.4 The City of Kelowna will be entitled to the benefit of any warranties by the Concessionaire under this Agreement to the extent applicable to the Project Facilities on the Kelowna Land and to the benefit of the undertakings by the Concessionaire under this Section 13.3A [Kelowna Land] to the extent applicable to such Project Facilities. The Concessionaire will execute such further documents and assurances and do all such other things as may be reasonably requested by the Province or the City of Kelowna for the purposes of confirming or giving effect to the provisions of this Section 13.3A.4.

13.4 Disputed Certificate

13.4.1 If there is any Dispute as to the decision of the Independent Certifier to issue or not to issue a Substantial Completion Certificate or Completion Certificate in accordance with the terms of Section 13.1 [Substantial Completion Certificate] or Section 13.2 [Completion Certificate], respectively, then either the Province’s Representative or the Concessionaire may refer such Dispute for resolution under the Disputes Resolution Procedure.

13.4.2 Notwithstanding any other provision in this Agreement or Schedule 16 [Disputes Resolution Procedure], if the Independent Certifier has issued the Substantial

Completion Certificate or Completion Certificate and the Province's Representative has referred a Dispute in respect thereof for resolution under the Disputes Resolution Procedure pursuant to Section 13.4.1, then for all purposes of this Agreement the Substantial Completion Certificate or Completion Certificate, as the case may be, will be deemed to have been issued unless it is determined in accordance with the Disputes Resolution Procedure that it was not properly issued by the Independent Certifier in accordance with the terms of Section 13.1 [Substantial Completion Certificate] or Section 13.2 [Completion Certificate], as applicable.

13.4.3 If the Substantial Completion Certificate is determined in accordance with the Disputes Resolution Procedure not to have been properly issued on the grounds that the Concession Highway was not safe for public use or the cost of completing the required rectification actions is more than ten per cent of the costs incurred by the Concessionaire under the Design-Build Contract up to the date of such determination pursuant to the Disputes Resolution Procedure, the Province may withhold the Performance Payments until such time as the required rectification actions have been fully completed and will thereafter forthwith forward the withheld Performance Payments to the Concessionaire.

13.4.3A If the Substantial Completion Certificate is determined in accordance with the Disputes Resolution Procedure not to have been properly issued and the cost of completing the required rectification actions is less than ten per cent of the costs incurred by the Concessionaire under the Design-Build Contract up to the date of such determination pursuant to the Disputes Resolution Procedure, the Province will apply an Asset Condition Retention in accordance with Part 6 of Schedule 10 [Payment Retentions].

13.4.4 If any Dispute as to the decision of the Independent Certifier to issue or not to issue a Substantial Completion Certificate or a Completion Certificate is referred for resolution under the Disputes Resolution Procedure, the Substantial Completion Longstop Date and the Completion Longstop Date shall be extended to take account of the time spent determining such Dispute.

14. **OPERATION, MAINTENANCE AND REHABILITATION**

14.1 Operation, Maintenance and Rehabilitation

Except to the extent that it is prohibited from so doing by reason of a breach by the Province of its obligations under Section 8.1 [Access for Concessionaire over the Site and Adjacent Areas] from the Substantial Completion Date and thereafter throughout the Contract Period the Concessionaire will operate, maintain and rehabilitate the Project Facilities, the Site and the Adjacent Areas in accordance with the terms of this Agreement (including the O&M Requirements) and in such a manner as to ensure satisfaction of the O&M Output Specifications and all other applicable Technical Requirements.

14.2 O&M Requirements

14.2.1 The Concessionaire may at any time hereafter submit to the Province's Representative in accordance with the Review Procedure any proposed revision to or substitution for the O&M Requirements or (as previously varied in accordance with this Section 14.2 [O&M Requirements]) or any part thereof. If there is no objection to such proposed revision or substitution (on the grounds set out in paragraph 3.4 of Part 2 of Schedule 8 [Review Procedure]), then the O&M Requirements as so varied will, subject to Section 14.2.2, be the O&M Requirements for the purposes of this Agreement, subject to any further revision or substitution in accordance with this Section 14.2.1 to which there is no objection in accordance with the Review Procedure. A revision to or substitution for the O&M Requirements pursuant to this Section 14.2.1 will not in any way qualify or relieve the Concessionaire of its primary responsibility to comply with, satisfy and perform the O&M Output Specifications notwithstanding any review of or failure to object to the proposed revision or substitution by the Province's Representative. For greater certainty, no additional payment to the Concessionaire or adjustment to the Performance Payments will be made as a consequence of implementation of a revision to or substitution for the O&M Requirements pursuant to this Section 14.2.1 or Section 14.2.2.

14.2.2 If the Concessionaire becomes aware that any element of the O&M Requirements does not comply with and satisfy the O&M Output Specifications, the Concessionaire will so notify the Province's Representative and as soon as reasonably practicable and in any event within 30 days of becoming aware of such matter the Concessionaire will propose (in accordance with Section 14.2.1) a revision to or substitution for the O&M Requirements so that they comply with and satisfy the O&M Output Specifications.

14.3 Inspections

14.3.1 The Concessionaire will give the Province's Representative timely notice of any general or principal inspection or any other inspection of Structures or other elements of the Project Facilities to be conducted in accordance with the O&M Output Specifications and the O&M Requirements or any of the other Technical Requirements.

14.3.2 The Province's Representative will be entitled to attend any inspection of the Project Facilities (whether or not it is entitled to receive or has received notice thereof in accordance with Section 14.3.1) upon giving reasonable notice to the Concessionaire.

14.4 Access

14.4.1 The Concessionaire will ensure that, subject to Section 8.1 [Access for Concessionaire Over the Site and Adjacent Areas]:

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- 14.4.1.1 the Province's Representative and any contractors, consultants or other persons authorized by the Province's Representative have unrestricted (other than to the extent that restriction may be necessary to satisfy health and safety requirements) access to the Project Facilities, the Site and the Adjacent Areas at all reasonable times throughout the Contract Period in order to perform the Province's Representative's functions under this Agreement;
- 14.4.1.2 the Province, BCTFA and any contractors, consultants or other persons authorized by the Province or BCTFA have unrestricted (other than to the extent that restriction may be necessary to satisfy health and safety requirements) access to the Project Facilities, the Site and the Adjacent Areas at all reasonable times throughout the Contract Period in order:
- 14.4.1.2.1 to perform any obligations or exercise any rights of the Province or BCTFA under this Agreement;
- 14.4.1.2.2 to fulfil any statutory or other functions or duties; or
- 14.4.1.2.3 without prejudice to Sections 14.4.1.2.1 and 14.4.1.2.2, to conduct any study, test or inspection for purposes of research initiated by the Province or BCTFA or any other person authorized by the Province or BCTFA, provided that any such study, test or inspection will be conducted in accordance with the provisions of Section 14.7 [Inspections]; and
- 14.4.1.3 without prejudice to Section 14.4.1.2, the owners or operators of any Third Party Facilities and their agents or contractors have access to the Project Facilities, the Site or the Adjacent Areas at all reasonable times and on reasonable notice throughout the Contract Period to install, operate, manage, maintain, repair, rehabilitate or reconstruct such Third Party Facilities, provided that the Province and BCTFA to the extent they have the legal authority to do so, will cause such parties in exercising such rights to use reasonable efforts to avoid physical disruption to the operation of the Concession Highway or physical damage to the Concession Highway.
- 14.4.2 Subject to Section 8.1 [Access for Concessionaire Over the Site and Adjacent Areas], the Concessionaire will allow all Relevant Authorities (including any Utility Suppliers) to access, or cause them to be allowed access, to the Project Facilities, the Site and the Adjacent Areas throughout the Contract Period in order to carry out any work (including surveys and inspections) in accordance with any Legal Requirements and to exercise any right, power or duty or perform any duty or obligation of such Relevant Authority under any Laws and Regulations, subject, other than in the case of an emergency, to reasonable notice being given. Whenever consistent with the requirements of the Relevant Authority in carrying out such work

or the Legal Requirements or Laws and Regulations (as the case may be) pursuant to which the work is to be carried out or the right or power is to be exercised or the duty or obligation is to be performed, such access may be limited so as not unnecessarily to impede or restrict traffic flows or any works being carried out by the Concessionaire. Subject to Section 8.1 [Access for Concessionaire Over the Site and Adjacent Areas], the Concessionaire will also allow the Province, BCTFA and any other Relevant Authorities or cause them to be allowed to enter upon the Project Facilities, the Site and the Adjacent Areas and to travel on the Concession Highway for the purposes of access to and from any other lands and/or facilities adjacent to or in proximity to the Project Facilities, the Site and the Adjacent Areas (including any other highway) owned or operated by such person or in which such person has any interest.

14.4.3 The Province will ensure that the Concessionaire (or the Contractor or Operator) has access to the Connecting Roads for which the Province is the highway authority at all reasonable times throughout the Contract Period to carry out the Undertakings and to the extent necessary to enable the Concessionaire to perform its obligations under this Agreement, subject, other than in the case of emergency, to reasonable prior notice being given. The Concessionaire, in exercising such access, will use reasonable efforts to avoid or, if unavoidable, to minimize physical disruption to the operation of the Connecting Roads and will not cause any physical damage to the Connecting Roads. In the case of Connecting Roads for which the Province is not the highway authority, the Concessionaire will be responsible for obtaining such access thereto as it may require in order to perform its obligations under this Agreement directly from the relevant highway authority. Any failure on the part of the Province to secure for the Concessionaire sufficient access to the Connecting Roads for which the Province is the highway authority to enable the Concessionaire to carry out the Undertakings and perform the obligations under this Agreement shall constitute a Compensation Event.

14.4.4 The Province (for itself and the Province's Representative) and the Concessionaire (for itself and the Contractor and Operator) respectively undertake to the other that the access granted or reserved to themselves in this Section 14.4 [Access] will be exercised in accordance with any reasonable health and safety and/or security arrangements for the time being in force in relation to the areas to which such access is granted or reserved (as the case may be) to the extent applied uniformly in respect of its own staff, employees, consultants and subcontractors, but this Section 14.4.4 will not be construed so as to impede the proper performance of their respective roles, functions and duties as envisaged by this Agreement.

14.5 Emergencies and Liaison

14.5.1 As soon as practicable after the date hereof the Parties will develop Liaison Procedures in accordance with the provisions of Parts 1 and 2 of Schedule 17 [Liaison Procedures], and the Concessionaire will comply with all such Liaison Procedures in respect of all matters to which they relate.

14.5.2 Without limiting the generality of Section 14.5.1, whenever the Concessionaire is required by this Agreement to take any action in accordance with the Liaison Procedures, it will take such action in accordance with the procedures set out in or developed in accordance with the provisions of Schedule 17 [Liaison Procedures].

14.5.3 Notwithstanding any other provision of this Agreement, the Concessionaire will take and will be entitled to take (at its own cost) such steps as are necessary in an emergency for the protection of the public, but subject to the provisions of the Liaison Procedures.

14.6 Maintenance and Other Works

The provisions of Section 11 [Design and Construction] and the relevant provisions of Part 2 of Schedule 8 [Review Procedure] will apply, *mutatis mutandis*, to any works that are the subject of a Proposal other than the Works and other than any works in relation to any Improvement, with any reference in such provisions to:

14.6.1 the Works being deemed a reference to such works that are the subject of the Proposal;

14.6.2 a Concessionaire Change being deemed a reference to an Alternative Concept; and

14.6.3 the Concessionaire Change Certificate being deemed a reference to an Alternative Concept Certificate.

14.7 Inspections

Any study, test or inspection referred to in Section 14.4.1.2.3 will be conducted in such a manner as to avoid or, if unavoidable, minimize to the extent reasonably possible any delay or disruption to the construction of the Works or the Decommissioning, any Lane Closures or any adverse effect on traffic flows on the relevant part of the Concession Highway and no such study, test or inspection will, without the consent of the Concessionaire substantially affect the physical integrity or functionality of the Project Facilities.

14.8 Management Plans

The Concessionaire will operate, repair, maintain and rehabilitate the Project Facilities in a manner that, in all material respects, complies with and meets the requirements contained in the Management Plans as updated from time to time without objection by the Province's Representative in accordance with the Review Procedure. The Concessionaire will prepare and submit to the Province's Representative in accordance with the Review Procedure the following plans: Operations and Maintenance Plan (as required in paragraph 1.10 of Part 1 of Schedule 7 [O&M Output Specifications]), Asset Management Plan (as required in paragraph 1.11 of Part 1 of Schedule 7 [O&M Output Specifications]), Annual Asset Management Plan (as required in paragraph 2.3 of Reporting Specifications for Highway

Concessions) and Five Year Management Plan (as required in Part 3 of Schedule 15 [Five Year Management Plan]).

14.9 Privacy Code

The Concessionaire, without limiting its obligation to comply with all Privacy Legislation and other Laws and Regulations, will comply with and cause all of its agents, contractors and subcontractors of any tier and the employees of any of them to comply with the provisions of Schedule 21 [Privacy Protection] in connection with all personal information (as defined therein) collected or created in the course of performing the Undertakings. Within 60 days following the Commencement Date the Concessionaire, in consultation with the Province's Representative, will develop and implement a privacy code satisfactory to the Province's Representative that complies with the requirements of all Privacy Legislation and other Laws and Regulations and incorporates the provisions of Schedule 21 [Privacy Protection]. The Concessionaire will observe and comply with and cause all of its agents, contractors and subcontractors of any tier and the employees of any of them to observe and comply with such privacy code, and, where necessary or as required by the Province's Representative from time to time, the Concessionaire will submit updates to such privacy code in accordance with the Review Procedure.

15. **TRAFFIC MANAGEMENT AND POLICE SERVICES**

15.1 Traffic Management and Police Services

15.1.1 Subject to Section 15.2 [Liaison], general management of traffic on the Concession Highway will be the responsibility of the Concessionaire.

15.1.2 Users will be subject to the same Laws and Regulations as those using other Comparable Controlled Access Highways, and the enforcement of those Laws and Regulations will be the responsibility of the Police. The Province, at no cost to the Concessionaire, will cause traffic policing and traffic law enforcement services to be provided in respect of the Concession Highway at a level that is similar to other Comparable Controlled Access Highways. If the Concessionaire wishes to request traffic policing or traffic law enforcement services over and above such level the Concessionaire (on reasonable prior notice to the Province) will make the request to the appropriate Police authorities who, the Concessionaire acknowledges, will be entitled to respond thereto in their absolute and unfettered discretion. The Concessionaire will not engage any private policing or security services or its own personnel to provide private traffic policing or traffic law enforcement services on the Concession Highway for any purpose without the Province's prior approval (which approval may be granted or withheld in the absolute and unfettered discretion of the Province).

15.2 Liaison

15.2.1 The Concessionaire will be responsible during the conduct of the Undertakings for ensuring compliance with the requirements of:

15.2.1.1 the Province in respect of then existing highways (other than the Concession Highway) for which the Province is the highway authority;

15.2.1.2 municipalities and other Relevant Authorities in respect of then existing highways for which they are the highway authority; and

15.2.1.3 the Police in respect of the Concession Highway or other highways,

with regard to the management of traffic which may be affected by the carrying out of the Undertakings, all in accordance with the Liaison Procedures.

15.2.2 The Concessionaire shall co-operate fully with Utility Suppliers, Governmental Authorities, Public Authorities, Relevant Authorities and any contractors or subcontractors of the Province and BCTFA working on the Existing Highway or the Project Facilities and co-ordinate its Undertakings accordingly.

15.3 Lane Closures

15.3.1 Lane Closures during construction of the Works will be dealt with in accordance with Section 11.8 [Traffic Management During Construction].

15.3.2 Not later than 60 days prior to the commencement of any Quarter, the Concessionaire shall submit to the Province's Representative in accordance with the Review Procedure a Schedule of Lane Closures in respect of such Quarter. Any such Schedule of Lane Closures must:

15.3.2.1 for the Original Service Period, be in accordance with the permitted Lane Closures set out in the Traffic Management Output Specifications and the Payment Mechanism; and

15.3.2.2 for the Enhanced Service Period, be in accordance with the permitted Lane Closures set out in the Local Area Specifications and the Payment Mechanism; and

15.3.2.3 give details of the proposed start and end dates for each period of Lane Closure and the works to be carried out that require the Lane Closure.

15.3.3 The Province's Representative may make comments in respect of any period of Lane Closure requested in a Schedule of Lane Closures submitted by the Concessionaire pursuant to Section 15.3.2 in accordance with paragraph 3.5 of Part 2 of Schedule 8 [Review Procedure]. In such event, the Province's Representative will notify the Concessionaire thereof with reasons and will indicate,

in the case of an objection pursuant to paragraph 3.5.3 of Part 2 of Schedule 8 [Review Procedure], an appropriate duration for such Lane Closure and in any other case a period when the unacceptable period can be re-scheduled, on the basis that each such re-scheduled period will be as close as reasonably practicable to the requested period of Lane Closure and of equal duration or, if the Concessionaire has indicated another period and/or duration that would be preferable to it and that is acceptable to the Province's Representative, such other period and/or duration. The Concessionaire will thereupon amend the relevant Schedule of Lane Closures accordingly and re-submit the same to the Province's Representative in accordance with the Review Procedure.

15.3.4 The Concessionaire will not effect any Lane Closures except:

15.3.4.1 in accordance with the schedule of Lane Closures included in the Traffic Management Requirements or a Schedule of Lane Closures to which no objection has been made under the Review Procedure;

15.3.4.2 in accordance with the procedures set out in Section 15.3.6; or

15.3.4.3 in an emergency, in accordance with Section 15.3.7.

15.3.5 Notwithstanding that there has been no objection to a period of Lane Closures provided for in a Schedule of Lane Closures in accordance with the Review Procedure, the Province's Representative may upon not less than 90 days' prior notice require the Concessionaire to re-schedule a period of Lane Closure if, due to a change in any circumstances, such re-scheduling is necessary to satisfy the criteria set out in paragraph 3.5 of Part 2 of Schedule 8 [Review Procedure], provided, however, that the Province's Representative may not require:

15.3.5.1 that such period of Lane Closure be brought forward by more than 60 days from the scheduled date of commencement of such period of Lane Closure; or

15.3.5.2 that a period of Lane Closure be deferred by more than 60 days from the scheduled date of commencement of such period of Lane Closure.

15.3.6 If the need arises for unscheduled maintenance or repair works (not being an emergency) requiring Lane Closures that are not Scheduled Closures, the Concessionaire will advise the Province's Representative of such need and request approval of the proposed commencement date and estimated duration of the requisite Lane Closures. The Province's Representative's approval of such Lane Closures will not be unreasonably withheld or delayed, having regard to the factors set out in paragraph 3.5 of Part 2 of Schedule 8 [Review Procedure] and such approved Lane Closures will be Scheduled Closures.

15.3.7 If as a result of an emergency the need arises for unscheduled maintenance or repair works requiring Lane Closures that are not Scheduled Closures the Concessionaire may effect such Lane Closures as Scheduled Closures, provided that the Concessionaire will:

15.3.7.1 as soon as reasonably practicable advise the Province's Representative of such Lane Closure and the reasons therefor;

15.3.7.2 take all reasonable steps to mitigate the necessity for and minimize the duration of such Lane Closure and avoid the total Closure of the Concession Highway or Closure of more than one lane in any direction; and

15.3.7.3 comply with provisions of the Construction Output Specifications, Construction Requirements, Traffic Management Output Specifications and Traffic Management Requirements applicable to unscheduled maintenance and repair works and unscheduled Lane Closures.

The Concessionaire will be responsible for identifying and signing any temporary detour route required as a result of any such Lane Closure in accordance with the provisions of the Technical Requirements applicable to traffic management.

15.3.8 If an emergency occurs on a Connecting Road, at the request of the Province's Representative the Concessionaire will as far as is reasonably practicable temporarily remove or modify any existing Lane Closures and delay any Scheduled Closures which in either such case conflict with any lane closures or other arrangements implemented to deal with the emergency on the Connecting Road.

15.3.9 **DELETED**.

15.4 Information Requirements

15.4.1 The Concessionaire will provide the Province with information (including details of road conditions, proposed Lane Closures and information about its traffic safety and management measures on the Concession Highway) for purposes of any highway information service operated by or on behalf of the Province from time to time in accordance with the Technical Requirements. Such information will contain such details, be in such format and be sent to such address at such times as is provided for in the Technical Requirements.

15.4.2 The Concessionaire will, in accordance with the O&M Requirements, operate a telephone service (not chargeable at premium rates) 24 hours per day to:

15.4.2.1 provide relevant information to callers about the Concessionaire's traffic safety and management measures on the Concession Highway and existing and planned Lane Closures; and

15.4.2.2 receive any complaints in respect of the Concession Highway,

and which the Concessionaire will (if required by the Province) connect to any telephone or other electronic communications system operated by or on behalf of the Province in relation to all or any part of the provincial highway system.

15.5 Province's Maintenance

15.5.1 Without prejudice to Section 15.3.8 and subject to Section 15.5.3, the Province will use all reasonable efforts to co-ordinate the maintenance programs for the Connecting Roads for which the Province is the highway authority and, prior to the date of Substantial Completion, the Existing Bridge with any Scheduled Closures so as to minimize to the extent reasonably feasible any disruption to the construction of the Works and the Decommissioning and the operation of the Concession Highway. The Concessionaire will be responsible for co-ordinating Lane Closures on the Concession Highway with the maintenance programs for the Connecting Roads for which the Province is not the highway authority directly with the relevant highway authority so as to minimize to the extent reasonably feasible any disruption to the construction of the Works and the Decommissioning and the operation of the Concession Highway.

15.5.2 Subject to Section 15.5.3, the Province will throughout the Contract Period repair and maintain the Connecting Roads for which the Province is from time to time the highway authority having regard to the character of such Connecting Roads from time to time and the traffic that is reasonably expected to use them and to the same standards of maintenance as are generally observed with respect to comparable highways in the same vicinity for which the Province is the highway authority.

15.5.3 In any case where the operation, maintenance and/or rehabilitation of any Connecting Road, other highway for which the Province is the highway authority (other than the Concession Highway) or, prior to the date of Substantial Completion, the Existing Bridge has been or is contracted out to a third party contractor:

15.5.3.1 the obligations of the Province under this Section 15.5 [Province's Maintenance] or any other provision of this Agreement that relate to such Connecting Road or other highway will, notwithstanding any other provision of this Agreement, be limited to using reasonable efforts (which will not in any case require the Province to pay money to or incur any additional obligations in favour of any such third party contractor) to cause such third party contractor to perform such obligations to the extent that the Province has the legal authority to do so having regard to the terms of the contract with the third party contractor;

15.5.3.2 the Concessionaire will use all reasonable efforts to co-ordinate its activities in connection with the operation, maintenance, repair and rehabilitation of the Concession Highway (including with respect to Lane

Closures) with the activities of such third party contractor in connection with the operation, maintenance, repair and rehabilitation of such Connecting Road, other highway or (prior to the date of Substantial Completion) the Existing Bridge; and

15.5.3.3 in the event of any disagreement or dispute between the Concessionaire and any such third party contractor with respect to the co-ordination of their respective activities as aforesaid, the disagreement or dispute will be resolved by the Province, acting in good faith having due regard to the rights and interests of all parties and the principle that the construction, operation, maintenance, repair and rehabilitation of the Concession Highway is generally to take precedence over similar activities to be performed by any such third party contractor.

15.5.4 Nothing in this Section 15.5 [Province's Maintenance] or any other provision of this Agreement derogates from or limits (or will be deemed to derogate from or limit) the ability of the Province, the Minister or any other highway authority to exercise all discretions, powers and rights conferred on it as a highway authority or requires (or will be deemed to require) the Province, the Minister or any other highway authority to act other than in accordance with all relevant Laws and Regulations and Legal Requirements and in a manner appropriate to a highway authority and consistent with the Province's, the Minister's or such other authority's statutory duties or functions and the principles of administrative law.

16. **SIGNING, TRAFFIC CONTROL DEVICES AND COMMUNICATIONS**

16.1 Signage and Traffic Control Devices

The Concessionaire, except to the extent required by any Province Change, will comply with the provisions of the Technical Requirements and all Laws and Regulations and Legal Requirements in connection with all signage and traffic control devices on or near the Concession Highway.

16.2 New Signs

Except to the extent that any of the same are specified by the Technical Requirements or any Province Change and notwithstanding and without prejudice to any obligation to obtain any necessary authorizations in accordance with Laws and Regulations and Legal Requirements in respect thereof, the Concessionaire will submit the proposed layout, location, type, size, colour and content of all traffic signs or other signs to be located on or near the Concession Highway to the Province's Representative in accordance with the Review Procedure. The Province's Representative may make comments on any such submission on the grounds set out in paragraph 3.6 of Part 2 of Schedule 8 [Review Procedure].

16.3 Directional Signs on Connecting Roads

Subject to any obligation of the Concessionaire to provide signs near the Concession Highway in accordance with the Technical Requirements, the Province will, at its cost, install on Connecting Roads for which the Province is the highway authority such signs notifying motorists of the access to the Concession Highway as are necessary in accordance with the Province's duties as highway authority. Directional signing with respect to the Concession Highway on Connecting Roads for which the Province is not the highway authority will be subject to agreement between the Concessionaire and the relevant highway authority.

16.4 Removal of Identification Signs

The Concessionaire will, at its own cost, remove all signs identifying the Concessionaire as the operator of the Concession Highway within 30 days following the expiry or termination of this Agreement.

16.5 Provider System

16.5.1 The Concessionaire will use the provincial radio communications system that the Ministry currently maintains to facilitate communications between the Ministry and persons undertaking road and bridge maintenance works in the Province (the "Provider System") on a non-exclusive basis and on the terms and conditions of the Ministry's standard form Provider System licence from time to time for persons undertaking such works.

16.5.2 In respect of the Provider System:

- 16.5.2.1 the Concessionaire will provide its own radios for vehicles and offices and ensure that each radio is compatible with the Provider System;
- 16.5.2.2 the Concessionaire will pay a monthly fee charged by the Ministry from time to time for the use of the Provider System repeaters;
- 16.5.2.3 if the Ministry changes or upgrades the Provider System, the Concessionaire will change or modify its equipment to ensure compatibility with the changed or upgraded system and any such change or upgrade shall constitute a Province Change; and
- 16.5.2.4 the Ministry may revoke the Provider System licence at any time by notice to the Concessionaire if the Ministry, in its absolute and unfettered discretion, decides to discontinue the provision and maintenance of the Provider System for persons undertaking road and bridge maintenance works in the Province.

16.5.3 To the extent that the monthly fee referred to in Section 16.5.2.2 increases by an amount in excess of the indexation allowance in the Payment Mechanism, the Concessionaire may include the additional cost as a pass-through item in the annual reconciliation of payments under Schedule 10 [Payments].

17. **DEFECTS**

17.1 **Anchor Defects**

17.1.1 If any of the Existing Anchors is load tested in accordance with section 3.4.7 of Part 1 of Schedule 5 [Construction Output Specifications] and:

17.1.1.1 that Existing Anchor fails the test at less than either:

17.1.1.1.1 the value given in Table O; or

17.1.1.1.2 110% of the value given in Table P times 1.4; or

17.1.1.2 where the Calculated Service Load on the basis of the Province's Design for that Existing Anchor was agreed or determined pursuant to section 3.4.6 of Part 1 of Schedule 5 [Construction Output Specifications] to be greater than 120% of the value given in Table P, that Existing Anchor fails the test at less than the smaller of:

17.1.1.2.1 the agreed or determined Calculated Service Load times 1.4;
and

17.1.1.2.2 1550 kN,

the Province's Representative shall issue a Province Change to repair or replace that Existing Anchor (at its sole option).

17.1.2 If any of the Existing Anchors is load tested in accordance with section 3.4.6 of Part 1 of Schedule 5 [Construction Output Specifications] and the Calculated Service Load for that Existing Anchor was greater than both 70% of the value given in Table O for that Existing Anchor and 110% of the value given in Table P for that Existing Anchor and that Existing Anchor fails the test (other than as set out in Section 17.1.1.2), the Concessionaire shall replace or repair that Existing Anchor at its own cost and the remaining provisions of this Section 17.1 [Anchor Defects] shall not apply to that Existing Anchor.

17.1.3 If at any time during the Contract Period any of the Existing Anchors (other than any Existing Anchor that has failed a load test pursuant to Section 17.1.2) or any anchor system that replaces an Existing Anchor pursuant to Section 17.1.1:

17.1.3.1 is determined as a result of the Concessionaire carrying out its obligations pursuant to Section 14.1 [Operations, Maintenance and Rehabilitation] to be unsafe through normal deterioration or mechanical damage; or

17.1.3.2 fail, and the loads it has been subjected to has at all times during the Contract Period been less than the Allowable Service Loads, as demonstrated by calibrated pretension installation and maintenance records; and

17.1.3.3 in each case the anchor chain, lower and upper cable and the lower and upper link bar attached to the relevant anchor have been inspected by the Concessionaire in accordance with Good Industry Practice and the pendant attaching the relevant anchor system to the pontoon has been properly maintained by the Concessionaire in accordance with Good Industry Practice,

the Province will at its cost repair or replace or cause to be repaired or replaced the relevant anchor, anchor chain, lower cable or lower link bar.

17.1.4 Any Dispute between the Province's Representative and the Concessionaire's Representative as to the remedial or other works required to comply with Section 17.1.3 will be referred for determination to the Disputes Resolution Procedure.

17.1.5 **DELETED**.

17.1.6 For greater certainty, where the Province is obligated to carry out remedial or other works pursuant to Section 17.1.3, it may in its absolute and unfettered discretion determine who will carry out such works and, if the Province determines to retain an independent contractor to carry out such works, the procurement method to be employed in selecting and retaining such contractor. Without limiting the generality of the foregoing, the Province may in the exercise of its discretion determine to have any such works carried out by its own labour forces (including day labour retained by the Province) or by a third party contractor or by the Concessionaire (any determination to have such works carried out by the Concessionaire to be notified to the Concessionaire as a Province Change).

17.2 Causeway Fill and Preload

17.2.1 The Parties acknowledge that as at the Commencement Date the Causeway Fill and Preload will be in the course of construction.

17.2.2 The Province will ensure that the Preload can be removed from the Causeway Fill by July 1, 2006.

17.2.3 The Concessionaire may carry out regular audits of the quality management systems of the Causeway Contractor during the execution of the Causeway Fill and Preload

Contract at such intervals as the Concessionaire determines appropriate, and may carry out other monitoring or spot checks of the execution of the Causeway Fill and Preload Contract. The Concessionaire will carry out such audits, monitoring and spot checks in such a way as to minimize disruption to the Causeway Contractor.

17.2.4 If any auditing, monitoring or spot checks by the Concessionaire reveals deficiencies in the execution of the Causeway Fill and Preload Contract:

17.2.4.1 the Concessionaire will inform the Province forthwith in writing stating in reasonable detail the deficiencies and suggestions for remedying such deficiencies; and

17.2.4.2 the Concessionaire may carry out increased levels of audits, monitoring or spot checks, whether in number, duration or detail, of the execution of the Causeway Fill and Preload Contract referred to in Section 17.2.3 until such time as it is reasonably satisfied that the circumstances described in this Section 17.2.4 have ceased to exist.

17.2.5 The Province will make reasonable efforts to deal with any deficiencies notified by the Concessionaire under Section 17.2.4.

17.2.6 The Province will provide the Concessionaire with copies of all settlement data and any settlement reports produced in connection with the Causeway Fill and Preload. The Concessionaire shall be responsible for collecting all settlement data on both the east and west Causeway Fill once the Preload is complete and shall provide the Province will copies of all such settlement data.

17.3 Joint Inspections of Causeway Fill and Preload

17.3.1 The Parties acknowledge that the expected settlement of the Causeway Fill and Preload is set out in the Geotechnical Foundation Report, Volumes 1 and 2, dated June 30, 2001 and prepared by McLeod Geotechnical (now Trow Consultants), located in Section 4.10.2.2, Final Reports, in the Data Room.

17.3.2 A joint inspection of the Preload will be carried out by the Province's Representative and the Concessionaire's Representative within 30 days prior to the proposed removal of the Preload and, within 15 days following the completion of such inspection, a statement of the expected residual settlement (magnitude, rate and expected differential settlement range) will be produced and agreed to by both of those parties (the "Settlement Statement"). Any Dispute between the Province's Representative and the Concessionaire's Representative as to the expected residual settlement (magnitude, rate and expected differential settlement range) will be referred for determination to the Disputes Resolution Procedure.

17.4 Compensation

17.4.1 If:

- 17.4.1.1 the expected residual settlement at the End of Term set out in the Settlement Statement is materially greater than 220 mm at either the west or east abutment;
- 17.4.1.2 the actual settlement of the Causeway Fill post construction as measured at either the west or east abutment is materially greater than the greater of 220 mm and the amount identified in the Settlement Statement; or
- 17.4.1.3 the actual differential settlement is materially greater than that identified in the Settlement Statement,

DELETED.

17.4.2 **DELETED**

17.5 Early Removal of the Preload

17.5.1 If the Concessionaire requests the Province to remove the Preload before July 1, 2006, it will give the Province at least 14 days' notice.

17.5.2 The Province's Representative and the Concessionaire's Representative will carry out a joint inspection of the Preload within 30 days of the Concessionaire's notice given under Section 17.5.1 and, within 15 days following the completion of such inspection, a Settlement Statement will be produced and agreed to by both of those parties. Any Dispute between the Province's Representative and the Concessionaire's Representative as to the expected residual settlement (magnitude, rate and expected differential settlement range) will be referred for determination to the Disputes Resolution Procedure.

17.5.3 The Province will remove the Preload following the agreement of the Settlement Statement pursuant to section 17.5.2.

17.5.4 In the circumstances set out in this Section 17.5 [Early Removal of the Preload] the Province shall not be responsible for any additional costs incurred by the Concessionaire if:

- 17.5.4.1 the expected residual settlement at the End of Term set out in the Settlement Statement is materially greater than 220 mm at either the west or east abutment;
- 17.5.4.2 the actual settlement of the Causeway Fill post construction as measured at either the west or east abutment is materially greater than the greater of 220 mm and the amount identified in the Settlement Statement; or

17.5.4.3 the actual differential settlement is materially greater than that identified in the Settlement Statement.

17.6 Remedial Action

17.6.1 For the purposes of this Agreement, “Causeway Defect” means any defect in the Causeway Fill and Preload resulting from the carrying out of the Causeway Fill and Preload Contract, other than any defects identified in Section 17.4.1 or 17.5.4.

17.6.2 In respect of any Causeway Defect that becomes apparent during the course of the Contract Period, the Province will at its cost rectify or cause to be rectified such Causeway Defect as soon as reasonably practical after the Causeway Defect is identified. The onus of establishing a Causeway Defect shall be on the Concessionaire. Any Dispute between the Province’s Representative and the Concessionaire’s Representative as to the remedial or other works required to rectify the same will be referred for determination to the Disputes Resolution Procedure.

17.6.3 **DELETED**

17.6.4 For greater certainty, where the Province is obliged pursuant to Section 17.6.2 to rectify or cause to be rectified any Causeway Defect, it may in its absolute and unfettered discretion determine who will carry out such works and, if the Province determines to retain an independent contractor to carry out such works, the procurement method to be employed in selecting and retaining such contractor. Without limiting the generality of the foregoing, the Province may in the exercise of its discretion determine to have any such works carried out by its own labour forces (including day labour retained by the Province) or by a third party contractor or by the Concessionaire (any determination to have such works carried out by the Concessionaire to be notified to the Concessionaire as a Province Change).

17.7 Other Defects

Except as expressly set out in this Agreement (including this Section 17 [Defects] or in Section 38.2.5 or 38.2.6), the Concessionaire is not entitled to make and will not make any claim against the Province or BCTFA whether in damages or for extensions of time or additional payments or other relief under this Agreement or otherwise in relation to any defects, latent or otherwise, in the Existing Highway.

18. **ARCHAEOLOGICAL WORKS AND ITEMS OF GEOLOGICAL, HISTORICAL OR ARCHAEOLOGICAL INTEREST OR VALUE**

18.1 Archaeological Works

The Concessionaire will carry out all archaeological surveys, inspections, impact assessments and other archaeological works (including in connection with Capital Works) specified as part of, and will consult with the Province’s archaeologists as required by, the

Technical Requirements. For greater certainty, it is acknowledged that the Concessionaire will not, subject to Sections 18.2.2 and 18.2.3, be required to excavate or remove any of the items referred to in Section 18.2.1.

18.2 Items of Geological, Historical or Archaeological Interest or Value

18.2.1 As between the Parties, all fossils, remains, coins, articles of value or antiquity and other objects having archaeological, artistic, historic or monetary interest or value, including all heritage objects (as such term is defined in the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187), which may be found on or at or in the Site, the Adjacent Areas or the Graving Dock Site are and will be the sole and absolute property of the Province.

18.2.2 Upon the discovery of any of the items referred to in Section 18.2.1 during the course of the Works or otherwise in the course of carrying out the Undertakings, the Concessionaire will:

18.2.2.1 immediately inform the Province's Representative;

18.2.2.2 take all steps not to disturb the item and, if necessary, cease any works in so far as performing such works would endanger the object or prevent or impede its excavation;

18.2.2.3 take all necessary steps to preserve the item in the same position and condition in which it was found; and

18.2.2.4 comply with all Laws and Regulations and all requirements of Governmental Authorities (other than the Ministry) with respect to such discovery, including pursuant to the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187.

18.2.3 If the Province wishes the Concessionaire to perform procedures which are in addition to any required pursuant to Section 18.2.2, then the Province's Representative will issue an instruction to the Concessionaire specifying what action the Province requires the Concessionaire to take in relation to such discovery and the Concessionaire will promptly and diligently comply with all such instructions. The issuing of any such instructions will constitute a Province Change and the provisions of Part 2 of Schedule 13 [Province Changes] shall apply.

19. END OF TERM

19.1 End of Term Requirements

The Concessionaire, at its expense, will ensure that at the End of Term each element of the Project Facilities complies in all respects with the End of Term Requirements.

19.2 Initial Inspection

19.2.1 Not less than 33 months nor more than 39 months prior to the expected End of Term, the Concessionaire and the Province's Representative will conduct a joint inspection (the "Initial Inspection") of all elements of the Project Facilities, including the pavement of the Concession Highway and all Structures forming part of the Concession Highway. If no date for the Initial Inspection has been agreed between the Concessionaire and the Province's Representative, the Concessionaire or the Province's Representative may initiate the Initial Inspection during such period by giving at least 30 days' notice to that effect to the other and such inspection will be conducted commencing on the date specified in such notice.

19.2.2 Such inspection will comply with the requirements set out in paragraph 11 of Part 4 of Schedule 5 [End of Term Requirements].

19.3 Renewal Program

19.3.1 Within 60 days after completion of the Initial Inspection, the Concessionaire will provide the Province's Representative with a report on the condition of the Project Facilities and a notice setting out:

19.3.1.1 the Concessionaire's proposals as to the Renewal Works;

19.3.1.2 the Concessionaire's proposals as to the Renewal Schedule; and

19.3.1.3 the Concessionaire's estimate of the Renewal Amount (including the identification of specific itemized sums for each specific identified and discrete element of the Renewal Works).

19.3.2 The proposals referred to in Section 19.3.1.1 will be made, *inter alia*:

19.3.2.1 on the basis of an assessment of the remaining service life of the relevant element of the Project Facilities in accordance with the provisions of paragraph 2 of Part 4 of Schedule 5 [End of Term Requirements]; and

19.3.2.2 on the assumption that the Project Facilities will be maintained in accordance with the O&M Output Specifications and the O&M Requirements for the remainder of the Contract Period.

19.3.3 The Province's Representative may, within 60 days after receipt of the notice from the Concessionaire in accordance with Section 19.3.1, by notice to the Concessionaire object to the proposals in respect of any or all of the Renewal Works, the Renewal Schedule and the Renewal Amount (or any element thereof) as set out in the Concessionaire's notice. The notice from the Province's Representative will give details of the grounds for such objection and will give the Province's Representative's proposals in respect of the Renewal Works and

Renewal Schedule and its estimate of the Renewal Amount. Failure by the Province's Representative to give notice within the said 60 day period will be deemed to constitute agreement by the Province with the Concessionaire's proposals provided pursuant to Section 19.3.1, but without prejudice to Section 19.3.6.

- 19.3.4 If no agreement is reached between the Concessionaire and the Province's Representative as to any matter referred to in the notice given in accordance with Section 19.3.3 within 30 days of receipt by the Concessionaire of such notice, then either the Concessionaire or the Province's Representative may refer the matter to the Disputes Resolution Procedure for determination.
- 19.3.5 Upon agreement or determination in accordance with the Disputes Resolution Procedure of the Renewal Works, the Renewal Amount and the Renewal Schedule, the Concessionaire will carry out the Renewal Works in accordance with the Renewal Schedule as the Renewal Works and the Renewal Schedule have been determined in accordance with the Disputes Resolution Procedure. For greater certainty, the Concessionaire will ensure at its own cost that the Renewal Works are carried out notwithstanding that the actual cost of the Renewal Works may be higher than the Renewal Amount. The Concessionaire, at the request of the Province's Representative and in any case not less frequently than quarterly, will provide the Province's Representative with reports on the progress of the Renewal Works and compliance with the Renewal Schedule (in each case as the same may be revised or added to in accordance with Section 19.5 [Revised Renewal Program]), and the Province's Representative may from time to time require or cause further inspections of the Project Facilities to monitor the progress of the Renewal Works.
- 19.3.6 For greater certainty, neither the agreement of the Province's Representative to any Renewal Works, Renewal Schedule or Renewal Amount or any element thereof, nor any revision of the same pursuant to Section 19.5 [Revised Renewal Program], nor the participation of the Province's Representative in any inspection under or the receipt by the Province's Representative of any report delivered pursuant to this Section 19 [End of Term], nor the complete or partial carrying out of the Renewal Works will relieve or absolve the Concessionaire from:
- 19.3.6.1 its obligation under Section 19.1 [End of Term Requirements]; or
 - 19.3.6.2 any obligation to conduct any other inspection or to deliver any other report or to perform any other works in accordance with the provisions of this Agreement.

19.4 Second Inspection

- 19.4.1 Not less than 21 months nor more than 27 months prior to the expected End of Term, the Concessionaire and the Province's Representative will conduct a joint inspection (the "Second Inspection") of all elements of the Project Facilities, including the pavement and the Structures referred to in Section 19.2.1 (whether or

not the Renewal Works in respect of the Project Facilities or any part thereof have been carried out). If no date for the Second Inspection has been agreed between the Concessionaire and the Province's Representative, the Concessionaire or the Province's Representative may initiate the Second Inspection during such period by giving at least 30 days' notice to that effect to the other and such inspection will be conducted commencing on the date specified in such notice.

19.4.2 Such inspection will comply with the requirements set out in Part 4 of Schedule 5 [End of Term Requirements] as applicable to each element of the Project Facilities.

19.5 Revised Renewal Program

19.5.1 Within 60 days after completion of the Second Inspection, the Concessionaire will provide the Province's Representative with a report on the condition of the Project Facilities and a notice setting out:

19.5.1.1 the Concessionaire's proposals as to any revisions or additions to the Renewal Works required to ensure that all elements of the Project Facilities will, on the End of Term, satisfy the End of Term Requirements;

19.5.1.2 the Concessionaire's proposals as to any revisions to the Renewal Schedule as a consequence of such revisions or additions to the Renewal Works; and

19.5.1.3 the Concessionaire's estimate of any changes in the Renewal Amount as a consequence of such revisions or additions to the Renewal Works.

19.5.2 The proposals referred to in Section 19.5.1.1 will be made, *inter alia*, on the basis set out in Section 19.3.2.

19.5.3 The Province's Representative may, within 60 days after receipt of the notice from the Concessionaire in accordance with Section 19.5.1, by notice to the Concessionaire object to any proposed revisions or additions to any or all of the Renewal Works, the Renewal Schedule and the Renewal Amount as set out in the Concessionaire's notice. The notice from the Province's Representative will give details of the grounds for such objection and will give the Province's Representative's proposals in respect of such matters. Failure by the Province's Representative to give notice within the said 60 day period will be deemed to constitute agreement by the Province with the Concessionaire's proposals pursuant to this Section 19.5 [Revised Renewal Program], but without prejudice to Section 19.3.6.

19.5.4 If no agreement is reached between the Concessionaire and the Province's Representative as to any matter referred to in the notice given in accordance with Section 19.5.3 within 30 days of receipt by the Concessionaire of such notice, then

either the Concessionaire or the Province's Representative may refer the matter to the Disputes Resolution Procedure for determination.

19.5.5 Upon agreement or determination in accordance with the Disputes Resolution Procedure of any revision or addition to the Renewal Works, the Renewal Amount or the Renewal Schedule, the Concessionaire will carry out the Renewal Works (as so revised or added to) in accordance with the Renewal Schedule (as so revised). For greater certainty, the Concessionaire will ensure at its own cost that the Renewal Works (as so revised or added to) are carried out notwithstanding that the actual cost of the Renewal Works may be higher than the Renewal Amount (as changed in accordance with this Section 19.5 [Revised Renewal Program]).

19.6 End of Term Inspection

19.6.1 Not later than 30 days after the End of Term, the Concessionaire and the Province's Representative will commence a joint inspection (the "End of Term Inspection") of all elements of the Project Facilities. Such inspection will comply with the requirements set out in Part 4 of Schedule 5 [End of Term Requirements] as applicable to each element of the Project Facilities. The Concessionaire and the Province's Representative will co-operate so as to complete such inspection in a reasonably expeditious manner.

19.6.2 Within 60 days after completion of the End of Term Inspection, the Province's Representative will either:

19.6.2.1 issue to the Concessionaire the End of Term Certificate; or

19.6.2.2 notify the Concessionaire of its decision not to issue the End of Term Certificate and state the reason for such decision.

19.6.3 The Province's Representative may refuse to issue the End of Term Certificate if as at the End of Term the Project Facilities for any reason do not comply with the End of Term Requirements in all material respects.

19.6.4 Any notice given by the Province's Representative in accordance with Section 19.6.2.2 will set out each respect in which the Project Facilities do not comply with the End of Term Requirements and will state the Province's Representative's estimate of the cost of ensuring that the Project Facilities comply in all material respects with the End of Term Requirements.

19.6.5 The Concessionaire may, within 30 days after receipt of a notice given in accordance with Section 19.6.2.2, by notice to the Province's Representative object to any matter set out in the Province's Representative's notice. The notice from the Concessionaire will give details of the grounds for such objection and will give the Concessionaire's proposals in respect of such matters. Failure by the Concessionaire to give such notice within the said 30 day period will be deemed to

constitute agreement by the Concessionaire with the Province's Representative's objections pursuant to Section 19.6.2.2 and the other matters set out in such notice pursuant to Section 19.6.4 (including estimates).

- 19.6.6 If no agreement is reached between the Concessionaire and the Province's Representative as to any matter referred to in a notice given by the Concessionaire in accordance with Section 19.6.5 within 30 days of receipt by the Province's Representative of such notice, then either the Concessionaire or the Province's Representative may refer the matter to the Disputes Resolution Procedure for determination, as the case may be, of:
- 19.6.6.1 whether the Renewal Works have been completed in substantial compliance with the requirements of this Agreement;
 - 19.6.6.2 whether the Project Facilities comply in all material respects with the End of Term Requirements; and
 - 19.6.6.3 the estimated cost of completing the Renewal Works and ensuring that the Project Facilities comply in all material respects with the End of Term Requirements.
- 19.6.7 If it is agreed or determined in accordance with the Disputes Resolution Procedure that the Concessionaire has not completed the Renewal Works in compliance with the requirements of this Agreement or that the Project Facilities do not comply in all material respects with the End of Term Requirements, then without prejudice to any other right or remedy of the Province the Concessionaire will pay to the Province an amount equal to the estimated cost of completing such Renewal Works and ensuring that the Project Facilities comply in all material respects with the End of Term Requirements, as agreed or determined in accordance with Section 19.6.6 (the "Remediation Amount"). Such payment will be made not later than 14 days after such estimated cost has been agreed or determined in accordance with this Section 19.6 [End of Term Inspection].

19.7 Retention Account

- 19.7.1 The Province will establish the Retention Account with a bank located in British Columbia (either as a new account or as segregated funds within an existing account of the Province) not later than the date that is 3 years prior to the expected End of Term. Any interest accrued on any money standing to the credit of the Retention Account will be credited to the Retention Account. All sums standing to the credit of the Retention Account from time to time, including any accrued interest, will be held in trust by the Province to be applied only in accordance with the following provisions of this Section 19.7 [Retention Account].
- 19.7.2 Subject to Section 19.7.12, from the date that is 3 years prior to the expected End of Term, the Province will withhold from any payment that would otherwise be due in

any month to the Concessionaire under this Agreement in respect of any instalment of the Performance Payment an amount (the “Monthly Retention”) as security for the performance by the Concessionaire of its obligations under Section 19.1 [End of Term Requirements]. Each Monthly Retention will be calculated in accordance with Section 19.7.3 and will be subject to Section 19.7.4. If the Monthly Retention in any month exceeds the instalment of the Performance Payment to which the Concessionaire is otherwise entitled for that month, then the Province will be entitled to set-off the shortfall against any subsequent payments of the Performance Payment in addition to the Monthly Retention that is otherwise to be withheld from such subsequent payments of the Performance Payment. The Province will deposit each Monthly Retention withheld by the Province into the Retention Account on the date on which payment of such sum would, in the absence of the provisions of this Section 19.7.2, be due to the Concessionaire. For greater certainty, such retentions will not be affected by or subject to any readjustment on account of any subsequent reconciliation of the Performance Payment payments pursuant to Section 32 [Calculation of Payments].

- 19.7.3 Unless the Province, in its absolute and unfettered discretion, agrees to a different schedule of Monthly Retentions proposed by the Concessionaire (and any consequential amendments to the provisions and procedures contemplated by this Section 19.7 [Retention Account]), the Monthly Retention applying during a Contract Year “n” will be calculated as follows:

$$\frac{\text{Renewal Amount}_n - \text{MR}}{M}$$

Where:

“Renewal Amount_n” is:

- (a) in the case of a Contract Year where the Initial Inspection Report is available, and prior to the availability of the Second Inspection Report, the Renewal Amount agreed or determined following the Initial Inspection in accordance with Section 19.3 [Renewal Program]; or
- (b) in the case of a Contract Year where the Second Inspection Report is available, the Renewal Amount agreed or determined following the Second Inspection in accordance with Section 19.5 [Revised Renewal Program]; or
- (c) if not agreed or determined in either case at the commencement of Contract Year “n”, the Province’s reasonable estimate of such Renewal Amount having regard to all information then available to the Province;

“MR” is the amount standing to the credit of the Retention Account at the date of calculation of the Monthly Retention; and

“M” is equal to the number of months from the date of calculation of the Monthly Retention to the End of Term.

- 19.7.4 If following recalculation of the Renewal Amount following the Second Inspection in accordance with Section 19.5 [Revised Renewal Program] the amount standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by any Laws and Regulations to be made from such account) exceeds the Renewal Amount, the Province will pay the difference to the Concessionaire and no further Monthly Retentions will be made.
- 19.7.5 If the Concessionaire delivers an acceptable letter of credit, guarantee or other form of security to the Province in accordance with Section 19.7.12, the Province will pay the amount standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by any Laws and Regulations to be made from such account) to the Concessionaire and will not make any further Monthly Retentions.
- 19.7.6 Within 30 days after the issue of an End of Term Certificate in accordance with Section 19.6.2.1, the Province will pay the moneys standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by any Laws and Regulations to be made from such account) to the Concessionaire, and release any security provided under Section 19.7.12.
- 19.7.7 If the Province’s Representative gives a notice in accordance with Section 19.6.2.2, then pending the agreement or determination in accordance with the Disputes Resolution Procedure of all matters referred to in that notice, the Province will retain in the Retention Account whichever is the lesser of:
- 19.7.7.1 the amount standing to the credit of the Retention Account (including accrued interest); and
 - 19.7.7.2 the amount stated by the Province’s Representative in the notice given in accordance with Section 19.6.2.2 as his or her estimate of the cost of completing the Renewal Works and/or of ensuring that the Project Facilities comply in all respects with the End of Term Requirements, and the balance (if any) of any amount standing to the credit of the Retention Account (including any accrued interest but less any bank charges and less any deductions required by any Laws and Regulations to be made from such account) will be paid to the Concessionaire in accordance with Section 19.7.6.
- 19.7.8 If any sum is retained in the Retention Account in accordance with Section 19.7.7, then the Province will continue to hold such sum in the Retention Account pending the agreement or determination under the Disputes Resolution Procedure of all

matters raised in the notice given by the Province's Representative in accordance with Section 19.6.2.2.

- 19.7.9 Within 30 days after the agreement or determination in accordance with the Disputes Resolution Procedure of the Remediation Amount, the Province will pay out of the Retention Account to itself an amount equal to the Remediation Amount or, if the amount standing to the credit of the Retention Account is insufficient to pay the Remediation Amount in full, the entire amount (including accrued interest but less any bank charges and less any deductions required by any Laws and Regulations to be made from such account) standing to the credit of the Retention Account. Any remaining sums standing to the credit of the Retention Account (after deducting the amount payable to the Province and any bank charges and any deductions required by any Laws and Regulations to be made from such account) will be paid by the Province out of the Retention Account to the Concessionaire.
- 19.7.10 If the amount standing to the credit of the Retention Account is less than the Remediation Amount, then the payment of any sum to the Province in accordance with Section 19.7.9 in or towards satisfaction of the Remediation Amount will not in any way prejudice or affect any other rights or remedies of the Province for the purpose of recovering the remainder of the Remediation Amount from the Concessionaire.
- 19.7.11 Upon the occurrence of an Event of Default, the Province may at its option and without prejudice to any of its other rights or remedies require that any amount standing to the credit of the Retention Account be applied in payment of any amount due from the Concessionaire to the Province or becoming due as a consequence of such Event of Default or any termination of this Agreement (including any damages arising from such Event of Default or termination). The Province will pay such sum to itself out of the Retention Account or, if the amount standing to the credit of the Retention Account is insufficient to pay such amount in full, the entire amount (including accrued interest but less any bank charges and less any deductions required by any Laws and Regulations to be made from such account) standing to the credit of the Retention Account. If the Province exercises such right, the Concessionaire will forthwith on demand pay to the Province an amount sufficient to restore the amount standing to the credit of the Retention Account to the level it was at prior to the exercise of such right by the Province, and the Province, upon receipt of such amount, will deposit the same into the Retention Account.
- 19.7.12 The foregoing provisions of this Section 19.7 [Retention Account] will not apply if and to the extent that the Concessionaire provides the Province with a letter of credit, guarantee or other form of security as security for the Concessionaire's obligations under this Section 19 [End of Term] (other than this Section 19.7 [Retention Account]) issued by a bank or other institution approved by the Province and in form and substance acceptable to the Province (in each case in the Province's absolute and unfettered discretion).

19.7.13 Upon completion of any separate identified and discrete element of the Renewal Works for which a specific itemized sum is separately identified in the estimate of the Renewal Amount produced pursuant to Section 19.3 [Renewal Program] or Section 19.5 [Revised Renewal Program] (as the case may be) as agreed between the Parties or as determined pursuant to the Disputes Resolution Procedure, then the Province will release from the Retention Account to the Concessionaire an amount equal to such specific itemized sum subject as provided in this Section 19.7.13, Section 19.7.14 and/or Section 19.7.15. Completion of any such element of the Renewal Works will be ascertained by the issue of a Renewal Certificate by the Province. The Province will release the relevant sum within 30 days of issue of the relevant Renewal Certificate. In such circumstances, the amount of the Monthly Retention will be recalculated as at the date of release referred to in this Section 19.7.13, by reference to the then Renewal Amount (taking into account the completed element of the Renewal Works), a figure for “MR”, as defined in Section 19.7.3, which is the amount standing to the credit of the Retention Account immediately after such release, and a figure for “M”, as defined in Section 19.7.3, which is equivalent to the number of full months remaining until the End of Term.

19.7.14

19.7.14.1 The Concessionaire will give at least 10 Working Days’ prior notice to the Province’s Representative of the date upon which the whole of the Renewal Works will be completed and ready for inspection by the Province’s Representative. Upon the Concessionaire notifying the Province’s Representative that completion as aforesaid has occurred, and subject to the delivery to the Province’s Representative of a Concessionaire’s Completion Certificate (Renewal Works) and all other relevant Certificates and supporting documentation in accordance with Part 3 of Schedule 5 [Design and Certification Procedure] with respect to the Renewal Works, the Province’s Representative will commence an inspection of the Renewal Works within 10 Working Days of receipt of such notice.

19.7.14.2 The Province’s Representative will within 20 Working Days of the commencement of such inspection either:

19.7.14.2.1 issue a Renewal Certificate; or

19.7.14.2.2 notify the Concessionaire of its decision not to issue a Renewal Certificate and state the reasons for such decision.

19.7.14.3 The Province’s Representative may refuse to issue a Renewal Certificate if:

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- 19.7.14.3.1 the Renewal Works have not been completed in all material respects in accordance with this Agreement; or
- 19.7.14.3.2 there has been non-compliance in any material respect with the Design and Certification Procedure or non-compliance with any Laws and Regulations or Legal Requirements in connection with the execution of the Renewal Works or with any other applicable provision of this Agreement which in either case has not been rectified.
- 19.7.14.4 If the Province's Representative gives a notice under Section 19.7.14.2.2, then the Concessionaire will issue to the Province's Representative a notice not less than 5 Working Days but not more than 10 Working Days prior to the date upon which the Concessionaire expects to complete such further works or other measures necessary or appropriate to remedy or remove the cause of the refusal to issue a Renewal Certificate notifying the Province's Representative accordingly. Upon the Concessionaire notifying the Province's Representative that such further works or other measures necessary or appropriate as aforesaid have been completed or taken, the Province's Representative will within 10 Working Days of receipt of such notice commence an inspection of such further works or measures and the provisions of Sections 19.7.14.2 and 19.7.14.3 and this Section 19.7.14.4 shall thereafter apply to such notice, *mutatis mutandis*.
- 19.7.14.5 The issue of any Renewal Certificate is without prejudice to and does not in any way limit:
- 19.7.14.5.1 the obligation of the Concessionaire to design, construct, operate, maintain and rehabilitate the Project Facilities subject to and in accordance with this Agreement;
- 19.7.14.5.2 any warranties given by the Concessionaire under this Agreement; and
- 19.7.14.5.3 the provisions of Section 13 [Inspection and Completion].
- 19.7.14.6 Any Dispute as to whether a Renewal Certificate is required to be issued in accordance with the terms of this Section 19.7.14 may be referred by either Party to the Disputes Resolution Procedure.
- 19.7.15 The Province will not be required to release any moneys from the Retention Account pursuant to Section 19.7.13 in respect of any element of the Renewal Works to the extent that, after release of such moneys, the amount remaining in the Retention Account would be insufficient to pay the reasonably estimated cost of completing all remaining Renewal Works the cost of which is scheduled to have been retained by the Province by way of the Monthly Retentions as at that time.

20. **INSURANCE**

20.1 **Insurance Cover**

20.1.1 The Concessionaire will take out and maintain in force, or cause to be taken out and maintained in force, the insurances specified in Part 1 of Schedule 11 [Insurance Requirements] throughout the relevant stages of the Contract Period as follows:

20.1.1.1 the Concessionaire will ensure that the insurances identified in paragraph 2 Construction Phase of Part 1 of Schedule 11 [Insurance Requirements] are taken out prior to the commencement of the Works and are thereafter maintained in force until the Completion Date, or such other date or dates as may be specified in Part 1 of Schedule 11 [Insurance Requirements] (the “Construction Insurance End Date”);

20.1.1.2 in the case of any construction works carried out by the Concessionaire after the Construction Insurance End Date, the Concessionaire will ensure that the insurances identified in paragraph 2 Construction Phase of Part 1 of Schedule 11 [Insurance Requirements] are taken out prior to the commencement of the works and are thereafter maintained in force until the date of completion of the works, or such other date or dates as may be specified in Part 1 of Schedule 11 [Insurance Requirements];

20.1.1.3 the Concessionaire will ensure that the insurances identified in paragraph 3 Operation Phase of Part 1 of Schedule 11 [Insurance Requirements] are taken out on a date at least 15 days prior to when such coverage is required and are thereafter maintained in force throughout the Contract Period; and

20.1.1.4 the Concessionaire will ensure that the insurances identified in paragraph 4 of Part 1 of Schedule 11 [Insurance Requirements] are taken out at least 15 days prior to the Construction Insurance End Date and are thereafter maintained in force throughout the Contract Period.

20.1.1A The Concessionaire will take out and maintain in force, or cause to be taken out and maintained in force, throughout the Contract Period all other insurances as may be required to be taken out from time to time in respect of the Project Facilities, the Site and the Adjacent Areas and the Graving Dock Site and the Undertakings in accordance with any Laws and Regulations or Legal Requirements and in the case of the Graving Dock Site in accordance with the Graving Dock Lease.

20.1.1B Where any insurance is required under Section 20.1.1A as a result of a demand of a Governmental Authority which demand was not itself required under any Laws and Regulations, the requirement will be treated as a Province Change and the provisions of Part 2 of Schedule 13 [Province Changes] shall apply.

20.1.2 Without prejudice to the Concessionaire's obligations under Section 20.1.1, prior to any such insurances being taken out (save in respect of any such insurances which have been approved by the Province, such approval not be unreasonably withheld, and which are in place on the date of this Agreement) and prior to any changes being made to such insurances (including any such insurances which have been approved by the Province and which are in place on the date of this Agreement), the Concessionaire will submit to the Province's Representative in accordance with the Review Procedure:

20.1.2.1 the identity of the insurer; and

20.1.2.2 the terms and conditions of such insurances or any revision to such terms and conditions;

and there shall have been no objection in accordance with the Review Procedure to:

20.1.2.3 the proposed insurer on any reasonable grounds; or

20.1.2.4 the terms and conditions of such insurances or the revision to such terms and conditions (as the case may be) on the grounds set out in paragraph 3.7 of Part 2 of Schedule 8 [Review Procedure].

The Concessionaire will forthwith ensure that any insurance taken out to which an objection is made in accordance with the Review Procedure (unless the objection is withdrawn by agreement between the Parties or it is determined pursuant to the Disputes Resolution Procedure that the objection was not in accordance with the Review Procedure) is amended to overcome such objection or that a new policy of insurance is put in place to which no objection is made in accordance with the Review Procedure, provided that this provision is without prejudice to the Province's right to insure pursuant to Section 20.5 [Province's Right to Insure].

20.1.3 No Party will take any action or fail to take any reasonable action or (insofar as it is within its power or the power of any of its Affiliates) permit anything to occur in relation to it or any of its agents, contractors or subcontractors of any tier or employees of any of them (including in the case of the Concessionaire, the Contractor, the Operator and the Designer) that would entitle any insurer to refuse to pay any claim under any such insurance policy in which that Party is an insured, a co-insured or an additional insured person.

20.2 Policies and Copies

The Concessionaire will furnish evidence of all required insurance coverages and any other insurance that the Concessionaire maintains in respect of the Project Facilities, the Site and the Adjacent Areas and the Graving Dock Site and/or the Undertakings, in accordance with paragraph 1 of Part 1 of Schedule 11 [Insurance Requirements], together with evidence that the premiums payable thereunder have been paid and that the insurances are in full force

and effect. The Concessionaire will provide such additional evidence of compliance with this Section 20 [Insurance] as may reasonably be requested by the Province's Representative from time to time.

20.3 Additional Named Insured Parties and Notice of Cancellation, Etc

With the exception of the professional indemnity insurance policy, each of the Province and BCTFA will be named as an additional named insured on all policies of insurance mentioned in Part 1 of Schedule 11 [Insurance Requirements]. Without prejudice to the notice requirements set out in paragraphs 2.6 and 3.6 of Part 1 of Schedule 11 [Insurance Requirements], which will apply as minimum notice requirements in any event, the Concessionaire will use its best efforts to cause the insurer under each policy mentioned in Part 1 of Schedule 11 [Insurance Requirements] to provide the Province and BCTFA with at least 90 days' prior written notice of any cancellation, removal, endorsement to restrict coverage or limits of liability, non-renewal, refusal to extend, material change in or lapse of the required insurance coverages.

20.4 Renewals

Renewals in relation to such insurances will be obtained from the insurers as and when necessary, and evidence of such renewals will be provided in accordance with paragraph 1 of Part 1 of Schedule 11 [Insurance Requirements] as soon as possible and in any event at least 30 days before the renewal date.

20.5 Province's Right to Insure

Subject to Section 20.8 [Uninsurable Risks], if the Concessionaire fails or refuses to obtain or maintain in force any insurance required to be effected by it under the provisions of this Section 20 [Insurance] or to provide evidence of such insurance and renewals in relation thereto as and when required and in accordance with paragraph 1 of Part 1 of Schedule 11 [Insurance Requirements], the Province will, without prejudice to any of its other rights under this Agreement or otherwise, have the right itself to procure such insurance, in which event any sums paid by the Province for that purpose together with a sum representing administrative costs in taking out such insurance at a rate of **DELETED** of such sums will immediately become due and payable to the Province by the Concessionaire and will be paid on demand, and the Province will be entitled to deduct such sums from any moneys due or which may become due to the Concessionaire.

20.6 Claims

20.6.1 The Concessionaire will maintain a written register of all claims or incidents which might result in a claim under any of the insurance policies referred to in this Section 20 [Insurance] and will allow the Province's Representative to inspect such register at any time.

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- 20.6.2 Without prejudice to Section 20.6.1, the Concessionaire will notify the Province's Representative within 5 Working Days of making any claim under any of the insurance policies referred to in this Section 20 [Insurance] where the value of the claim exceeds \$25,000 (index linked) or (regardless of the value of the claim), the claim involves personal injury or death accompanied by full particulars of the incident(s) giving rise to the claim.
- 20.6.3 The Province agrees to provide, in a timely manner, the Concessionaire with any relevant documents in the possession of the Province that may be required by an insurer or the Concessionaire in connection with any claim or threatened claim under any of the insurance policies referred to in this Section 20 [Insurance] provided that the Province will have no obligation to provide any information with respect to which it is subject to an express obligation of confidentiality or privacy (whether under any Laws and Regulations or contract or otherwise) or which it is otherwise precluded from disclosing under any Privacy Legislation or other Laws and Regulations.

20.6A. Serious Damage or Destruction

20.6A.1 If:

- 20.6A.1.1 any part of the Project Facilities (including the Works or any part thereof), the Site or the Adjacent Areas are damaged or destroyed for any reason; or
- 20.6A.1.2 if any of the events referred to in Section 8.18.10.1 occurs; or
- 20.6A.1.3 any part of the Existing Highway is damaged or destroyed as a result of the actions or omissions of the Concessionaire, its agents, contractors or subcontractors of any tier or the employees of any of them,

in respect of which in any case the cost of restoration, replacement, reinstatement or remediation exceeds or is reasonably estimated to exceed \$10 million (index linked), then the Province shall require the Concessionaire to restore, replace and reinstate the damaged or destroyed Existing Highway, Works or the Project Facilities or to carry out any remediation, as applicable, whereupon the Concessionaire will do so and the provisions of Sections 20.6B [Restoration and Reinstatement] and 20.7 [Application of Proceeds] apply.

20.6A.2 If the cost of restoration, replacement, reinstatement or remediation exceeds or is reasonably estimated to exceed \$10 million (index linked) and:

- 20.6A.2.1 the Concessionaire has delivered to the Province a Reinstatement Plan pursuant to Section 20.6B.3;
- 20.6A.2.2 the Reinstatement Plan is adopted pursuant to Section 20.6B.4.1; and

20.6A.2.3 the Concessionaire is diligently carrying out the Reinstatement Works in accordance with the Reinstatement Plan,

the Province will not exercise its rights to terminate this Agreement in accordance with Sections 42.6 [Termination for Total Failure of Crossing] or 42.7 [Termination for Serious Damage or Destruction].

20.6A.3 If the Province is entitled to exercise its rights to terminate this Agreement in accordance with Sections 42.6 [Termination for Total Failure of Crossing] or 42.7 [Termination for Serious Damage or Destruction], it will give the Concessionaire at least 30 days' notice of its intention to do so. Upon such termination and payment to the Concessionaire of the amount set out in Section 42.6.2 or 42.7.2, as the case may be, the Province will be entitled absolutely to the proceeds of all insurances referred to in Section 20.7.1.2 and any accrued interest and may use such amounts for any purposes in its absolute and unfettered discretion.

20.6B. Restoration and Reinstatement

20.6B.1 In this Section 20.6B [Restoration and Reinstatement] and in Section 20.7 [Application of Proceeds], “damaged” and any grammatical form of such word includes “contaminated”.

20.6B.2 Subject to Section 20.6A [Serious Damage or Destruction], Section 20.8 [Uninsurable Risks] and Section 37.4 [Consequences of Eligible Force Majeure], if the Project Facilities (including the Works or any part thereof), the Site or the Adjacent Areas are damaged or destroyed, the Concessionaire will restore, replace and reinstate the damaged or destroyed Works or the Project Facilities promptly and, in any event, as soon as possible in the circumstances.

20.6B.2A Subject to Section 20.6A [Serious Damage or Destruction], Section 20.8 [Uninsurable Risks] and Section 37.4 [Consequences of Eligible Force Majeure], if the Existing Highway is damaged as a result of the actions or omissions of the Concessionaire, its agents, contractors or subcontractors of any tier or the employees of any of them, the Concessionaire will repair the damage to the Existing Highway promptly and, in any event, as soon as possible in the circumstances.

20.6B.3 Where any reinstatement, replacement or restoration work referred to in Sections 20.6B.2 or 20.6B.2A is reasonably estimated to cost more than \$500,000 (index linked), the Concessionaire will deliver to the Province in accordance with the Review Procedure, as soon as possible and in any event within 20 Working Days after the occurrence of the damage or destruction, a plan (“Reinstatement Plan”) prepared by the Concessionaire for the carrying out of the works (“Reinstatement Works”) necessary to restore, replace or reinstate the damaged or destroyed Works, Project Facilities or the Existing Highway, as the case may be. The Concessionaire will set out in the Reinstatement Plan:

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- 20.6B.3.1 the proposed terms upon which the Reinstatement Works are to be effected and the procurement procedure which the Concessionaire proposes to implement to procure the execution of the Reinstatement Works (which, if required by the Province to comply with any Laws and Regulations, will be a competitive procedure designated by and conducted under the supervision of the Province and which the Province agrees it will carry out as expeditiously as possible);
- 20.6B.3.2 (a) if the damage or destruction of the Works, Project Facilities or the Existing Highway occurs prior to the Completion Date, the Concessionaire's proposal for an amended Project Schedule and/or Works Schedule to identify the Reinstatement Works and the schedule for their execution (such proposal for an amended Project Schedule and/or Works Schedule to be submitted in accordance with Section 12.2 [Variations to Project Schedule] and Section 12.3 [Preparation of Works Schedule] and Section 11.8.2); or
- (b) if the damage or destruction of the Works or Project Facilities occurs on or after the Completion Date, the Concessionaire's proposal for a schedule to identify the Reinstatement Works and the schedule for their execution (such proposal to be submitted in accordance with the Review Procedure); and
- 20.6B.3.3 the Concessionaire's proposal for any related amendment of the schedule of Lane Closures included in the Traffic Management Requirements or the Local Area Specifications (such proposal for amendment of the schedule of Lane Closures to be submitted in accordance with Section 15 [Traffic Management And Police Services]).
- 20.6B.4 If the Province is satisfied that the Reinstatement Plan will enable the Concessionaire to comply with Section 20.7.4 within a reasonable time, there has been no comment or objection from the Province in respect of any matter that is subject to the Review Procedure under Section 20.6B.3, and the Province does not wish to exercise its rights to terminate this Agreement under any provision of this Agreement, acknowledging that in the circumstances set out in Section 20.6A.2 the Province does not have the right to terminate under Sections 42.6 [Termination for Total Failure of Crossing] or 42.7 [Termination for Serious Damage or Destruction]:
- 20.6B.4.1 the Reinstatement Plan will be adopted;
- 20.6B.4.2 the Concessionaire will carry out the Reinstatement Works in accordance with the Technical Requirements and all other applicable requirements under this Agreement and, where applicable, in accordance with the Reinstatement Plan to which there has been no objection in accordance with the Review Procedure. All designs, plans and specifications in respect of the Reinstatement Works will be subject to the same checking

and review procedures and requirements as are applicable to the Works and other works carried out by the Concessionaire in the course of performing the Undertakings under this Agreement;

- 20.6B.4.3 if the value of the Reinstatement Works exceeds \$2 million (index linked), the persons retained by the Concessionaire to design and carry out any Reinstatement Works will, as a condition to their retainer and prior to commencing any Reinstatement Works or design work in connection therewith, enter into a Collateral Agreement with the Province, BCTFA and the Concessionaire in substantially the same form as the Collateral Agreement entered into by the Contractor;
- 20.6B.4.4 prior to the Expiry Date, any insurance proceeds paid to the Insurance Trustee will be held and applied by the Insurance Trustee in accordance with Section 20.7 [Application of Proceeds]. On or after the Expiry Date, the Insurance Trustee will pay all amounts it is then holding to the Province and the Province may use such amounts for any purposes in its sole and absolute discretion;
- 20.6B.4.5 the Province agrees and undertakes that, subject to compliance by the Concessionaire with its obligations under this Section 20.6B [Restoration and Reinstatement] and Section 20.7 [Application of Proceeds], and provided that (1) the Concessionaire fully complies with the Reinstatement Plan; and (2) the Province has not previously exercised its rights to terminate this Agreement, it will not exercise any other right which it might otherwise have to terminate this Agreement by virtue of the event which gave rise to the claim for the Insurance Proceeds; and
- 20.6B.4.6 upon request, the Province will use its reasonable efforts to facilitate the carrying out of the Reinstatement Plan by the Concessionaire.

20.7 Application of Proceeds

- 20.7.1 The Concessionaire will ensure that the insurers under any of the insurance policies that the Concessionaire is required to take out and maintain in force or to cause to be taken out or maintained in force pursuant to Section 20.1.1 pay the proceeds of:
- 20.7.1.1 any insurance policy for third party legal liability, contractor's pollution liability (to the extent payable to a third party) or employer's liability directly to the third party or employee concerned or, where any insured party has discharged the relevant liability to the third party or employee concerned prior to the payment of any relevant insurance proceeds, to the insured party who discharged the relevant liability or to any collateral agent or trustee for the Senior Funders to the extent required by the Senior Funding Agreements;

20.7.1.2 any contractor's all risks, property damage or contractor's pollution liability (to the extent not covered by Section 20.7.1.1 and excluding any business interruption or loss of profits insurance proceeds payable to the Concessionaire under such policy) insurance policy in the following manner:

- (A) Where the insurance proceeds payable in respect of any single claim (or the aggregate value of the claims in respect of a series of related events) made under the relevant insurance policy is equal to or less than \$1,000,000 (index linked), directly to the Concessionaire or to any collateral agent or trustee for the Senior Funders to the extent required by the Senior Funding Agreements. The Concessionaire will ensure that such proceeds are applied to the Reinstatement Works in respect of the damage that gave rise to the proceeds and not for any other purpose.
- (B) Where the insurance proceeds payable in respect of any single claim (or the aggregate value of the claims in respect of a series of related events) made under the relevant insurance policy is more than \$1,000,000 (index linked) to the Insurance Trustee pursuant to the provisions of the Insurance Trust Agreement. Amounts held by the Insurance Trustee will be dealt with in accordance with either Section 20.7.2 or 20.7.3; and

20.7.1.3 any other insurance so as to ensure the performance by the Concessionaire of its obligations under this Agreement.

The insurance proceeds paid or payable to the Insurance Trustee under Section 20.7.1.2(B) are referred to as the "Insurance Proceeds".

20.7.2 If the Concessionaire has, in accordance with the provisions of the relevant Reinstatement Plan, entered into a contract with a third party for the purpose of carrying out the Reinstatement Works in respect of the damage or destruction that gave rise to the Insurance Proceeds and, in accordance with such contract, the Concessionaire is required to make a payment to such third party for such purpose, then the Insurance Trustee will, not later than the latest of:

- 20.7.2.1 the date that is 15 Working Days after receipt by the Insurance Trustee of a copy of an invoice from such third party to the Concessionaire accompanied by a written confirmation of the Concessionaire addressed to the Insurance Trustee that the amount of the invoice is payable in accordance with the relevant contract and that the Concessionaire requires such invoice to be discharged out of the Insurance Proceeds;

20.7.2.2 the date that is 5 Working Days' prior to the due date for payment of such invoice by the Concessionaire under the terms of the relevant contract; and

20.7.2.3 the date that is 15 Working Days after receipt of the Insurance Proceeds by the Insurance Trustee in respect of the relevant Reinstatement Works,

make payment to the relevant third party, in instalments from time to time, an amount equal to the lesser of such Insurance Proceeds and the amount of such invoice, provided that the Insurance Trustee has also received such certificates and evidences as the Insurance Trustee shall reasonably require for the purpose of being satisfied that such Reinstatement Works have been partially completed in accordance with the Technical Requirements or completed, as the case may be, and that the Project is not subject to any builders liens. Upon completion of the relevant Reinstatement Works, the balance (if any) of any such Insurance Proceeds together with any accrued interest will be paid jointly to the Province and the Concessionaire or to any collateral agent or trustee for the Senior Funders to the extent required by the Senior Funding Agreements. The Concessionaire hereby undertakes that if following such payment to the Concessionaire the Province receives a demand from the relevant insurer for all or any part of such balance, the Concessionaire will pay the amount demanded to the relevant insurer within the time period stated in the demand.

20.7.3 If the Concessionaire itself, in accordance with the provisions of the relevant Reinstatement Plan, carries out the Reinstatement Works in respect of which the Insurance Proceeds have been paid to the Insurance Trustee, then the Insurance Trustee will, on the later of the date that is 15 Working Days after:

20.7.3.1 receipt by the Insurance Trustee of a certificate from the Concessionaire addressed to the Insurance Trustee confirming in writing the amount of the Insurance Proceeds claimed by the Concessionaire from the Insurance Trustee, based on the cost of the Reinstatement Works carried out by the Concessionaire; and

20.7.3.2 payment of the Insurance Proceeds to the Insurance Trustee in respect of the relevant Reinstatement Works,

make payment to the Concessionaire in instalments from time to time, of an amount equal to the lesser of such Insurance Proceeds and the amount claimed in such certificate, provided that the Insurance Trustee has also received such certificates and evidence as the Insurance Trustee shall reasonably require for the purpose of being satisfied that such Reinstatement Works have been partially completed in accordance with the Technical Requirements or completed, as the case may be, and that the Project is not subject to any builders liens. Upon completion of the Reinstatement Works, such Insurance Proceeds together with any accrued interest will be paid to the Concessionaire or to any collateral agent or trustee for the Senior

Funders to the extent required by the Senior Funding Agreements. The Concessionaire hereby undertakes that if following such payment to the Concessionaire the Province receives a demand from the relevant insurer for all or any part of such balance, the Concessionaire will pay the amount demanded to the relevant insurer within the time period stated in the demand.

20.7.4 Where insurance proceeds are to be used, in accordance with this Agreement, to restore, replace or reinstate any Works, Project Facilities or the Existing Highway, the Concessionaire will ensure that the work is carried out in accordance with:

20.7.4.1 the Technical Requirements so that on completion of the work, the provisions of this Agreement are complied with, subject to any changes required by the applicable standards and codes and Laws and Regulations then existing; or

20.7.4.2 such other specifications and requirements as may be agreed between the Province and the Concessionaire.

20.7.5 The Concessionaire will ensure that the terms of all policies of insurance that the Concessionaire is required to take out and maintain in force or cause to be taken out and maintained in force in accordance with this Agreement are (without prejudice to any other requirement of this Agreement) taken out and maintained upon terms which give effect to the provisions of this Section 20.7 [Application of Proceeds].

20.8 Uninsurable Risks

20.8.1 The Province will forthwith notify the Concessionaire and the Concessionaire will forthwith notify the Province if a risk or component of a risk (other than risk normally covered by professional indemnity or professional liability insurance) required to be insured against under Section 20.1 [Insurance Cover] becomes or is expected to become Uninsurable. Any Dispute as to whether a particular risk has become or is expected to become Uninsurable shall be referred for resolution by the Disputes Resolution Procedure. In addition, the Concessionaire may notify the Province if a risk insured against under its business interruption insurance becomes or is expected to become Uninsurable and such risk becoming Uninsurable constitutes or would constitute a default under, or otherwise entitles or would entitle the Senior Funders to enforce their security under, the Senior Funding Agreements. If both Parties agree or it is determined in accordance with the Disputes Resolution Procedure that the relevant risk is or is about to become Uninsurable and that:

20.8.1.1 the risk being Uninsurable is not or will not be knowingly caused by the actions or omissions of the Concessionaire or any Contracting Affiliate or any of its agents, contractors or subcontractor of any tier or employees of any of them; and

20.8.1.2 prudent directors of project companies of a similar nature to the Concessionaire operating the same or similar businesses would, if faced with the same risk being Uninsurable (in the absence of the type of relief envisaged by this Section 20.8 [Uninsurable Risks]), be acting reasonably and in the best interests of the company if they resolved to cease to operate such businesses as a result of that risk becoming Uninsurable, taking into account the likelihood of the risk which is Uninsurable occurring (if it has not already occurred) and the financial consequences for such company and its creditors if such Uninsurable risk did occur (or has occurred), and other mitigants against such consequences which may be available to such company, and assuming that, upon such cessation of operation of the business and liquidation of such company's assets, an amount equal to the Force Majeure Termination Sum would be available for distribution in accordance with the requirements of Laws and Regulations,

then the Parties together with their respective insurance advisors will meet to discuss the means by which the risk should be managed (including considering the feasibility of self-insurance by either or all Parties and/or amendments to this Agreement) and will use all reasonable efforts to manage such risk short of termination of this Agreement recognizing that Uninsurable risks are a risk to be borne solely by the Province. During any period where a Dispute as to whether a risk has or has not become Uninsurable is being resolved through the Disputes Resolution Procedure, the provisions of Section 20.8.2.2 shall apply.

20.8.2 If the requirements of Section 20.8.1 are satisfied but the Parties cannot agree pursuant to Section 20.8.1 as to how to manage the risk that is or is about to become Uninsurable (an "Uninsurable Risk"), then if the risk is or becomes Uninsurable:

20.8.2.1 in respect of third party liability or business interruption insurance only the Province will (at the Province's option) either elect (by notice to the Concessionaire) to terminate this Agreement, whereupon this Agreement will terminate and the Province will pay to the Concessionaire an amount equal to the Force Majeure Termination Sum, or elect to allow this Agreement to continue in which event Section 20.8.2.2 below will thereafter apply in respect of such risk;

20.8.2.2 if Section 20.8.2.1 does not apply or if that Section does apply but the Province has elected to allow this Agreement to continue as contemplated therein, this Agreement will continue but with the remaining Performance Payments being adjusted, from the date upon which the risk becomes Uninsurable, to deduct an amount equal to the amount indicated in the Financial Model as being the amount that the Concessionaire was liable to pay (or in the case of business interruption insurance, the amount that the Concessionaire was paying) for insurance for such risk immediately prior to it becoming Uninsurable (provided that

where the risk is Uninsurable for part of a year only, the reduction in the remaining Performance Payments will be pro rated to the number of months for which the risk is Uninsurable). On the occurrence of the risk (but only so long as the risk remains Uninsurable), the Province will (at the Province's option) either:

20.8.2.2.1 pay to the Concessionaire an amount equal to the insurance proceeds that would have been payable directly to the Concessionaire (net of any deductibles) had the relevant insurance continued to be available and this Agreement will continue (with the Province being responsible for amounts equal to the insurance proceeds that otherwise would have been paid to it pursuant to Section 20.7 [Application of Proceeds]); or

20.8.2.2.2 elect (by notice to the Concessionaire) to terminate this Agreement whereupon this Agreement will terminate and the Province will pay to the Concessionaire an amount equal to the Force Majeure Termination Sum,

provided that the Province will not in any such case elect to terminate this Agreement pursuant to Section 20.8.2.2 if the Concessionaire releases the Province from all obligations under Section 20.8.2.1 and deposits with the Insurance Trustee an amount equal, in the reasonable opinion of the Province, to the insurance proceeds that would have been paid to the Insurance Trustee pursuant to Section 20.7 [Application of Proceeds] had the relevant insurance continued to be available (which amount will be held and disbursed by the Insurance Trustee in place of such insurance proceeds in accordance with the provisions of Section 20.7 [Application of Proceeds]).

20.8.3 If this Agreement is terminated pursuant to Section 20.8.2.2 and at the date of such termination third party public liability insurance is an Uninsurable Risk, and if:

20.8.3.1 there is an outstanding third party claim against the Concessionaire at the date of such termination; or

20.8.3.2 following the date of such termination a third party claim is subsequently made against the Concessionaire,

which in either case would have been covered by the third party public liability insurance that the Concessionaire would have been required to carry had that risk not been an Uninsurable Risk, then the Province will pay to the Concessionaire any amount for which the Concessionaire becomes liable in respect of such claim in addition to the Force Majeure Termination Sum and in these circumstances the provisions of Section 39.6 [Conduct of Claim] will apply as if such payments were an indemnity claim to which that Section applies.

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- 20.8.4 If the Province makes any payment to the Concessionaire pursuant to Section 20.8.2 or Section 20.8.3, then the Province, to the extent of the amount paid, will be subrogated to the Concessionaire's rights against any third party in respect of the occurrence or claim as a result of which the payment was made.
- 20.8.5 Where there is an Uninsurable Risk the Concessionaire will approach the insurance market on a regular basis and in any event at intervals of no longer than six months to establish whether the relevant risk remains an Uninsurable Risk.
- 20.8.6 Where a risk that was previously an Uninsurable Risk ceases to be so and the Concessionaire becomes aware or is informed by the Province that this is the case, the Concessionaire in the case of insurance required under Section 20.1 [Insurance Cover] will forthwith take out and maintain or cause to be taken out and maintained insurance in accordance with the requirements of this Agreement in respect of the risk and in any case (including in any case where business interruption is the risk which has ceased to be Uninsurable, regardless of whether the Concessionaire takes out such insurance upon the risk ceasing to be Uninsurable):
- 20.8.6.1 the provisions of Section 20.8.1 to 20.8.5 (inclusive) will no longer apply to the risk; and
- 20.8.6.2 the Performance Payments will be increased in each year for which the relevant risk is no longer an Uninsurable Risk by an amount equal to the amount that was deducted pursuant to the provisions of Section 20.8.2 (provided that where the risk ceases to be an Uninsurable Risk for part of a year only, the increase in the Performance Payments will be pro rated to the number of months for which the risk ceases to be an Uninsurable Risk).
- 20.8.7 Nothing in this Section 20 [Insurance] obliges the Concessionaire to take out insurance in respect of a risk that is Uninsurable.

20.9 Savings

- 20.9.1 Neither failure to comply nor full compliance with the insurance provisions of this Agreement will limit or relieve the Concessionaire of its liabilities and obligations under this Agreement, including in particular (but without limiting the generality of the foregoing) the Concessionaire's obligation to indemnify and hold the Province and BCTFA or either of them harmless in compliance with any provisions contained in this Agreement.
- 20.9.2 The submission or delivery to the Province's Representative of any draft insurance policy or certificate of insurance or other evidence of compliance with this Section 20 [Insurance] will not, irrespective of whether any objection is made thereto by the Province's Representative, imply acceptance by the Province or the Province's Representative that the extent of the insurance coverage is sufficient or

that the terms and conditions thereof are satisfactory, in either case for the purposes of the Project.

20.10 No Indemnification for Insured Claims

The Concessionaire will not be entitled to any payment from the Province pursuant to Section 39.3 [Province's Indemnities] or Section 44 [Compensation on Termination] to the extent that the Concessionaire is or should be able to recover under any insurance which the Concessionaire is required to take out and maintain or cause to be taken out and maintained in accordance with Section 20.1 [Insurance Cover] (whether or not such insurance has in fact been effected or, if effected, has been vitiated as a result of any act or omission of the Concessionaire or any Contracting Affiliate including non-disclosure or under-insurance) or any other policy of insurance (including business interruption or loss of profits insurance) that the Concessionaire has taken out and maintained.

20.11 Benchmarking of Insurance

20.11.1 Six months before the Scheduled Substantial Completion Date, the Concessionaire will engage a major insurance broker to carry out a thorough analysis of the then current insurance markets (without limiting the underwriters approached) in order to find the then lowest available premiums for the insurances set out in Section 20.11.11.1 to 20.11.11.7 (the "O&M Insurances") from insurers with at least an A-Rating (excluding any increase in the premiums resulting from the Concessionaire's claims record) and at least three months before the Scheduled Substantial Completion Date will provide the Province with a report setting out full details of the instructions provided to the broker, the broker's analysis and the premiums that will be payable for each of the O&M Insurances.

20.11.2 The Province will review the report produced under Section 20.11.1 and may either accept that report or may carry out its own analysis of the insurance markets using a broker of its own choice and dealing with underwriters of its own choice, provided such insurers have at least an A- Rating. The Concessionaire will at its cost provide the Province with all information the Province reasonably requests in relation to the O&M Insurances, including full details of its claims record and any other information that a prudent underwriter would require to rate the relevant risk (the Concessionaire acknowledging that a request for such information would be reasonable on the part of the Province). The Province will provide the Concessionaire with a report setting out full details of the instructions provided to the broker, the broker's analysis and the premiums that will be payable for each of the O&M Insurances.

20.11.3 If the Concessionaire fails to provide the Province with full details of its claims record, any information that a prudent underwriter would require to rate the relevant risk or any other information reasonably requested by the Province (as determined by the Disputes Resolution Procedure), the Province's obligation to increase the

Performance Payments as set out in Section 20.11.5.4 will not come into effect until such information has been provided.

20.11.4 If the Province and the Concessionaire cannot agree on the lowest available premium from insurers with at least an A- Rating (excluding any increase in the premiums resulting from the Concessionaire's claims record), they will refer the matter to the Disputes Resolution Procedure. The premiums that are agreed or determined by the Disputes Resolution Procedure shall be the "Lowest Initial Premiums" for the purposes of this Section.

20.11.5 On the Substantial Completion Date, the Province will adjust the Performance Payments for the Contract Year starting on the Substantial Completion Date to reflect the following:

20.11.5.1 the Province will apply the Annual Percentage Increase to the Initial Premium Indication for each of the O&M Insurances for each year from the Commencement Date to the Substantial Completion Date (applying the Annual Percentage Increase pro rata for any part of a year), resulting in the "Base Initial Premium";

20.11.5.2 the Province will establish the difference between the total of all of the Lowest Initial Premiums for the O&M Insurances and the total of all of the Base Initial Premiums for the O&M Insurances;

20.11.5.3 if the total of all of the Lowest Initial Premiums for the O&M Insurances is less than the total of all of the Base Initial Premiums for the O&M Insurances, the whole of the difference shall be deducted from the Performance Payments; and

20.11.5.4 if the total of all of the Lowest Initial Premiums for the O&M Insurances is more than the total of all of the Base Initial Premiums for the O&M Insurances, the Performance Payments shall be increased by the difference in accordance with the following:

- (a) initially the difference shall be split 60/40, with only 60% of the difference increasing the Performance Payments; and
- (b) if 40% of the difference is more than \$125,000 (this \$125,000 is in dollars as at Substantial Completion and will be index linked thereafter and proportionately reduced where the relevant Contract Year is less than 12 months), then any amount in excess of \$125,000 (this \$125,000 is in dollars as at Substantial Completion and will be index linked thereafter and proportionately reduced where the relevant Contract Year is less than 12 months) shall also increase the Performance Payments.

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- 20.11.6 90 days before each anniversary of the Substantial Completion Date (each anniversary of the Substantial Completion Date being referred to as an “Insurance Adjustment Date”) the Concessionaire will review the O&M Insurances and will engage a major insurance broker to carry out a thorough analysis of the then current insurance markets (without limiting the underwriters approached) in order to find the then lowest available premiums for the O&M Insurances from insurers with at least an A- Rating (excluding any increase in the premiums resulting from the Concessionaire’s claims record) and at least 30 days before the relevant Insurance Adjustment Date will provide the Province with a report setting out full details of the instructions provided to the broker, the broker’s analysis and the premiums that will be payable for each of the O&M Insurances.
- 20.11.7 The Province will review the report produced under Section 20.11.6 and may either accept that report or may carry out its own analysis of the insurance markets using a broker of its own choice and dealing with underwriters of its own choice, provided such insurers have at least an A- Rating. The Concessionaire will at its cost provide the Province with all information the Province reasonably requests in relation to the O&M Insurances, including all information relating to its claims history, any correspondence with its insurers, and any other information that a prudent underwriter would require to rate the relevant risk (the Concessionaire acknowledging that a request for such information would be reasonable on the part of the Province). The Province will provide the Concessionaire with a report setting out full details of the instructions provided to the broker, the broker’s analysis and the premiums that will be payable for each of the O&M Insurances.
- 20.11.8 If the Concessionaire fails to provide the Province with full details of its claims record, any correspondence with its insurers, any information that a prudent underwriter would require to rate the relevant risk or any other information reasonably requested by the Province (as determined by the Disputes Resolution Procedure), the Province’s obligation to increase the Performance Payments as set out in Section 20.11.10.4 will not come into effect until such information has been provided.
- 20.11.9 If the Province and the Concessionaire cannot agree on the lowest available premium from insurers with at least an A- Rating (excluding any increase in the premiums resulting from the Concessionaire’s claims record), they will refer the matter to the Disputes Resolution Procedure. The premiums that are agreed or determined by the Disputes Resolution Procedure shall be the "Lowest Annual Premiums" for the purposes of this Section.
- 20.11.10 On each Insurance Adjustment Date the Province will adjust the Performance Payments for the following Contract Year to reflect the following:
- 20.11.10.1 the Province will apply the Annual Percentage Increase to the actual premium paid for each of the O&M Insurances in the previous year, resulting in the Base Annual Premium;

- 20.11.10.2 the Province will establish the difference between the total of all of the Lowest Annual Premiums for the O&M Insurances and the total of all of the Base Annual Premiums for the O&M Insurances;
- 20.11.10.3 if the total of all of the Lowest Annual Premiums for the O&M Insurances is less than the total of all of the Base Annual Premiums for the O&M Insurances, the whole of the difference shall be deducted from the Performance Payments; and
- 20.11.10.4 if the total of all of the Lowest Initial Premiums for the O&M Insurances is more than the total of all of the Base Initial Premiums for the O&M Insurances, the Performance Payments shall be increased by the difference in accordance with the following:
 - (a) initially the difference shall be split 60/40, with only 60% of the difference increasing the Performance Payments; and
 - (b) if 40% of the difference is more than \$125,000 (index linked and proportionately reduced where the relevant Contract Year is less than 12 months), then any amount in excess of \$125,000 (index linked and proportionately reduced where the relevant Contract Year is less than 12 months) shall also increase the Performance Payments.

20.11.11 The following insurance coverages will be subject to this Section 20.11 [Benchmarking of Insurance]:

	Insurance cover	Initial Premium Indication	Annual Percentage Increase
20.11.11.1	General Liability, as set out in paragraph 3.1 of Part 1 of Schedule 11 [Insurance Requirements]	DELETED	DELETED
20.11.11.2	Professional Liability as set out in paragraph 3.2 of Part 1 of Schedule 11 [Insurance Requirements]	DELETED	DELETED
20.11.11.3	Director's and Officer's Legal Liability, including corporate indemnification for the Concessionaire. Limit of liability - \$5,000,000 ; deductible - \$100,000 , . The payment of any deductible shall be the responsibility of the Concessionaire	DELETED	DELETED

20.11.11.4	Boiler and Machinery insurance for all boilers, pressure vessels, electrical and mechanical machines on a comprehensive basis including property damage and business interruption for an amount equal to the replacement value of like kind and quality of the item insured. Limit of liability - \$5,000,000 ; deductible - \$50,000 . The payment of any deductible shall be the responsibility of the Concessionaire.	DELETED	DELETED
20.11.11.5	Auto Liability in accordance with paragraph 3.3 of Part 1 of Schedule 11 [Insurance Requirements]	Premium established by ICBC	DELETED
20.11.11.6	Property Insurance, as set out in paragraph 4 of Part 1 of Schedule 11 [Insurance Requirements]	DELETED	DELETED
20.11.11.7	Business Interruption insurance coverage extension (as part of the Property Insurance referred to in Section 20.11.11.6) up to DELETED as a result of an insurable loss. Limit of liability - DELETED ; deductible DELETED	DELETED	DELETED

20.11.12 Sample calculations of the benchmarking processes described in this Section 20.11 are set out in Annex 1 of Schedule 11. The numbers used in the sample calculations are for illustrative purposes only.

20.11.13 If:

- 20.11.13.1 A.M. Best Company changes its rating so that A- Rating no longer represents A.M Best Company’s opinion that a company assigned that rating has an excellent ability to meet their ongoing obligations to policyholders;
- 20.11.13.2 A.M. Best Company ceases to provide ratings for insurance companies; or
- 20.11.13.3 there are only a limited number of insurance companies with at least an A- Rating who will provide the relevant insurance coverage,

then the Province and the Concessionaire will meet to assess an appropriate substitute for the A- Rating, based on the overriding test that the insurances should be provided by insurers of good repute and standing.

21. **MOT SECTION WORKS AND KELOWNA AGREEMENT**

21.1 **MOT Section Works and Kelowna Agreement**

- 21.1.1 The Province will cause the MOT Section Works to be completed prior to July 31, 2008. If the MOT Section Works are not completed by July 31, 2008 or if the improvements contemplated within the Kelowna Agreement are not completed in accordance with the Kelowna Agreement resulting in a reduction of vehicular traffic capacity on the Concession Highway, the parties agree that such non-completion will be a Traffic Volume Change Event described in Part 2 of Schedule 10 [Traffic Volume Payment] and the traffic bands or the vehicle rate or both may be adjusted in accordance with paragraph 2.3 of Part 2 of Schedule 10 [Traffic Volume Payment]. The parties may agree on any other adjustments to the Performance Payments in lieu of the adjustments to the traffic bands or the vehicle rate.
- 21.1.2 Subject to Sections 21.1.1, 21.1.3 or 21.1.4 or paragraph (o) of the definition of Compensation Event in Schedule 1 [Definitions and Interpretation] or as otherwise expressly provided in this Agreement, the Concessionaire does not have any Claim whatsoever against the Province or BCTFA arising from or in connection with the MOT Section Works or any works contemplated in the Kelowna Agreement, including for any reduction in the Performance Payments resulting in reduced traffic flow on the Concession Highway caused by the construction of the MOT Section Works or the improvements contemplated in the Kelowna Agreement.
- 21.1.3 If the Concessionaire is delayed in its completion of the works required at the intersection of Abbott Street and Highway 97 as a result of any act or omission of the City of Kelowna (not resulting from any negligence of the Concessionaire or failure of the Concessionaire to act in accordance with Good Industry Practice), and apart from the completion of such works Substantial Completion would have occurred, then Substantial Completion will be deemed to have occurred.
- 21.1.4 If the Concessionaire is delayed in its completion of the New Highway as a result of any act or omission of the MOT Section Contractor (not resulting from any negligence of the Concessionaire or failure of the Concessionaire to act in accordance with Good Industry Practice), and apart from the completion of such works Substantial Completion would have occurred, then Substantial Completion will be deemed to have occurred.

PART III
RELATIONSHIP AND MONITORING

22. **REPRESENTATIVES**

22.1 **Province's Representative**

22.1.1 The Province will appoint a competent and qualified person as the Province's Representative to act as its agent in relation to the Undertakings, including in relation to the design, construction, completion, commissioning and testing of the Works, the design and completion of the Decommissioning and all other aspects of the Undertakings. The Province's Representative will exercise the functions set out in Part 1 of Schedule 8 [Province's Representative] and such other functions in respect of this Agreement as the Province may notify to the Concessionaire at least 30 days prior to the Province's Representative's exercise of such other functions, from time to time.

22.1.2 During any period when there is no Province's Representative, the functions which would otherwise be performed by the Province's Representative will be carried out by such other person as the Province may designate by notice to the Concessionaire.

22.1.3 Except as expressly stated in this Agreement, the Province's Representative does not have any authority to relieve the Concessionaire of any of its obligations under this Agreement.

22.1.4 Except as otherwise notified by the Province to the Concessionaire and subject to Section 22.1.5, the Concessionaire is entitled to treat any act of the Province's Representative as being expressly authorized by the Province and the Concessionaire will not be required to determine whether an express authority has in fact been given.

22.1.5 Any decision by the Province's Representative is specific to the circumstances to which it relates, and will not be construed as binding on, or limiting any other decision to be made by, the Province's Representative, whether in the same or similar circumstances or otherwise.

22.1.6 Without prejudice to Section 22.1.4, in the exercise of any of its functions the Province's Representative may:

22.1.6.1 refer any matter to the Province or any of the Province's employees, agents, advisors, consultants, contractors or subcontractors of any tier for advice or determination;

22.1.6.2 rely upon any advice received or determination made following a reference pursuant to Section 22.1.6.1;

22.1.6.3 rely on any other advice that the Province's Representative considers necessary or appropriate in the circumstances; and

22.1.6.4 designate any other person to conduct or attend any inspection or test or to take any other action that is to be conducted, attended or taken, or that is permitted to be conducted, attended or taken, by the Province's Representative under the terms of this Agreement.

22.2 Concessionaire's Representative

22.2.1 The Concessionaire will appoint a competent and qualified person to act as its agent in connection with this Agreement. Such appointment will be subject to the approval of the Province, such approval not to be unreasonably withheld or delayed.

22.2.2 The Concessionaire's Representative will have full authority to act on behalf of the Concessionaire for all purposes of this Agreement. Except as otherwise notified by the Concessionaire to the Province and subject to Section 22.2.4, the Province, BCTFA and the Province's Representative are entitled to treat any act of the Concessionaire's Representative in connection with this Agreement as being expressly authorized by the Concessionaire, and BCTFA, the Province and the Province's Representative will not be required to determine whether any express authority has in fact been given.

22.2.3 The Concessionaire's Representative responsible for supervision of construction works necessary to complete, commission and test the Works or a duly experienced and authorized subordinate will remain on the Site or the Graving Dock Site, as appropriate, during all active periods of construction.

22.2.4 Any decision by the Concessionaire's Representative is specific to the circumstances to which it relates, and will not be construed as binding on, or limiting any other decision to be made by, the Concessionaire's Representative, whether in the same or similar circumstances or otherwise.

22.3 Change of Representatives

22.3.1 The Province may at any time and from time to time by notice to the Concessionaire terminate the appointment of any Province's Representative or appoint one or more substitute Province's Representatives, who will be competent and qualified persons. Any such notice will specify the effective date of such termination or substitution.

22.3.2 Save in the case of death or serious illness, the appointment of the Concessionaire's Representative will not be terminated without the prior approval of the Province, such approval not to be unreasonably withheld or delayed. Immediately upon the Concessionaire's Representative ceasing to act in the case of death or serious illness and prior to termination of the appointment in all other cases, the Concessionaire will by notice to the Province appoint a substitute. Such appointment will be subject

to the approval of the Province, such approval not to be unreasonably withheld or delayed.

22.4 Key Individuals

22.4.1 The Concessionaire represents to the Province that the key individuals for the Undertakings are identified in Part 3 of Schedule 8 [Key Individuals]. The Concessionaire will cause such persons (or suitable replacement individuals with equivalent qualifications and experience) to remain involved in the Undertakings in the capacities set out in that Schedule.

22.4.2 The Concessionaire will not change any of the key individuals identified in Part 3 of Schedule 8 [Key Individuals] unless the proposed replacement individual has equivalent qualifications and experience to those of the individual being replaced. The Concessionaire will provide the Province with advance notice of any such change, together with details of the qualifications and experience of the proposed replacement.

23. QUALITY MANAGEMENT

23.1 Quality Management Systems and Quality Documentation

23.1.1 The Concessionaire is responsible for all quality assurance and quality control activities required to manage its own processes as well as those of its contractors, subcontractors and suppliers of any tier throughout the Contract Period. The Concessionaire will throughout the Contract Period ensure that all aspects of the Undertakings are the subject of a Quality Management System that complies with the provisions of this Section 23 [Quality Management] and the requirements of Schedule 6 [Quality Management], and will comply with and cause each of its agents, contractors, subcontractors and suppliers of any tier and the employees of each of them to comply with the requirements of such Quality Management System.

23.1.2 The Quality Management System referred to in Section 23.1.1 will, at a minimum include the Quality Documentation described in paragraph 2 of Schedule 6 [Quality Management] and will comply with:

23.1.2.1 the principles of the ISO 9001:2000 Standard and any other applicable standards specified in Schedule 6 [Quality Management];

23.1.2.2 the Technical Requirements (as amended from time to time by any Province Change);

23.1.2.3 Good Industry Practice; and

23.1.2.4 all other requirements set out in Schedule 6 [Quality Management].

23.1.2A The Concessionaire's Quality Management System (as described in the Concessionaire's Quality Manual) which is the subject of the Operations, Maintenance and Rehabilitation Quality Management Plan and Traffic Quality Management Plan must be certified as being compliant with the ISO 9001:2000 Standard at least 90 days prior to Substantial Completion by an accredited ISO 9001:2000 certification agency acceptable to the Province, acting reasonably, which certification is to be maintained by the Concessionaire throughout the Contract Period. The rest of the Concessionaire's Quality Management System does not require certification by any accredited ISO 9001:2000 certification agency, but must be compliant with the ISO 9001:2000 Standard. The Concessionaire will update its entire Quality Management System and all Quality Documentation from time to time, in accordance with Section 23.1.9, to ensure that the Quality Management System and all Quality Documentation are and at all times remain in full compliance with the ISO 9001:2000 Standard and the requirements of this Agreement (including Schedule 6 [Quality Management]).

23.1.3 Without limiting the generality of Section 23.1.2, there will be:

- 23.1.3.1 a Quality Manual for all aspects of the Undertakings and meeting the requirements set out in Annex 1 to Schedule 6 [Quality Management];
- 23.1.3.2 a Design Quality Management Plan for undertaking any design and inspection activities covered by the Design-Build Contract and the Design Subcontract and meeting the requirements set out in Annex 2 to Schedule 6 [Quality Management];
- 23.1.3.3 a Construction Quality Management Plan for undertaking the activities covered by the Design-Build Contract and meeting the requirements set out in Annex 3 to Schedule 6 [Quality Management];
- 23.1.3.4 an Operation, Maintenance and Rehabilitation Quality Management Plan for undertaking the activities covered by the Operating and Maintenance Contract and meeting the requirements set out in Annex 4 to Schedule 6 [Quality Management];
- 23.1.3.5 a Traffic Quality Management Plan for undertaking traffic management meeting the requirements set out in Annex 5 to Schedule 6 [Quality Management];
- 23.1.3.6 an Environmental Quality Management Plan meeting the requirements set out in Annex 6 to Schedule 6 [Quality Management]; and
- 23.1.3.7 a Quality Management Plan for any other party contracting with the Concessionaire, the Designer, the Contractor or the Operator for the purposes of undertaking any aspect of the Undertakings (excluding legal and financial advisors and Funders) in each case for undertaking the

activities covered by that party's contract with the Concessionaire, the Designer, the Contractor or the Operator (as the case may be) and meeting the requirements of the Concessionaire's Quality Manual.

23.1.4 The Concessionaire will:

- 23.1.4.1 submit its Quality Manual to the Province's Representative in accordance with the Review Procedure within 30 days of the Commencement Date;
- 23.1.4.2 submit its Quality Management Plans to the Province's Representative in accordance with the Review Procedure within 45 days of the Commencement Date;
- 23.1.4.3 submit its Quality Audit Plans to the Province's Representative in accordance with the Review Procedure within 90 days of the Commencement Date; and
- 23.1.4.4 submit its monthly Quality Management System Report for each month to the Province's Representative within 10 Working Days of the start of the following month.

All Quality Management Plans must be fully implemented within 180 days from the Commencement Date.

23.1.5 Except with the prior written consent of the Province, the Concessionaire will not commence or permit the commencement of any aspect of the Undertakings before those parts of the Quality Documentation that concern such aspect of the Undertakings have been submitted to the Province's Representative under the Review Procedure and there has been no objection thereto in accordance with the Review Procedure.

23.1.6 The Concessionaire will comply with the Quality Management System detailed in the Quality Manual and will ensure that:

- 23.1.6.1 each of the Contractor and the Designer complies with the Design Quality Management Plan in connection with all design and inspection activities under the Design-Build Contract and the Design Subcontract;
- 23.1.6.2 the Contractor complies with the Construction Quality Management Plan, the Traffic Quality Management Plan and the Environmental Quality Management Plan in connection with all activities under the Design-Build Contract;
- 23.1.6.3 the Operator complies with the Operation, Maintenance and Rehabilitation Quality Management Plan, the Traffic Quality Management Plan and the Environmental Quality Management Plan in

connection with all activities under the Operating and Maintenance Contract; and

- 23.1.6.4 any other party contracting with the Concessionaire, the Designer, the Contractor or the Operator complies with that party's Quality Management Plan in connection with the activities covered by that party's contract with the Concessionaire, the Designer, the Contractor or the Operator (as the case may be).
- 23.1.7 Where any aspect of the Undertakings is performed by more than one contractor, subcontractor or supplier, then the provisions of this Section 23 [Quality Management] will apply in respect of each of such contractors, subcontractors or suppliers, and references in this Section 23 [Quality Management] to the Designer, the Contractor and the Operator or any other party will be construed accordingly.
- 23.1.8 The Concessionaire will submit to the Province's Representative in accordance with the Review Procedure any proposed changes or additions to or revisions of any of the Quality Documentation, provided that no such changes, additions or revisions will be given effect to unless and until there has been no objection thereto in accordance with the Review Procedure.
- 23.1.9 Without limiting the generality of Section 23.1.8, the Concessionaire will from time to time submit to the Province's Representative in accordance with the Review Procedure any changes to any of the Quality Documentation required for such Quality Documentation to continue to reflect and comply with the requirements set out in Section 23.1.2, provided that no such changes will be given effect to unless and until there has been no objection thereto in accordance with the Review Procedure.
- 23.1.10 If the Concessionaire fails to propose any change required pursuant to Section 23.1.9, then the Province may propose such change and it will be dealt with in accordance with the Review Procedure as though it had been proposed by the Concessionaire and will not therefore be treated as a Province Change. Any Dispute will be resolved in accordance with the Disputes Resolution Procedure.
- 23.1.11 If there is no objection by the Province's Representative under the Review Procedure to a part of the Quality Documentation referred to in Section 23.1.5 or to a change, addition or revision proposed pursuant to Section 23.1.8, Section 23.1.9 or Section 23.1.10, then the Quality Documentation will be amended to incorporate such part, change, addition or revision.

23.2 Quality Manuals, Plans and Procedures

If any Quality Documentation refers to, relies on or incorporates any quality manual, plan, procedure or like document then such quality manual, plan, procedure or other document or the relevant parts thereof will (unless the Province's Representative otherwise agrees) be

submitted to the Province's Representative at the time that the relevant Quality Documentation or part of or change, addition or revision to the Quality Documentation is submitted in accordance with the Review Procedure, and the contents of such quality manual, plan, procedure or other document will be taken into account in the consideration of the relevant Quality Documentation or part of or change, addition or revision to the Quality Documentation in accordance with the Review Procedure. The Province's Representative may require the amendment of any such quality manual, plan, procedure or other document to the extent necessary to enable the relevant Quality Documentation to satisfy the requirements of Section 23.1.2.

23.3 Additional Information

Notwithstanding any other provision of this Section 23 [Quality Management], the Concessionaire will provide the Province's Representative with such information as the Province's Representative may reasonably request from time to time to demonstrate compliance with this Section 23 [Quality Management] and the provisions of Schedule 6 [Quality Management].

23.4 Testing

23.4.1 Where the Concessionaire is required by any of the Technical Requirements (as amended from time to time by any Province Change) or by the Design and Certification Procedure or any Quality Documentation to carry out any calibration, sample, test or inspection, such calibration, sample, test or inspection will be carried out in accordance with the following provisions of this Section 23.4 [Testing] and the provisions of the relevant Quality Documentation.

23.4.2 All on-site and off-site calibrations, samples, tests and inspections will be carried out by laboratories that are duly accredited for the carrying out of such calibrations, samples, tests and inspections in accordance with ISO/IEC 17025, as amended, updated or replaced from time to time. For specific activities, industry-recognized accreditation will be accepted in lieu of ISO/IEC 17025. These include:

- 23.4.2.1 concrete and concrete materials: CSA A283-00, "Qualification Code for Concrete Testing Laboratories", to the appropriate category for the tests being done;
- 23.4.2.2 structural steel and welding: CSA W178.1-02, "Certification of Welding Inspection Organizations", to the level appropriate for the inspection being carried out;
- 23.4.2.3 aggregates, bituminous paving mixtures: "Canadian Council of Independent Laboratories", as appropriate to the work being carried out; and

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- 23.4.2.4 protective coatings: “National Association of Corrosion Engineers”, as appropriate to the work being carried out.

The Concessionaire may request the approval of the Province’s Representative to use other industry-recognized accreditations, which approval will not be unreasonably withheld or delayed if such other accreditation is applicable to the work for which it is proposed and meets the intent of ISO/IEC 17025.

- 23.4.3 The Concessionaire will be responsible at its own expense for any remedial work required as a result of any failure to pass any calibration, sample, test or inspection required in accordance with this Agreement or as a result of any laboratory not being duly accredited as required by this Agreement.

23.5 Quality Management Representative

The Concessionaire will at all times maintain a Quality Management Representative who will, irrespective of such person’s other responsibilities, have defined authority for ensuring the establishment and maintenance of the Concessionaire’s Quality Management System and auditing and reporting on the performance of the Concessionaire’s Quality Management System. The identity of the Quality Management Representative (and any replacement) will be subject to the approval of the Province (such approval not to be unreasonably withheld or delayed). Without limiting the generality of the foregoing, the job specification and responsibilities of the Quality Management Representative will include:

- 23.5.1 developing, implementing and maintaining, and ensuring the effective operation of, the Concessionaire’s Quality Management System;
- 23.5.2 initiating management reviews, not less frequently than annually, and taking other actions necessary to ensure the effective operation and continuous improvement of the Concessionaire’s Quality Management System;
- 23.5.3 preparing Quality Audit Plans and scheduling and coordinating internal and external Quality Audits of key processes with the Concessionaire’s personnel and with the Concessionaire’s contractors, subcontractors and suppliers of any tier (including the Designer, the Contractor and the Operator);
- 23.5.4 ensuring that all Quality Audits required under Section 23.6.1 and the Quality Documentation are conducted and reporting the findings of such audits to the Province’s Representative;
- 23.5.5. immediately stopping any work or activity which is not being performed or carried out in accordance with the Quality Documentation applicable thereto;
- 23.5.6 liaising with the Province’s Representative and acting as the single point representative for the Concessionaire on all matters relating to the quality management;

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- 23.5.7 coordinating all matters and issues relating to the certification of the Concessionaire's Quality Management System;
 - 23.5.8 preparing and submitting to the Province's Representative monthly Quality Management System reports; and
 - 23.5.9 ensuring that relevant quality records are retained in accordance with the Concessionaire's Quality Management System and in any event for the retention periods required by Section 25 [Records].

23.6 Quality Monitoring

- 23.6.1 The Concessionaire will conduct internal and external Quality Audits of its own processes and those of its contractors, subcontractors and suppliers of any tier (including the Designer, the Contractor and the Operator) and third party Quality Audits will be conducted in accordance with the requirements of Schedule 6 [Quality Management] and the Quality Documentation and Quality Audit Plans referred to therein and the results of such Quality Audits will be made available to the Province's Representative upon request. The Quality Audit Plans will identify the processes to be audited and the planned dates of the audits. All key processes will be audited not less frequently than annually, and the reports of such audits will be made available to the Province's Representative upon request.
- 23.6.2 Without prejudice to Section 26 [Monitoring of Performance], the Province's Representative may, during business hours and at the Province's cost, carry out scheduled and unscheduled external Quality Audits of the Concessionaire's Quality Management System (including compliance with all Quality Documentation) as provided in Schedule 6 [Quality Management], and may carry out other monitoring and spot checks of such Quality Management System and materials and other testing activities at its absolute and unfettered discretion.
- 23.6.3 If either:
 - 23.6.3.1 the Province's Representative reasonably believes that the Concessionaire is failing to conduct Quality Audits of its Quality Management System as required by this Agreement; or
 - 23.6.3.2 any auditing, monitoring or spot checks of the Quality Management System reveal deficiencies in the Quality Management System or the implementation thereof,

the Province's Representative may carry out increased levels of Quality Audits to an extent reasonable in the circumstances (whether in number, duration or detail) of all or any aspect of the external Concessionaire's Quality Management System until such time as the Province's Representative is reasonably satisfied that neither of the circumstances described in Section 23.6.3.1 or Section 23.6.3.2 continues to exist.

23.6.4 If the Province's Representative carries out increased levels of external Quality Audits pursuant to Section 23.6.3, the Concessionaire will compensate the Province for all direct costs incurred relating thereto unless the Concessionaire refers the matter to the Disputes Resolution Procedure and it is determined pursuant to the Disputes Resolution Procedure that the increased levels of audits were unwarranted in which event the Province will compensate the Concessionaire for its costs associated with the increased levels of audits.

24. REPORTS AND INFORMATION

24.1 Required Reports

The Concessionaire will submit to the Province's Representative all reports provided or specified in Part 2 of Schedule 15 [Reports], in or required under the provisions of this Agreement and the Technical Requirements including all reports specified or referred to in such numbers as provided therein, which reports will, at the Province's Representative's request, be accompanied by a copy of such report or any part thereof on computer diskette or other electronic storage device in such form and compatible with such software as the Province's Representative reasonably requires.

24.2 Form

24.2.1 The following Reports will be submitted to the Province's Representative for review in accordance with Part 2 of Schedule 8 [Review Procedure]:

- 24.2.1.1 the Construction Staging Plan;
- 24.2.1.2 the Decommissioning Plan;
- 24.2.1.3 the New Crossing Erection Plan;
- 24.2.1.4 the Graving Dock Construction Facility Plan; and
- 24.2.1.5 the Demolition Plan.

24.2.2 The form of all Reports other than those listed in Section 24.2.1, unless otherwise specified, will be agreed with the Province's Representative, such agreement not to be unreasonably withheld.

24.3 Further Information

The Concessionaire will at any time and from time to time at its own cost in respect of then existing information and at the Province's cost for the development of new information provide the Province's Representative with such further or other information with respect to the Project as the Province's Representative may reasonably require.

24.4 Objections to Reports

24.4.1 If the Province's Representative considers that any Report, other than those listed in Section 24.2.1, either has not been compiled in accordance with the provisions of this Agreement or has been based on erroneous information or data, then it may serve a notice to that effect on the Concessionaire within 30 days of receipt of such Report objecting to such Report.

24.4.2 If any such objection has not been resolved by agreement between the Province's Representative and the Concessionaire within 14 days after the service of such notice, then either of them may refer the matter to the Disputes Resolution Procedure for determination.

24.5 Revisions to Reports

If either:

24.5.1 the resolution (whether by agreement or determination under the Disputes Resolution Procedure) of any objection made pursuant to Section 24.4.1; or

24.5.2 the correction of any calculation as a result of defective Measuring Equipment,

requires any revision or adjustment to any Report, then the Concessionaire will as soon as practicable issue revised versions of each affected Report and such revised Report shall for all purposes of this Agreement take the place of the original Report.

24.6 Employee Information and Changes to Workforce

24.6.1 Except where restricted by any Laws and Regulations, the Concessionaire, in accordance with the provisions set out in Schedule 24 [Employee Information and Changes to Workforce], will from time to time upon request therefor provide the Province with information with respect to the employees employed by the Concessionaire or any of its contractors and subcontractors of any tier whose work (or any part of it) is work undertaken for the purposes of this Agreement.

24.6.2 Except where restricted by any Laws and Regulations, the Concessionaire will comply and cause the Contractor and Operator to comply with the provisions of Schedule 24 [Employee Information and Changes to Workforce] with respect to changes in connection with the employees referred to in Section 24.6.1.

25. **RECORDS**

25.1 Required Records

The Concessionaire will maintain and update those records relating to the Project, the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site and the Undertakings set out in Part 1 of Schedule 15 [Records]. The Concessionaire will maintain

copies of all records relating to the Project, the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site and the Undertakings at a location within British Columbia and will inform the Province of the particulars of that location.

25.2 Audit and Inspection

All records relating to the Project, the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site and the Undertakings including the records referred to in Section 25.1 [Required Records], will be kept in good order and in such form as to be capable of audit and inspection (including by electronic means to the extent that such records were delivered by the Province or otherwise are maintained in an electronic format) by the Province's Representative. The Concessionaire will make any such records available for audit or inspection by or on behalf of the Province, BCTFA, the Province's Representative or any of their authorized representatives at all reasonable times, and on reasonable notice. Without limiting the foregoing or any other provisions of this Agreement, the Minister may require, at the Province's cost, the accounts and other records of the Concessionaire with respect to the Project, the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site and the Undertakings or any part thereof to be audited from time to time pursuant to the provisions of section 9 of the *Transportation Investment Act*.

25.3 Copies

The Province, BCTFA and the Province's Representative and any of their authorized representatives will be entitled, using their own or contracted labour for such purpose, to take copies of all records of the Concessionaire with respect to the Project, the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site and the Undertakings or any part thereof at the Concessionaire's cost, excluding labour costs, and for that purpose to use such copying facilities as are maintained at the place where the records are kept.

25.4 Management and Retention of Records

25.4.1 Within 45 days of the Commencement Date, the Concessionaire will submit to the Province's Representative in accordance with the Review Procedure, an initial Records Management Protocol which complies with the requirements set forth in Part 1 of Schedule 15 [Records] and with all Laws and Regulations and Legal Requirements that would from time to time be applicable to the creation, maintenance, management, retention and disposal of the relevant records if they were maintained by the Province (the "Records Management Protocol"). The Concessionaire will comply with such Records Management Protocol as submitted and updated from time to time without objection by the Province's Representative in accordance with the Review Procedure, in connection with all records maintained by the Concessionaire in connection with the Project, the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site or the Undertakings or any part thereof. The Concessionaire will, where necessary or as required by the Province's Representative from time to time, submit updates to the Records Management Protocol from time to time in accordance with the Review Procedure to ensure that

the Records Management Protocol continues to meet the requirements of this Section 25.4.1, Part 1 of Schedule 15 [Records] and Good Industry Practice.

25.4.2 The Concessionaire will comply promptly and at its expense with:

25.4.2.1 all Privacy Legislation and other Laws and Regulations and Legal Requirements relating to information, records and other documentation relating to or acquired, obtained or produced in connection with the Project, the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site or the Undertakings or any part thereof; and

25.4.2.2 all requests or requirements of the Province from time to time for the purpose of enabling the Province, BCTFA or any other Governmental Authority to comply with its obligations under any Privacy Legislation or other Laws and Regulations or Legal Requirements relating to information, records and other documentation relating to or acquired, obtained or produced in connection with the Project, the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site or the Undertakings or any part thereof.

25.4.3 Without prejudice to any longer retention periods required under Laws and Regulations (which will be complied with by the Concessionaire), all records maintained by the Concessionaire with respect to the Project, the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site and the Undertakings, including the records referred to in Section 25.1 [Required Records], will be retained in accordance with provincial and federal government retention policies and in any event for no less than the periods specified for the relevant records in Part 1 of Schedule 15 [Records] or, if no such period is specified, a period of 7 years after the end of the Contract Year to which such records relate. Notwithstanding the foregoing or any other provisions of this Agreement, all as-built drawings must be retained indefinitely and all records relating to the subject matter of any Dispute must be retained for at least 7 years after the resolution of the Dispute.

25.4.4 Where the period for the retention of any records (including as set out for any class of records in Part 1 of Schedule 15 [Records]) has expired, the Concessionaire will notify the Province as to what it intends to do with such records. If it intends to dispose of them or subsequently decides to dispose of them, the Concessionaire will notify the Province, and if the Province elects within 40 days of receipt of such notice to receive those records or any part of them then the Concessionaire, at the Province's cost, will deliver such records to the Province in the manner and at such location as the Province reasonably specifies.

25.4.5 Upon the termination for whatever reason of this Agreement, the Concessionaire will at its own cost deliver up to the Province in the manner and at such location as the Province reasonably specifies all records relating to the Project, the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site and the

Undertakings, including the records referred to in Section 25.1 [Required Records], which were in existence at the Expiry Date (or, where those records are required by Laws and Regulations to remain with the Concessionaire, copies thereof) or such part of such records as the Province may by notice to the Concessionaire specify. The Concessionaire shall be entitled to retain copies of all such records. The Province, so long as it retains possession thereof, will allow the Concessionaire to inspect records the Concessionaire delivers to the Province pursuant to this Section 25.4.5, subject to reasonable notice.

25.4.6 The Concessionaire will retain in safe storage for a period of not less than 15 years following the Expiry Date all records referred to in Section 25.4.5 that the Province does not require to be delivered to it. Alternatively, the Concessionaire may at its option and at its expense deliver such records to the Province, in such manner and at such location as the Province reasonably specifies, for storage. The costs of retaining those records in safe storage will be borne:

25.4.6.1 by the Concessionaire where the termination arises as a result of an Event of Default;

25.4.6.2 by the Province where the termination arises as a result of a Concessionaire Termination Event or Termination for Convenience; and

25.4.6.3 in cases of termination other than those referred to in Sections 25.4.6.1 and 25.4.6.2, severally by the Concessionaire and the Province each being responsible for 50% of the costs.

25.5 Computer Records

To the extent that the records of the Concessionaire are to be created or maintained on a computer or other electronic storage device and to the extent that procedures for the back-up and off-site storage of copies of such records are not otherwise provided for in the Technical Requirements, the Records Management Protocol will establish a procedure for back-up and off-site storage of copies of such records and the Concessionaire will adhere to such procedure and cause the Contractor, the Designer and the Operator and its and their respective contractors and subcontractors to implement and adhere to such procedure (provided that prior to the establishment of such procedure the Concessionaire will in any event comply with and cause the Contractor, the Designer and the Operator and its and their respective contractors and subcontractors to comply with Good Industry Practice in respect thereof).

26. MONITORING OF PERFORMANCE

26.1 Breach of this Agreement

26.1.1 The Concessionaire will notify the Province's Representative of the occurrence of any failure by the Concessionaire to perform its obligations under this Agreement

that gives rise to an Availability/Performance Deduction in accordance with Part 8 of Schedule 10 [Performance Deductions] and of any other material breach of its obligations under this Agreement as soon as practicable and in any case within 7 days after it becomes aware of such matter.

- 26.1.2 If at any time the Concessionaire has failed to perform any of its obligations under this Agreement (including its obligation to pursue the Works and the Decommissioning diligently in accordance with Section 12.5 [Achievement of Completion], and whether or not any such failure has been notified under Section 26.1.1) and such failure is capable of remedy or, if such failure is not capable of remedy, the circumstances which gave rise to such failure are capable of being addressed in such a way as to reduce the risk of such failure occurring again, then the Province's Representative may (unless the Concessionaire has already remedied the failure or is diligently pursuing a course of action to address the circumstances which gave rise to such failure) serve a notice on the Concessionaire (a "Default Notice") requiring the Concessionaire (at its own cost and expense) either to remedy such failure (and any damage resulting from such failure) within a reasonable period taking into account the nature and extent of the failure, but in any event being not less than 30 days (the "Remedial Period") or within such period to develop a plan to address the circumstances which gave rise to such failure in such a way as to reduce the risk of such failure occurring again and thereafter to comply with such plan and, for greater certainty, a failure to either remedy or to develop and comply with a plan of the type described in this Section 26.1.2 shall, of itself, constitute a failure to perform on the part of the Concessionaire.
- 26.1.2A Notwithstanding any other provision of this Agreement, the Concessionaire will only be entitled to dispute a Default Notice if it refers such dispute to the Disputes Resolution Procedure within 20 Working Days of receipt of such Default Notice. If the circumstances set out in Section 26.5.2 apply and if, the Concessionaire fails to take the steps referred to in the final paragraph of Section 26.5.2 in the time required therefor by the Province, the Province may serve a Default Notice on the Concessionaire which, for the purposes of this Section 26.1.2, will only be required to stipulate the occurrence of that event and will not be required to stipulate any Remedial Period.
- 26.1.2B For greater certainty, where any event as set out in Section 40.1 [Events of Default] contains a time period before which it becomes an Event of Default and the Province has given a Default Notice under Section 26.1.2 in respect of that event, the time period contained in Section 40.1 [Events of Default] shall run concurrently with any time period under this Section 26 [Monitoring of Performance].
- 26.1.3 For greater certainty, the provisions of this Agreement relating to Default Notices and the Parties' respective rights and obligations in respect thereof are without prejudice to and do not affect or limit the provisions of Part 8 of Schedule 10 [Performance Deductions] relating to Nonconformity Reports and the Parties' respective rights and obligations relating thereto, and the provisions of Part 8 of

Schedule 10 [Performance Deductions] relating to Nonconformity Reports and the Parties' respective rights and obligations in respect thereof are without prejudice to and do not affect or limit the provisions of this Agreement relating to Default Notices and the Parties' respective rights and obligations relating thereto.

26.2 [Not Used]

26.3 Warning Notices

26.3.1 Without prejudice to any other right or remedy available to the Province, if at any time the total of all Availability/Performance Deductions in any rolling three month period exceeds 10% of the Maximum Performance Payment for such rolling three month period, then the Province's Representative may give notice (herein called an "Availability/Performance Deductions Warning Notice") to the Concessionaire. Any such notice will state on its face that it is an "Availability/Performance Deductions Warning Notice". Any Availability/Performance Deductions in respect of any act or omission of the Concessionaire that is the subject of a Default Warning Notice will be excluded from the determination of the total Availability/Performance Deductions in any rolling three month period for the purposes of this Section 26.3.1.

26.3.2 Without prejudice to any other right or remedy available to the Province, if at any time:

26.3.2.1 the Concessionaire has failed to perform any of its material obligations under this Agreement and such failure is not capable of remedy and the circumstances giving rise to such failure are not capable of being addressed pursuant to a course or plan of action of the type described in Section 26.1.2; or

26.3.2.1A the Concessionaire has failed to perform any of its obligations under this Agreement and such failure is not capable of remedy and, irrespective of whether the circumstances giving rise to such failure are being addressed pursuant to a course or plan of action of the type described in Section 26.1.2, the Concessionaire has failed to perform the same or similar obligations either three times in succession or more than three other times within the period of three months ending on the date of such failure to perform; or

26.3.2.2 a Default Notice is given by the Province's Representative pursuant to Section 26.1.2 and more than three other Default Notices have been given at any time within the period of three months ending on the date that the first mentioned Default Notice is given in respect of the same or similar failures to perform; or

26.3.2.3 a Default Notice is given by the Province's Representative pursuant to Section 26.1.2 and the applicable Remedial Period has expired

without the failure to perform notified in the Default Notice having been remedied or without the plan of action described in Section 26.1.2 having been developed by the Concessionaire,

then the Province's Representative may give notice (herein called a "Default Warning Notice") to the Concessionaire setting out in specific terms the matter or matters giving rise to such notice. Any such notice will state on its face that it is a "Default Warning Notice". The Concessionaire may, within 20 Working Days of receipt of the relevant Default Warning Notice, dispute that one or more of the circumstances described in Sections 26.3.2.1 to 26.3.2.3 above apply, and where it does so, the relevant Default Warning Notice(s) shall be of no effect until the relevant Dispute has been resolved pursuant to the Disputes Resolution Procedure and it has been found that one of the circumstances aforesaid does apply and the Concessionaire has failed to remedy such default within 15 Working Days after the decision has been rendered pursuant to the Disputes Resolution Procedure.

26.4 Increased Monitoring

If:

- 26.4.1 the total of all Availability/Performance Deductions in any month exceeds 10% of the Maximum Performance Payment for that month; or
- 26.4.2 the Concessionaire receives a total of 2 or more Default Warning Notices in any single Contract Year; or
- 26.4.3 any material discrepancy, inaccuracy or error (including error by omission or incompleteness) is discovered by the Province or the Province's Representative in respect of the Annual Report and/or the Monthly Report which results in (or would if such discrepancy, inaccuracy or error had not been discovered have resulted in) any material overpayment being made by the Province to the Concessionaire,

then the Province's Representative may (without prejudice to any other right or remedy available to the Province) by notice to the Concessionaire increase the level of its monitoring of the Concessionaire until such time as the Concessionaire has demonstrated to the reasonable satisfaction of the Province's Representative that it will perform and is capable of performing its obligations under this Agreement. The notice to the Concessionaire will specify the additional measures to be taken by the Province's Representative in monitoring the Concessionaire in response to the matters which led to such notice being sent. The Concessionaire will compensate the Province for all reasonable costs incurred by the Province as a result of such increased level of monitoring.

26.5 Province's Remedial Rights

- 26.5.1 Without prejudice to Section 26.5.2, if at any time the Province's Representative serves a Default Notice under Section 26.1.2 and the Concessionaire fails to remedy

the failure within the Remedial Period, then the Province may (without prejudice to any other right or remedy available to it) itself take such steps as are necessary to remedy such failure or engage others to take such steps, and the provisions of Sections 26.5.3 and 26.5.4 will apply.

26.5.2 Notwithstanding any other provision of this Agreement and without prejudice to any other right or remedy of the Province:

26.5.2.1 if the Province considers that a breach by the Concessionaire of an obligation under this Agreement may create an immediate threat to public safety;

26.5.2.2 in an emergency;

26.5.2.3 where it appears to the Province reasonably necessary in the interests of highway safety;

26.5.2.4 where it appears to the Province necessary in order to secure the carrying out of any statutory or other function or duty; or

26.5.2.5 where the New Crossing is completely closed for a period of more than three hours,

the Province may give notice requiring the Concessionaire forthwith to take such steps as the Province considers reasonably necessary to mitigate or preclude such state of affairs. If the Concessionaire fails to take such steps as the Province thinks reasonably necessary and within such time as the Province acting reasonably, but having regard to the nature of the circumstances, thinks fit, then the Province may for as long as the relevant circumstances described in Section 26.5.2 continue to persist take such steps itself or engage others to take such steps, and the provisions of Sections 26.5.3 and 26.5.4 will apply.

26.5.3 To the extent that the Parties agree or it is determined under the Disputes Resolution Procedure that the Concessionaire did not fail to perform its obligations under this Agreement or the Province was not reasonable in requiring the Concessionaire to take the steps required under Section 26.5.2 or, in the case of Section 26.5.2.1, no such breach occurred (any such determination to be made on the basis of the facts known to the Province at the time it took or required such action to be taken), or, in the case of Section 26.4, the level of such increased monitoring was unjustified having regard to the circumstances giving rise to the entitlement to increased monitoring, then any actions taken by or on behalf of the Province pursuant to Section 26.5.1 or Section 26.5.2 and/or any requirement of the Province thereunder shall constitute a Compensation Event and the provisions of Part 4 of Schedule 13 [Compensation Events] will apply and any Warning Notice issued as a result shall be deemed to be of no effect.

26.5.4 Except in the circumstances referred to in Section 26.5.3, the Concessionaire will reimburse the Province for all reasonable direct costs incurred by the Province in taking the steps or engaging others to take the steps referred to in Section 26.5.2.

27. [NOT USED]

28. **UTILITIES**

28.1 **Concessionaire Responsibility**

28.1.1 The Concessionaire will not construct or install or permit the construction or installation of any Utilities on, in, under or over the Project Facilities, the Site and the Adjacent Areas or any part thereof without the prior consent of the Province (which consent may be given or withheld in the absolute and unfettered discretion of the Province); provided that the Concessionaire will not be in default under this Section as a result of the exercise by a Utility Supplier of its rights under a Utility Agreement or as a result of any Utility Works carried out in compliance with Section 28.2 [Utility Works] and any other relevant provisions of this Agreement. Without limiting the generality of the foregoing, at no time will the Concessionaire use or permit the use of the New Crossing for gas, oil or other petroleum product pipelines or infrastructure in connection therewith (other than those (if any) existing on the Commencement Date) without the prior consent of the Province (which consent may be given or withheld in the absolute and unfettered discretion of the Province).

28.1.2 Except for Utility Works carried out in compliance with Section 28.2 [Utility Works] and any other relevant provisions of this Agreement, all Utilities now or hereafter located on, in, under or over the Existing Highway, the Project Facilities, the Site and the Adjacent Areas (including Utilities within any excavation) are to be protected and preserved and not interrupted by the Concessionaire during and after the performance of the Works and any other works carried out in the course of the Undertakings in accordance with the terms of any Utility Agreement relating thereto which has been disclosed to the Concessionaire.

28.1.3 The Concessionaire will be responsible for confirming the actual locations of all Utilities now or hereafter located on, in, under or over the Existing Highway, the Project Facilities, the Site and the Adjacent Areas and ensuring that its agents, contractors and subcontractors of any tier and employees of any of them are made aware of such locations as necessary to ensure compliance at all times with the provisions of this Section 28 [Utilities].

28.1.4 The Concessionaire will abide by, observe, comply with and perform and cause its agents, contractors and subcontractors of any tier and employees of any of them to abide by, observe, comply with and perform the terms of the Utility Policy Manual.

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- 28.1.5 Without limiting any other provision of this Agreement, the Concessionaire will, except to the extent caused by the negligent or wilful act or omission of the Province and/or BCTFA or any other person for whom either the Province or BCTFA is responsible at law, or any Third Party Contractor, indemnify and hold the Province and BCTFA harmless with respect to any loss or damage caused (whether in the course of any Utility Works or otherwise) to any Utilities by the Concessionaire or its agents, contractors or subcontractors of any tier or the employees of any of them.
- 28.1.6 The Concessionaire will contract directly with the relevant suppliers for all electricity, gas, water, sewer, telephone and communications services and other utilities and services supplied to the Project Facilities, the Site and the Adjacent Areas and used or consumed in the conduct of the Undertakings and will pay for all such utilities and services. If the Province or BCTFA are invoiced for any such utilities or services, the Province or BCTFA (as the case may be) will forward the invoices to the Concessionaire for payment. If the Concessionaire fails to pay such invoices within 30 days of its receipt of such invoices, the Province or BCTFA (as the case may be) may pay such invoices and the Concessionaire, upon demand, will forthwith reimburse the Province or BCTFA (as the case may be) for the amount so paid.
- 28.1.7 The Concessionaire will copy the Province on all correspondence to or from any existing or proposed Utility Suppliers.
- 28.1.8 The Province will copy the Concessionaire on all relevant correspondence to or from any existing or proposed Utility Supplier, provided that the Province will have no obligation to provide any information with respect to which it is subject to an express obligation of confidentiality or privacy (whether under any Laws and Regulations or contract or otherwise) or which it is otherwise precluded from disclosing under any Privacy Legislation or other Laws and Regulations.
- 28.2 Utility Works
- 28.2.1 Subject to the provisions of Section 28.2A [Cost Sharing], the Concessionaire is responsible for securing all temporary and permanent Utilities required in connection with or as part of the Works and the Decommissioning and any other works carried out in the course of the Undertakings, and for all Utility Works to be carried out in connection with or as part of the Works and such other works, including the removal, adjustment and/or temporary or permanent relocation of Utilities. Subject to the rights of Utility Suppliers under the Utility Agreements, all Utility Works will be carried out by or under the supervision of and at the risk and expense of the Concessionaire and, without limiting the generality of the foregoing, the Concessionaire will be responsible for:
- 28.2.1.1 obtaining from the relevant Utility Supplier, municipality, private owner or other Interested Party all rights of entry or access to the relevant

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- Utilities that are necessary or expedient in connection with the Utility Works;
- 28.2.1.2 identifying all requirements in respect of the Utility Works, including determining the most effective strategies for undertaking the Utility Works, including the transfer of Utilities from the Existing Bridge to the New Crossing prior to Decommissioning;
 - 28.2.1.3 liaising, arranging, co-ordinating and entering into all necessary agreements with relevant Utility Suppliers, municipalities, private owners and other Interested Parties in connection with the Utility Works, including obtaining any necessary permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorizations in connection therewith, providing access for inspections and providing information and plans during and following completion of the Utility Works;
 - 28.2.1.4 ensuring that all Permits, Licences and Approvals in connection with the Utility Works are obtained;
 - 28.2.1.5 observing and complying with any instructions or directions relating to the Utility Works that may be issued by the Province expressly on behalf of a relevant Utility Supplier;
 - 28.2.1.6 securing or causing to be secured the entry into or execution of all relevant construction and maintenance agreements, service contracts, and other agreements in connection with the Utility Works;
 - 28.2.1.7 installing at least two minimum 100 mm diameter conduits for future Utilities over the entire length of the New Crossing in addition to conduits required for existing Utilities;
 - 28.2.1.8 ensuring that the demolition, disassembly and removal of the Existing Bridge and causeway satisfy all reasonable requirements of Utility Suppliers as set out in the Utility Agreements;
 - 28.2.1.9 ensuring, to the extent reasonably possible, that Utilities are not interrupted by the construction, completion, commissioning and testing of the Works, the design and completion of the Decommissioning and the performance of the Undertakings (including any transfer of Utilities) without the prior written permission of the relevant Utility Supplier; and
 - 28.2.1.10 co-operating in the performance of the Undertakings with any Utility-Suppliers working on the Site, the Adjacent Areas, the Project Facilities or the Existing Highway, and co-ordinate the design, construction, completion, commissioning and testing of the Works, the design and

completion of the Decommissioning and the performance of the Undertakings accordingly.

Subject to the provisions of Section 28.2A [Cost Sharing], the Concessionaire will be responsible for all costs and expenses arising from or in connection with any of the foregoing. If any such costs and expenses are charged directly to the Province or BCTFA, the Province or BCTFA (as the case may be) will forward the invoices to the Concessionaire for payment. If the Concessionaire fails to pay such invoices within 30 days of its receipt of such invoices, the Province or BCTFA (as the case may be) may pay such costs and expenses and the Concessionaire, upon demand, will forthwith reimburse the Province or BCTFA (as the case may be) for the amount so paid.

28.2.2 Without prejudice to Section 28.3.3, if the Concessionaire, having used all reasonable efforts to do so, is unable to obtain from the relevant Utility Supplier, municipality, private owner or other Interested Party the rights of entry or access to any Utilities that are necessary or expedient to carry out any Utility Works required for the conduct of the Undertakings within a reasonable time and on reasonable terms, then the Concessionaire may request the assistance of the Province in obtaining such rights of entry or access and the Province, to the extent it has the legal ability to do so under existing Laws and Regulations, will use reasonable efforts to provide such assistance. Where the Concessionaire is given assistance by the Province in accordance with this Section 28.2.2, and regardless of whether or not the Concessionaire ultimately obtains the relevant rights of entry or access as a result of the provision of such assistance, the Concessionaire will indemnify and hold the Province harmless in respect of any Losses and/or Claims suffered or incurred by the Province as a result of or in connection with the provision of such assistance.

28.2A Cost Sharing

28.2A.1 Within 30 days of the date of execution of this Agreement, the Parties will develop a utility works plan. The utility works plan shall describe all permits, licences, rights and agreements which the Concessionaire contemplates it will require from Utility Suppliers in order to carry out the Works and/or the Decommissioning or any work or activities ancillary to the same. The utility works plan will set out in reasonable detail the relevant time periods which the Parties contemplate will be required to obtain the relevant permit, licence, rights or other agreements from the relevant Utility Suppliers and identify a date by which each such permit, licence, right or agreement will be issued, granted or entered into by such Utility Supplier. The utility works plan will also detail the costs of obtaining each such permit, licence, right or other agreement and of the Concessionaire performing its obligations thereunder.

28.2A.2 If there is any delay in the obtaining of any permit, licence, right or agreement with any Utility Supplier by the date set out therefor in the utility works plan

delivered pursuant to Section 28.2A.1, such delay shall be for the account of the Concessionaire until it exceeds 30 days, whereupon any further delay in excess of 30 days in relation to such permit, licence, right or agreement shall (unless it is caused by any failure on the part of the Concessionaire diligently to pursue the same) **DELETED**.

28.2A.3 If the costs of obtaining any permit, licence, right or agreement referred to in Section 28.2A.1 or of the Concessionaire performing its obligations thereunder are in excess of the amounts detailed in the list referred to in Section 28.2A.1, **DELETED**.

28.3 Utility Agreements

28.3.1 The Concessionaire acknowledges the terms of the Utility Agreements existing as at the Commencement Date to the extent that such information was included in the Data Room. When any Utility Works affecting Utilities referred to in a Utility Agreement are to be carried out, the Concessionaire will, prior to commencing such Utility Works, give written notice to the relevant Utility Supplier confirming that the Utility Works are being carried out by or on behalf of the Concessionaire pursuant to this Agreement.

28.3.2 In the exercise of its rights and performance of its obligations under this Agreement the Concessionaire agrees to comply with, observe and abide by and to cause its agents, contractors and subcontractors of any tier and employees of any of them to comply with, observe and abide by the terms of all Utility Agreements (whether existing on the Commencement Date or entered into or amended thereafter in accordance with Section 28.4 [Rights of Province]), in each case to the extent that such terms have been or will be accurately disclosed by the Province to the Concessionaire. The Concessionaire will not do or omit to do or permit to be done or omitted anything that would result in the Province being in material default of any terms of the Utility Agreements that have been disclosed by the Province to the Concessionaire.

28.3.3 The Concessionaire is responsible for satisfying itself as to the extent to which it is entitled to take the benefit of or exercise rights under any Utility Agreement (including any pricing arrangements provided for therein) as at the Commencement Date and, without limiting any other disclaimer or release of liability provided herein, the Province makes no representation or warranty whatsoever in that regard. In the event of a dispute between the Concessionaire and a Utility Supplier as to whether the Concessionaire is entitled to the benefit of or to exercise rights under any Utility Agreement (including a dispute as to whether the Concessionaire is entitled to the benefit of any pricing arrangements provided for therein) which dispute, despite the reasonable and diligent efforts of the Concessionaire, has not been resolved within a reasonable period of time, the Province, at the request and expense of the Concessionaire, will use reasonable efforts within and subject to the scope of its legal rights under the terms of the relevant Utility Agreement to assist

the Concessionaire in taking the benefit of or exercising the relevant rights under the Utility Agreement. Where the Concessionaire is given assistance by the Province in accordance with this Section 28.3.3, and regardless of whether or not the Concessionaire is ultimately able to take the benefit of or exercise the relevant rights under the relevant Utility Agreement as a result of the provision of such assistance, the Concessionaire will indemnify and hold the Province harmless in respect of any Losses and/or Claims suffered or incurred by the Province as a result of or in connection with the provision of such assistance.

28.4 Rights of Province

The Province may enter into new Utility Agreements or amendments to existing Utility Agreements (which may include the grant of new Encumbrances or the amendment of existing Encumbrances affecting the Existing Highway, the Project Facilities, the Site and the Adjacent Areas or any part thereof) after the Commencement Date to permit or facilitate the design, construction, installation, operation, repair, management, maintenance, rehabilitation, reconstruction and/or relocation of any existing or new Utilities. If the Province enters into any such new Utility Agreement or amendment that affects the Project Facilities, the Site or the Adjacent Areas or the conduct of the Undertakings:

28.4.1 the Province will give notice to the Concessionaire and provide the Concessionaire with particulars of the effect of the new Utility Agreement or amendment as it relates to the Project Facilities, the Site or the Adjacent Areas and the conduct of the Undertakings; and

28.4.2 the Province will include provisions in the new Utility Agreement or amendment requiring the Utility Supplier to use reasonable efforts in exercising its rights thereunder as they relate to the Existing Highway, the Project Facilities, the Site or the Adjacent Areas so as to avoid or, if unavoidable, minimize physical disruption to the operation of the Concession Highway or physical damage to the Project Facilities. To the extent that any act or omission of the Utility Supplier or any person for whom the Utility Supplier is at law responsible causes any physical disruption or damage to the Existing Highway, the New Highway, the Project Facilities, the Site or the Adjacent Areas, **DELETED**.

29. **DELEGATION OF OBLIGATIONS, RIGHTS, POWERS AND FUNCTIONS**

29.1 Delegated Obligations

With effect from Substantial Completion, there are imposed on the Concessionaire in accordance with Section 6(4) of the *Transportation Investment Act*, the Delegated Obligations. The Concessionaire acknowledges that the imposition of such Delegated Obligations in this Agreement is in accordance with Section 6(4) of the *Transportation Investment Act*.

29.2 Delegated Rights, Powers and Functions

- 29.2.1 With effect from Substantial Completion, there are delegated to the Concessionaire in accordance with Section 6(3) of the *Transportation Investment Act*, the Delegated Rights, Powers and Functions. The Concessionaire acknowledges that the delegation of such Delegated Rights, Powers and Functions in this Agreement is in accordance with Section 6(3) of the *Transportation Investment Act*.
- 29.2.2 The delegation of the Delegated Rights, Powers and Functions to the Concessionaire does not in any way derogate from, diminish, fetter or otherwise interfere with or limit any of the rights, powers and functions of the Minister, including those rights, powers and functions included in the Delegated Rights, Powers and Functions. At any time and from time to time the Minister in his or her absolute and unfettered discretion may, personally or through existing or future delegates of the Minister, exercise any of the rights, powers and functions included in the Delegated Rights, Powers and Functions.
- 29.2.3 On receipt of notice from the Minister that the Minister intends to exercise any right, power or function included in the Delegated Rights, Powers and Functions, the Concessionaire will not exercise any such right, power or function in relation to the same matter in any way that conflicts with the exercise by the Minister of the same right, power or function, or results in a decision of the Concessionaire that conflicts with the decision of the Minister in relation to the exercise of such right, power or function in relation to the same matter.
- 29.2.4 If a right, power or function is delegated to the Concessionaire under this Agreement, any common law principle and any provision of an enactment that constrains, qualifies or otherwise applies to the Minister in or in relation to the exercise or performance of that right, power or function, also applies to constrain, qualify or affect the Concessionaire in or in relation to the exercise or performance by the Concessionaire of that right, power or function.

29.3 Concessionaire's Responsibility

- 29.3.1 The Concessionaire will exercise the Delegated Rights, Powers and Functions and discharge the Delegated Obligations with all reasonable care and will ensure that all reasonable care is taken in anything that is done or not done or caused to be done or not done by the Concessionaire or its agents, contractors or subcontractors of any tier or by the employees of any of them in connection with the exercise of the Delegated Rights, Powers and Functions and the discharge of the Delegated Obligations.
- 29.3.2 The Concessionaire will exercise the Delegated Rights, Powers and Functions and discharge the Delegated Obligations:

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- 29.3.2.1 subject to and in accordance with the terms of this Agreement and only for the purposes of performing its obligations hereunder;
 - 29.3.2.2 in good faith, without bias or capriciousness;
 - 29.3.2.3 in a rational manner; and
 - 29.3.2.4 subject to and in accordance with all Laws and Regulations and Legal Requirements, including the rules of natural justice and the duty of fairness applicable to the Delegated Rights, Powers and Functions and the Delegated Obligations and to the exercise or discharge of the Delegated Rights, Powers and Functions and the Delegated Obligations by the Concessionaire.

29.4 No Assignment or Sub-Delegation

The Concessionaire will not assign directly or indirectly or sub-delegate any of the Delegated Rights, Powers and Functions or Delegated Obligations but, for greater certainty, may engage agents, contractors or subcontractors to do or cause to be done works, services and any other thing whatsoever in the exercise of the Delegated Rights, Powers and Functions and the discharge of the Delegated Obligations. The engagement of agents, contractors and subcontractors will not relieve the Concessionaire of any responsibilities in connection with any of the Delegated Rights, Powers and Functions, with any of the Delegated Obligations or with any of such works, services or other thing.

29.5 Responsibility and Liability

Without limiting any other responsibility or liability the Concessionaire may be subject to at law or under any enactment, the Concessionaire is, subject to Section 29.2.3, fully responsible and liable for the acts or omissions of the Concessionaire and of any of its agents, contractors and subcontractors of any tier and employees of any of them, engaged to do or cause to be done any works, services or other thing whatsoever in connection with the exercise of the Delegated Rights, Powers and Functions or the discharge of the Delegated Obligations, including if such acts or omissions constitute defaults in performing any of the obligations set out in Section 29.2.4 and Section 29.3 [Concessionaire's Responsibility], and if any Loss or Claim is sustained by any person by reason of such act or omission or default. For greater certainty, the Concessionaire will not be responsible for its omissions to act as set out above in relation to any Delegated Right, Power or Function or any Delegated Obligation where the Minister has given notice under Section 29.2.3 and the Concessionaire is acting in accordance with that notice.

29.6 Revocation or Modification

- 29.6.1 The Minister may where the Minister considers it to be in the public interest to do so, including where there has been any failure on the part of the Concessionaire or any of its agents, contractors or subcontractors of any tier or employees of any of

them to observe, abide by or comply with any term of this Section 29 [Delegation of Obligations, Rights, Powers and Functions] or any other provision of this Agreement, revoke, modify, or suspend, in whole or in part, with respect to any matter or matters, or category or categories of matter or matters, temporarily or otherwise, the delegation of the Delegated Rights, Powers and Functions and the imposition of the Delegated Obligations, and for greater certainty, such modification may include adding or removing rights, powers, functions and obligations of the Minister.

29.6.2 If the Minister revokes, modifies, or suspends, in whole or in part, the delegation of the Delegated Rights, Powers and Functions as contemplated under Section 29.6.1 for a reason other than a failure (including for greater certainty, the consequences of any such failure) on the part of the Concessionaire or any of its agents, contractors or subcontractors of any tier or employees of any of them to observe, abide by or comply with any term of this Section 29 [Delegation of Obligations, Rights, Powers and Functions] or any other provision of this Agreement, and if the Concessionaire, despite using all reasonable efforts to do so, is rendered unable to observe, abide by, comply with or otherwise perform a term of this Agreement by reason of such revocation, modification or suspension by the Minister, then such revocation, modification or suspension will constitute a Relevant Change in Law.

29.6.3 Any revocation, modification or suspension contemplated under Section 29.6.1 will not constitute and is not to be construed as being a repudiation of this Agreement by the Province and will not constitute an Eligible Change or, subject only to Section 29.6.2, a Relevant Change in Law.

29.6.4 For greater certainty, if a statutory provision set out in Schedule 19 [Delegated Obligations, Powers, Rights and Functions] is repealed prior to Substantial Completion, such repeal will not constitute and is not to be construed as being a repudiation of this Agreement by the Province, and will be treated as a revocation of the delegation under Section 29.6.1.

29.7 Revocation and Termination on Expiry Date

Subject to Section 29.6 [Revocation or Modification], the delegation of the Delegated Rights, Powers and Functions to and the imposition of the Delegated Obligations on the Concessionaire are effective from Substantial Completion to the end of the Contract Period and will be automatically and without further action by the Minister or the Concessionaire revoked and terminated in their entirety on the Expiry Date (but without prejudice to any liability, whether incurred prior to or after the Expiry Date, in connection with or as a result of the exercise of the Delegated Rights, Powers and Functions or the discharge of the Delegated Obligations).

29.8 Transfer on Revocation or Termination

On the revocation, termination or suspension of the delegation of all or any of the Delegated Rights, Powers and Functions, the Concessionaire will at the request of the Minister promptly take such actions as are necessary to facilitate the efficient transfer or delegation of any such Delegated Rights, Powers and Functions to such person or persons as the Minister may designate.

29.9 No Claims

Notwithstanding the delegation of the Delegated Rights, Powers and Functions to the Concessionaire and the imposition of the Delegated Obligations on the Concessionaire, the Concessionaire does not, subject to Section 29.6 [Revocation or Modification] have any Claim whatsoever against the Province or the Minister arising from or in connection with the delegation by the Minister, the failure by the Minister to delegate, or the exercise or performance or failure by the Minister to exercise or perform, personally or through existing or future delegates of the Minister, of any of the rights, powers or functions included in the Delegated Rights, Powers and Functions or any of the obligations included in the Delegated Obligations in relation to the Project Facilities, the Site and the Adjacent Areas or any part thereof.

29.10 Data Gathering, Document Preparation, etc

The Concessionaire (at its cost) will be responsible for, and will provide, all data gathering, document preparation, administrative and other support and liaison (including preparation of plans, publication of notices, administrative steps required to serve notices and serving notices) in such manner and at such times as will enable the Province and BCTFA to exercise all statutory and other powers, functions and discretions and to discharge all duties in respect of the Project Facilities, the Site and the Adjacent Areas or any part thereof.

30. **OTHER THIRD PARTIES**

30.1 Third Party Complaints and Claims

30.1.1 The Concessionaire, in consultation with the Province's Representative and the Provincial Ombudsman, will establish a protocol for dealing with complaints received from the public in connection with the conduct of the Undertakings, the Project Facilities, the Site and the Adjacent Areas or any part thereof that is satisfactory to the Province's Representative and the Provincial Ombudsman, and will deal with any complaints received (whether orally or in writing, and whether from a User, a Marine User or others) in accordance with such protocol. The Concessionaire will, where necessary or as required by the Province's Representative, submit updates to the complaints protocol from time to time in accordance with the Review Procedure to ensure that the complaints protocol continues to meet the requirements of the Provincial Ombudsman and Good Industry Practice and the reasonable requirements of the Province.

30.1.2 If the Concessionaire receives any Claim from a third party relating wholly to any period prior to the date of execution of this Agreement, it will promptly forward such Claim to the Province. All other Claims from third parties will be dealt with in accordance with the provisions of Section 39 [Indemnities].

30.2 Claims Against Third Parties

30.2.1 As between the Province, BCTFA and the Concessionaire, the Concessionaire will bear, without recourse to the Province or BCTFA, and will indemnify and hold the Province and BCTFA harmless in respect of, any Claim or Loss suffered by the Province, BCTFA, the Concessionaire, the Province's Representative or any of such persons' agents, contractors or subcontractors of any tier or the employees of any of them which is caused by the acts or omissions of any User, any Marine User or other person on or about the Project Facilities, the Site or the Adjacent Areas or the Graving Dock Site, or (during the conduct of the Decommissioning) on or about the Existing Bridge, including any damage to property, personal injury or death and any loss of income (including any reduction in the Performance Payment).

30.2.2 For greater certainty, nothing in Section 30.2.1 affects:

30.2.2.1 any right of the Province or BCTFA to make or recover any Claim against any person referred to in Section 30.2.1 for damage suffered by the Province, BCTFA or any of their respective agents, contractors or subcontractors of any tier or the employees of any of them; or

30.2.2.2 any right of the Concessionaire to make or recover any Claim against any person referred to in Section 30.2.1 for damage suffered by the Concessionaire or any of its agents, contractors or subcontractors of any tier or the employees of any of them.

30.2.3 For greater certainty, nothing in Section 30.2.1 applies to any Contamination caused by any User, any Marine User or other person on or about the Project Facilities, the Site or the Adjacent Areas, or (during the conduct of the Decommissioning) on or about the Existing Bridge, except in so far as that Contamination results directly or indirectly from the negligent or wrongful acts of the Concessionaire or any of its agents, contractors or subcontractors of any tier or the employees of any of them.

30.3 Conduct of Claims Against Third Parties

30.3.1 Subject to the prior consent of the Province or BCTFA (as applicable) acting reasonably, and to such terms as the Province or BCTFA may reasonably require, the Concessionaire may if necessary bring any action against a person referred to in Section 30.2.1 in the name of the Province or BCTFA provided that the Concessionaire will indemnify and hold the Province and BCTFA harmless in respect of all costs and expenses of and Losses and Claims arising out of any such action.

30.3.2 With respect to any action brought under Section 30.3.1 and without prejudice to any terms which the Province or BCTFA may reasonably require in accordance with that Section:

30.3.2.1 the Concessionaire will keep the Province and BCTFA fully informed about the conduct of the action;

30.3.2.2 the Concessionaire will consult with the Province and BCTFA about the conduct of the action and act in accordance with the reasonable requirements of the Province and BCTFA in the conduct of such action; and

30.3.2.3 the Concessionaire will not settle the action without the consent of the Province or BCTFA (as applicable), such consent not to be unreasonably withheld or delayed; provided that such consent will not be required to the settlement of the action if the amount of the claim at issue does not exceed \$50,000 (index linked) or such other amount as may be designated from time to time by the Province and the settlement of the action does not involve any admission of liability on the part of the Province or BCTFA.

30.4 Police

The Concessionaire will comply at its own cost and expense at all times with all lawful and other proper instructions of the Police in respect of the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site and the conduct of the Undertakings.

30.5 Interested Parties

The Concessionaire will discharge at its own cost and expense:

30.5.1 the Requirements of Interested Parties; and

30.5.2 any lawful requirements of any Relevant Authorities or other Governmental Authorities of which the Concessionaire has notice or ought reasonably to be aware from time to time.

30.6 Extraordinary Traffic

30.6.1 On receipt of any notification from the Province pursuant to Section 30.6.2, the Concessionaire will from time to time provide the Minister with its reasonable estimate of any damage to the Concession Highway or expense that may be caused by any Extraordinary Traffic on the Concession Highway for the Minister's consideration in determining the amount of any compensation that should be paid by the person responsible for the Extraordinary Traffic. The Province will pay to the Concessionaire within 30 days of receipt by the Province any compensation received

from any person responsible for any Extraordinary Traffic on the Concession Highway, an amount equivalent to the amount of compensation received by the Province net of the amount of any administrative costs incurred by the Province in connection with the assessment and collection of such compensation.

30.6.2 The Concessionaire will be responsible at its expense for liaising with the Police and other relevant persons regarding any Extraordinary Traffic and for managing any Extraordinary Traffic and carrying out any necessary related works.

30.6.3 **DELETED**.

**PART IV
PAYMENTS**

31. **TRAFFIC, AVAILABILITY, SAFETY AND USERS' SATISFACTION**

31.1 Lane Availability Payment

In consideration for the carrying out of the Undertakings, the Province will pay the Concessionaire the Lane Availability Payment determined in accordance with the provisions of Part 3 of Schedule 10 [Lane Availability Payment] during the Enhanced Service Period. The provisions of Part 3 of Schedule 10 [Payments] will apply with respect to the determination of the Unavailability Deductions during the Enhanced Service Period.

31.2 Traffic Volume Payment

In consideration for the carrying out of the Undertakings, the Province will pay the Concessionaire the Traffic Volume Payment determined in accordance with the provisions of Part 2 of Schedule 10 [Traffic Volume Payment] during the Enhanced Service Period.

31.3 Safety Performance Payment

In consideration for the carrying out of the Undertakings, the Province will pay the Concessionaire the Safety Performance Payment determined in accordance with the provisions of Part 4 of Schedule 10 [Safety Performance Payment] during the Enhanced Service Period.

31.4 Users Satisfaction Payment

In consideration for the carrying out of the Undertakings, the Province will pay the Concessionaire the Users Satisfaction Payment determined in accordance with the provisions of Part 5 of Schedule 10 [Users Satisfaction Payment] during the Enhanced Service Period.

32. **CALCULATION OF PAYMENTS**

32.1 Performance Payments

32.1.1 In consideration for the carrying out of the Undertakings, the Province will pay the Concessionaire an amount in respect of each Contract Year (the "Performance Payment") determined in accordance with the provisions of Part 1 of Schedule 10 [Performance Payments] during the Enhanced Service Period. For greater certainty, the Performance Payments to the Concessionaire under this Agreement are related to and based upon performance by the Concessionaire of its obligations under this Agreement, and, except as may otherwise be expressly provided herein, are not specific to the measurement of any materials or quantities.

32.1.2 Monthly instalments of the Performance Payment or parts thereof in respect of a Contract Year during the Enhanced Service Period will be determined and paid in accordance with the provisions of paragraph 2 of Part 1 of Schedule 10 [Performance Payments], and the aggregate of such monthly instalments will be adjusted in accordance with Section 32.2 [Annual Reconciliation].

32.2 Annual Reconciliation

32.2.1 Not later than 30 days following the end of each Contract Year the Concessionaire will provide the Province with a notice setting forth the following information:

32.2.1.1 the actual Performance Payment in respect of such Contract Year, determined in accordance with Section 32.1.1, including all Performance/Availability Deductions;

32.2.1.2 the total of the monthly instalments of the Performance Payment paid in respect of such Contract Year;

32.2.1.3 the total of any Asset Condition Retentions made during the Contract Year providing details of when such Asset Condition Retentions were made and released to the Concessionaire and the balance of such Asset Condition Retentions outstanding at the end of such Contract Year;

32.2.1.4 the amount payable by the Province to the Concessionaire in respect of the Performance Payment for such Contract Year, being the amount by which the total of the amount in Section 32.2.1.1 and any Asset Condition Retentions outstanding at the end of such Contract Year as reported pursuant to Section 32.2.1.3 exceeds the amount in Section 32.2.1.2, or the amount payable by the Concessionaire to the Province in respect of the Performance Payment for such Contract Year, being the amount by which the total of the amount in Section 32.2.1.2 exceeds the amount in Section 32.2.1.1 and any Asset Condition Retentions outstanding at the end of such Contract Year as reported pursuant to Section 32.2.1.3;

32.2.1.5 any GST (if applicable) or PST included in the amount payable pursuant to Section 32.2.1.4 or, where the amount is payable to the Province, the amount of any GST (if applicable) or PST overpaid by the Province included in the payment (in either event, in the case of PST, identifying the relevant taxable property or service and the value thereof);

32.2.1.6 any other adjustments to reflect previous over-payments and/or under-payments (each adjustment stated separately);

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- 32.2.1.7 any other amount due and payable from the Concessionaire to the Province or from the Province to the Concessionaire under this Agreement;
 - 32.2.1.8 any interest payable in respect of any amounts owed; and
 - 32.2.1.9 the net amount owing by the Province to the Concessionaire or by the Concessionaire to the Province.
- 32.2.2 The notice given pursuant to Section 32.2.1 (the “Annual Reconciliation Notice”) will be accompanied by work papers clearly setting forth the derivation of the figures set out in the Annual Reconciliation Notice. The work papers will illustrate, *inter alia*, the calculation of:
- 32.2.2.1 the Performance Payment (in accordance with the calculations specified in Part 1 of Schedule 10 [Performance Payments] during the Enhanced Service Period);
 - 32.2.2.2 any adjustments to reflect previous over-payments and/or under-payments;
 - 32.2.2.3 any other amount due and payable from the Concessionaire to the Province or from the Province to the Concessionaire under this Agreement; and
 - 32.2.2.4 if the Annual Reconciliation Notice reflects any amounts due and owing on which interest is payable, the amount of interest.

33. **INVOICING AND PAYMENT**

33.1 Monthly Invoices

- 33.1.1 Instalments of the Performance Payment will be payable by the Province to the Concessionaire monthly in arrears.
- 33.1.2 Within 10 days following the last day of each month in each Contract Year, the Concessionaire will deliver to the Province a report setting out the payments payable in respect of such month in accordance with Section 32.1.2. The report will show:
 - 33.1.2.1 the instalment of the Performance Payment payable for the relevant month determined in accordance with paragraph 2 of Part 1 of Schedule 10 [Performance Payments];
 - 33.1.2.2 any GST (if applicable) included in the payment for the relevant month;

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- 33.1.2.3 any property or services subject to PST included in the payment for the relevant month, the value of the relevant property or service, and the PST included in the payment for the relevant month;
 - 33.1.2.4 any adjustments to reflect previous over-payments and/or under-payments (each adjustment stated separately);
 - 33.1.2.5 any other amount due and payable from the Concessionaire to the Province or from the Province to the Concessionaire under this Agreement;
 - 33.1.2.6 any interest payable in respect of any amounts owed;
 - 33.1.2.7 the net amount owing by the Province to the Concessionaire or by the Concessionaire to the Province; and
 - 33.1.2.8 the information required in Schedule 10 [Payments].
- 33.1.3 The report delivered pursuant to Section 33.1.2 will be accompanied by work papers clearly setting forth the derivation of the figures set out in the report. The work papers will illustrate, *inter alia*, the calculation of:
- 33.1.3.1 the monthly instalment of the Performance Payment for the relevant month and each component thereof (all in accordance with the calculations specified in Section 33.1.2.1);
 - 33.1.3.2 any adjustments to the invoice to reflect previous over-payments or under-payments;
 - 33.1.3.3 any other amount due and payable from the Concessionaire to the Province or from the Province to the Concessionaire under this Agreement;
 - 33.1.3.4 if the invoice reflects any amounts due and owing on which interest is being charged, the amount of interest; and
 - 33.1.3.5 the Performance/Unavailability Deductions for the relevant month.
- 33.1.4 If the report delivered pursuant to Section 33.1.2 shows a net amount owing by the Province to the Concessionaire, it will be accompanied by an invoice from the Concessionaire to the Province in respect of such amount (which invoice will separately identify any GST and any PST included in the amount owing by the Province and, in the case of PST, the relevant taxable property or service and the value thereof). If the report shows a net amount owing by the Concessionaire to the Province, the Province will issue a debit note to the Concessionaire in respect of such amount promptly following its receipt of such report (which debit note will

separately identify any GST and any PST included in the calculation of such amount).

33.2 Annual Invoices

33.2.1 If the Annual Reconciliation Notice shows an amount payable by the Concessionaire to the Province, the Province will issue a debit note to the Concessionaire in respect of such amount promptly following its receipt of the Annual Reconciliation Notice (which debit note will separately identify any GST and any PST overpaid by the Province).

33.2.2 If the Annual Reconciliation Notice shows an amount payable by the Province to the Concessionaire, the Concessionaire will issue an invoice to the Province in respect of such amount together with the Annual Reconciliation Notice (which invoice will separately identify any additional GST and any additional PST included in the amount owing by the Province and, in the case of PST, the relevant taxable property or service and the value thereof).

33.3 Province's Invoices

If the Concessionaire fails to issue any report or invoice within the time period required pursuant to this Section 33 [Invoicing and Payment], the Province may acting reasonably and in good faith itself prepare such report or invoice and the report or invoice so prepared will be deemed to have been issued by the Concessionaire.

33.4 Due Date for Payments

33.4.1 Without prejudice to Section 33.6 [Disputed Amounts], the Province will pay to the Concessionaire the amount of an invoice issued by the Concessionaire pursuant to Section 33.1.4 not later than the later of:

33.4.1.1 the last day of the month following the month to which the invoice relates; or

33.4.1.2 the twentieth day after the Province has received both the said invoice and the Monthly Report in respect of such month.

33.4.2 Without prejudice to Section 33.6 [Disputed Amounts], the Concessionaire will pay to the Province the amount of a debit note issued by the Province pursuant to Section 33.1.4 not later than the later of:

33.4.2.1 the last day of the month following the month to which the debit note relates; or

33.4.2.2 the twentieth day after the Concessionaire has received the said debit note.

33.4.3 Without prejudice to Section 33.6 [Disputed Amounts], the Province will pay to the Concessionaire the amount of an invoice issued by the Concessionaire pursuant to Section 33.2.2 not later than the later of:

33.4.3.1 30 days after receipt of such invoice; or

33.4.3.2 the twentieth day after the Province has received the said invoice, the Annual Reconciliation Notice in respect of the relevant Contract Year and the Annual Report in respect of such Contract Year.

33.4.4 Without prejudice to Section 33.6 [Disputed Amounts], the Concessionaire will pay to the Province the amount of a debit note issued by the Province pursuant to Section 33.2.1 not later than 30 days after receipt of such debit note.

33.4.5 If the original due date for any payment pursuant to this Agreement is not a Working Day, then the due date will be the Working Day next following the original due date.

33.5 Payments

All payments under this Agreement will be made in Canadian Dollars for value on the due date to the bank account of the recipient (located in the City of Vancouver or the City of Victoria, British Columbia) specified in the invoice or debit note (save as otherwise provided in the Direct Agreement), quoting the invoice or debit note number against which payment is made.

33.6 Disputed Amounts

33.6.1 Either the Concessionaire or the Province will have the right to dispute, in good faith, any amount specified in an invoice or debit note referred to in this Agreement. The Party disputing any such amount will pay the whole amount of the invoice or debit note in question pending resolution of the Dispute.

33.6.2 The Concessionaire and the Province will use their reasonable efforts to resolve the Dispute in question within 30 days of the Dispute arising. If they fail to resolve the Dispute within that period, then either Party may refer the matter to the Disputes Resolution Procedure for determination.

33.6.3 Any amount agreed or determined not to have been due will be repaid within 10 Working Days following resolution of the Dispute, together with interest thereon at a rate per annum equal to the Interest Rate plus 1 per cent per annum from the day after the date on which payment was made to (and including) the date of payment.

33.7 Late Payments

If any undisputed payment due under this Agreement remains unpaid after its due date, such payment will bear interest at a rate per annum equal to the Interest Rate plus 2 per cent per annum from the day after the date on which the payment was due to (and including) the date

of payment. The right of either the Concessionaire or the Province to receive interest in respect of the late payment of any sum due is without prejudice to any other rights that Party may have under this Agreement.

33.8 Satisfaction of Obligation

If the calculation of any amounts payable by a Party under this Agreement would (but for this Section 33.8 [Satisfaction of Obligation]) require the Party to pay an amount to more than one person or more than once within the same provision or under more than one provision of this Agreement, in respect of the same cost, expense, liability or obligation, that Party's obligations in respect thereof will be discharged if and to the extent that payment of such amount is paid once only.

33.9 Set-Off

33.9.1 Subject to Section 44.8 [Rights of Set-Off], whenever any sum of money is recoverable from or payable by the Concessionaire under this Agreement, such sum may be deducted from or reduced by the amount of any sum then due or which at any time thereafter may become due to the Concessionaire under this Agreement or any other contract between the Concessionaire and the Province or any other ministry, office, instrumentality or agency of the Province made pursuant to the provisions of this Agreement. The provisions of this Section are without prejudice to and do not limit or derogate from any statutory right of the Province to withhold any sum of money due or becoming due to the Concessionaire.

33.9.2 Whenever any sum of money is recoverable from or payable by the Province under this Agreement, such sum may be deducted from or reduced by the amount of any sum then due or which at any time thereafter may become due to the Province under this Agreement or any other contract between the Concessionaire and the Province or BCTFA made pursuant to the provisions of this Agreement.

33.10 Examination of Records

Without limiting the provisions of Section 25.2 [Audit and Inspection] or Section 26.4 [Increased Monitoring], the Province or its authorized representative will have the right at reasonable hours upon giving the Concessionaire reasonable notice and at its own expense to examine and make copies of the books and records of the Concessionaire relative to the Project and/or this Agreement to the extent necessary to verify the accuracy of any accounting statement, charge, computation or claim made pursuant to any of the provisions of this Agreement (including the Annual Report and any report delivered pursuant to Section 33.1.2), provided that:

33.10.1 such books and records need not (unless the same contain information relating to a Dispute) be preserved longer than the period required in accordance with Section 25.4 [Management and Retention of Records]; and

33.10.2 if any such examination reveals any inaccuracy in any invoice issued pursuant to this Agreement, the necessary adjustments in such invoice and payment will be made within 14 days after the date such inaccuracy is established by agreement or pursuant to the Disputes Resolution Procedure.

33.11 Interest on Overpayment

33.11.1 If as a result of any inaccuracy in an invoice (for whatever reason including for greater certainty as a result of any error or inaccuracy in any Annual Report) any overpayment is made by the Province to the Concessionaire (as against the sum that would have been paid but for such inaccuracy) then the Concessionaire will, in addition to repaying such overpayment to the Province, pay interest thereon at a rate per annum equal to the **DELETED** per annum from the date of payment of the invoice by the Province to the Concessionaire to the date of repayment of such overpayment by the Concessionaire (which sums the Province may pursue and recover as a debt in any Court having jurisdiction in accordance with Section 58.2 [Jurisdiction]). The right of the Province to recover the overpayment and interest thereon is without prejudice to any other rights the Province may have under this Agreement.

33.11.2 If as a result of any inaccuracy in an invoice any overpayment is made by the Concessionaire to the Province (as against the sum that would have been paid but for such inaccuracy) then the Province will, in addition to repaying such overpayment to the Concessionaire, pay interest thereon at a rate per annum equal to the **DELETED** per annum from the date of payment of the invoice by the Concessionaire to the Province to the date of repayment of such overpayment by the Province (which sums the Concessionaire may pursue and recover as a debt in any court having jurisdiction in accordance with Section 58.2 [Jurisdiction]). The right of the Concessionaire to recover the overpayment and interest thereon is without prejudice to any other rights the Concessionaire may have under this Agreement.

33.12 Final Payments

For greater certainty and without limiting section 10(3) of the *Transportation Investment Act* or any other provision of this Agreement, for purposes of section 10(1)(a.1) of the *Transportation Investment Act*, the obligations of the Province, if any, to make the final payment in respect of the Performance Payment and to make any payment pursuant to Section 44 [Compensation on Termination] arise before termination of this Agreement.

PART V
CHANGE, LIABILITIES AND TERMINATION

34. **CHANGE PROCEDURE**

If at any time after the date of this Agreement an Eligible Change occurs, except and to the extent that the facts upon which such Eligible Change is based arise out of an acknowledged and unremedied breach by the Concessionaire (or any person for whom the Concessionaire is responsible) of any material obligations under this Agreement or the Project Documents, the provisions of Schedule 13 [Changes] will apply.

35. **CHANGE IN LAW**

35.1 **Performance after Change in Law**

35.1.1 Following any and all Changes in Law, the Concessionaire will perform the Undertakings in accordance with the terms of this Agreement, including in compliance with all Laws and Regulations.

35.1.2 The Concessionaire will be responsible for, and will comply with, any and all Changes in Law.

35.1.3 For greater certainty, the Concessionaire acknowledges that the *Transportation Act* has been passed and brought into force (except one section) and that neither the bringing into force of the remaining section nor the repeal or amendment of any enactments (other than the *Transportation Act*) as a result of the remaining section of the *Transportation Act* being brought into force will constitute a Change in Law.

35.2 **Mitigation**

Without prejudice to any of its other obligations under this Agreement, the Concessionaire will:

35.2.1 use all reasonable efforts to mitigate the adverse effects of any Compensable Change in Law (other than a Withholding Change in Law) and take all reasonable steps to minimize any increase in costs arising from any such Compensable Change in Law ; and

35.2.2 use all reasonable efforts to take advantage of any positive or beneficial effects of any Compensable Change in Law (other than a Withholding Change in Law) and take all reasonable steps to maximize any reduction in costs arising from any such Compensable Change in Law.

Any compensation payable to the Concessionaire or adjustment to the Performance Payments in respect of any Compensable Change in Law (other than a Withholding Change in Law) will not take into account any amounts incurred or to be incurred as a result of the

Concessionaire's failure to comply with this Section 35.2 [Mitigation] and will take into account any reduction in costs that would have been realized had the Concessionaire complied with this Section 35.2 [Mitigation]. For greater certainty, any amounts reasonably expended in accordance with this Section 35.2 [Mitigation] will be taken into consideration in calculating any compensation payable to the Concessionaire or adjustment to the Performance Payment in respect of any Compensable Change in Law (other than a Withholding Change in Law).

35.2A Mitigation for Withholding Taxes

35.2A.1 Without prejudice to any of its other obligations under this Agreement, the Concessionaire will:

35.2A.1.1 use all reasonable efforts to mitigate the adverse effects of any Withholding Change in Law, including by undertaking a Refinancing;

35.2A.1.2 use all reasonable efforts to take advantage of any positive or beneficial effects of any Withholding Change in Law and take all reasonable steps to maximise any reduction in costs arising from the Withholding Change in Law,

it being acknowledged by the Parties that the Concessionaire shall have no obligation to undertake a Refinancing if the economic benefits of such Refinancing (less all costs incurred and to be incurred in connection with such Refinancing including the costs of mitigation for the Withholding Change in Law as set out in Section 35.2A.1) are less than the costs associated with complying with such Withholding Change in Law.

35.2A.2 Any compensation payable to the Concessionaire or adjustment to the Performance Payments in respect of any Withholding Change in Law will not take into account any amounts incurred or to be incurred as a result of the Concessionaire's failure to comply with this Section 35.2A [Mitigation for Withholding Taxes] and will take into account any reduction in costs that would have been realized had the Concessionaire complied with this Section 35.2A [Mitigation for Withholding Taxes]. Any amounts expended in accordance with this Section 35.2A [Mitigation for Withholding Taxes] will be for the account of the Concessionaire only and will not be taken into consideration in calculating any compensation payable to the Concessionaire or adjustment to the Performance Payment in respect of the Withholding Change in Law.

35.2A.3 On request from the Concessionaire, the Province, to the extent it has the legal ability to do so under existing Laws and Regulations, will use reasonable efforts to provide assistance to the Concessionaire in connection with mitigating the effects of a Withholding Change in Law. Where the Concessionaire is given assistance by the Province in accordance with this Section 35.2A.3, the Concessionaire will indemnify and hold the Province harmless in respect of any Losses and/or Claims

suffered or incurred by the Province as a result of or in connection with the provision of such assistance.

35.3 Adjustments for Compensable Change in Law

35.3.1 On the occurrence of a Compensable Change in Law, either the Concessionaire or the Province will be entitled to seek compensation or adjustments to the Performance Payments to compensate for any increase or decrease (as the case may be) in the net cost to the Concessionaire of performing the Undertakings. Any such adjustments will be calculated in accordance with this Section 35.3 [Adjustments for Compensable Change in Law] and, as applicable, Section 35.4 [Relevant Change in Law], Section 35.5 [Relevant Works Change in Law], Section 35.5A [Materials Change in Law], Section 35.5B [Withholding Change in Law] or Section 35.5C [PST Change in Law].

35.3.2 On the occurrence of a Compensable Change in Law:

35.3.2.1 either the Concessionaire or the Province may give notice to the other of the occurrence of the Compensable Change in Law;

35.3.2.2 the Concessionaire and the Province will meet within 30 days of such notice to consult and seek to agree on the effect of the Compensable Change in Law, and if they have not agreed on the occurrence or the effect of the Compensable Change in Law within 7 days of such meeting, then either of the Province or the Concessionaire may refer the question of whether a Compensable Change in Law has occurred or the effect of the Compensable Change in Law for determination in accordance with the Disputes Resolution Procedure;

35.3.2.3 within 7 days of such agreement or determination, the Province's Representative will issue a request for a Province Change and the provisions of Part 2 of Schedule 13 [Province Changes] will apply except that:

35.3.2.3.1 the Concessionaire may decline to provide a Change Appraisal or object to such Province Change only on the grounds that the implementation of the Province Change would not give effect to or comply with the Compensable Change in Law;

35.3.2.3.2 the Province will issue a Province Change Confirmation in respect of the Province Change in accordance with Part 2 of Schedule 13 [Province Changes];

35.3.2.3.3 the Concessionaire will be obligated to obtain and comply with all Permits, Licences and Approvals in connection

with the Province Change as provided in Section 3.5 [Permits, Licences and Approvals];

35.3.2.3.4 the Province will not be entitled to withdraw any such request for a Province Change or Province Change Confirmation nor to withhold any Province Change Confirmation except on grounds that there is a more efficient means of dealing with the Compensable Change in Law than that proposed in the Change Appraisal submitted to the Province by the Concessionaire;

35.3.2.3.5 the Concessionaire will comply with its obligations under Section 35.2 [Mitigation]; and

35.3.2.3.6 any compensation payable, or adjustment to the Performance Payment, will be calculated in accordance with Section 35.4 [Relevant Change in Law], Section 35.5 [Relevant Works Change in Law], Section 35.5A [Materials Change in Law], Section 35.5B [Withholding Change in Law] or Section 35.5C [PST Change in Law], as applicable, subject to Section 35.2 [Mitigation].

35.4 Relevant Change in Law

35.4.1 [Not used]

35.4.2 Any compensation payable or adjustment to the Performance Payments in respect of a Relevant Change in Law will be calculated on the basis that the Concessionaire will be placed in no better or worse position than it would have been in had the Relevant Change in Law not occurred, taking into account, *inter alia*, the provisions of Section 35.2 [Mitigation] and:

35.4.2.1 the extent to which the Concessionaire has been, or will be, compensated as a result of any indexation of the Performance Payments under this Agreement; and

35.4.2.2 any net increase or decrease in the costs of the Concessionaire in performing the Undertakings resulting from the Relevant Change in Law; and

35.4.2.3 any amount which the Concessionaire will recover under any insurance policy (or would have recovered if it had complied with the requirements of this Agreement or any policy of insurance maintained or required to be maintained under this Agreement), which amount, for greater certainty, shall not include the amount of any excess deductibles or any amount above the maximum insured amount applicable to any such insurance policy.

35.4.3 The Concessionaire will not be entitled to any other payment or compensation or, except as provided otherwise in this Agreement, relief in respect of a Relevant Change in Law or associated Province Change or the consequences of either.

35.5 Relevant Works Change in Law

35.5.1 If prior to the Completion Date, the cost impact of all Relevant Works Changes in Law on the cost of the Works and the Decommissioning:

35.5.1.1 is less than \$375,000, either positive or negative, neither the Province nor the Concessionaire shall be entitled to any payment or compensation pursuant to this Section 35.5 [Relevant Works Change in Law] or otherwise; or

35.5.1.2 is more than \$375,000, either positive or negative, the Performance Payments will be adjusted on the basis that the Concessionaire will be placed in no better or worse position than it would have been in had the Relevant Works Change in Law not occurred, taking into account, *inter alia*, the provisions of Section 35.2 [Mitigation].

35.5.2 If a Relevant Works Change in Law occurs after the Completion Date and the cost impact in a given Contract Year (in aggregate with all other such Relevant Works Changes in Law that have a cost impact in the same Contract Year) on the cost of performance by the Concessionaire of the Undertakings in that Contract Year is less than \$50,000 (index linked and proportionately reduced where that given Contract Year is less than 12 months), neither the Province nor the Concessionaire shall be entitled to any payment or compensation pursuant to Section 35.3 [Adjustments for Compensable Change in Law] or otherwise in respect of the cost impact of that Relevant Works Change in Law in that Contract Year or, except as provided in this Agreement, any other relief in respect of such Relevant Works Change in Law in that Contract Year.

35.5.3 If the cost impact (as described in Section 35.5.2) is greater than \$50,000 (indexed linked and proportionately reduced where that given Contract Year is less than 12 months), the Concessionaire will be entitled to receive compensation from the Province for the additional cost impact, taking into account, *inter alia*, the provisions of Section 35.2 [Mitigation].

35.5.4 The Concessionaire will not be entitled to any other payment or compensation or, except as provided otherwise in this Agreement, relief in respect of a Relevant Works Change in Law or associated Province Change or the consequences of either.

35.5A Materials Change in Law

35.5A.1 If a Materials Change in Law occurs, the Concessionaire will be entitled to receive compensation from the Province for any amounts over \$125,000 (index linked and proportionately reduced where the relevant Contract Year is less than 12 months) incurred by the Concessionaire in any Contract Year as a direct result of the increase in the cost of any materials used by the Concessionaire in carrying out the Undertakings after the Completion Date. The compensation payable or adjustment to the Performance Payments in respect of a Materials Change in Law will be calculated taking into account, *inter alia*, the provisions of Section 35.2 [Mitigation] and:

35.5A.1.1 the extent to which the Concessionaire has been, or will be, compensated as a result of any indexation of the Performance Payments under this Agreement;

35.5A.1.2 any net increase or decrease in the costs of the Concessionaire in performing the Undertakings resulting from the Materials Change in Law; and

35.5A.1.3 any amount which the Concessionaire will recover under any insurance policy (or would have recovered if it had complied with the requirements of this Agreement or any policy of insurance maintained or required to be maintained under this Agreement), which amount, for greater certainty, shall not include the amount of any deductible or any amount above the maximum insured amount applicable to any such insurance policy.

35.5A.2 The Concessionaire will not be entitled to any other payment or compensation or, except as provided otherwise in this Agreement, relief in respect of a Materials Change in Law or associated Province Change or the consequences of either.

35.5B Withholding Change in Law

35.5B.1 Any compensation payable or adjustment to the Performance Payments in respect of a Withholding Change in Law will be calculated on the basis that the Concessionaire will be placed in no better or worse position than it would have been in had the Withholding Change in Law not occurred, taking into account, *inter alia*, the provisions of Section 35.2A [Mitigation for Withholding Taxes].

35.5B.2 The Concessionaire will not be entitled to any other payment or compensation or, except as provided otherwise in this Agreement, relief in respect of a Withholding Change in Law or associated Province Change or the consequences of either.

35.5C PST Change in Law

35.5C.1 Any compensation payable or adjustment to the Performance Payments in respect of a PST Change in Law will be calculated on the basis that the Concessionaire will be placed in no better or worse position than it would have been in had the PST Change in Law not occurred, taking into account, *inter alia*, the provisions of Section 35.2 [Mitigation].

35.5C.2 The Concessionaire will not be entitled to any other payment or compensation or, except as provided otherwise in this Agreement, relief in respect of a PST Change in Law or associated Province Change or the consequences of either.

35.6 Change in Law other than Compensable Change in Law

35.6.1 Either the Concessionaire or the Province may give notice to the other of the need for a Province Change in order to enable the Concessionaire to comply with any Change in Law which is not a Compensable Change in Law, in which event:

35.6.1.1 the Concessionaire and the Province will meet within 30 days to consult in respect of the effect of the Change in Law and any Province Change required as a consequence thereof; and

35.6.1.2 within 14 days of such meeting the Province's Representative will, if a Province Change is required in order to comply with the Change in Law, issue a request for a Province Change and the provisions of Part 2 of Schedule 13 [Province Changes] will apply except that:

35.6.1.2.1 the Concessionaire may decline to provide a Change Appraisal or the Concessionaire may object to such Province Change only on the grounds that the implementation of the Province Change would not give effect to or comply with the Change in Law;

35.6.1.2.2 the Province's Representative will issue a Province Change Confirmation in respect of the Province Change in accordance with Part 2 of Schedule 13 [Province Changes];

35.6.1.2.3 the Concessionaire will be obligated to obtain and comply with all Permits, Licences and Approvals in connection with the Province Change as provided in Section 3.5 [Permits, Licences and Approvals];

35.6.1.2.4 the Province's Representative will not be entitled to withdraw any such request for a Province Change or Province Change Confirmation nor to withhold any Province Change Confirmation except on grounds that there is a more efficient

means of dealing with the Change in Law than that proposed in the Change Appraisal submitted to the Province by the Concessionaire; and

35.6.1.2.5 the Concessionaire will not be entitled to any payment or other compensation or relief from any performance of its obligations under this Agreement in respect of such Change in Law or associated Province Change or the consequences of either.

36. **ADDITIONAL WORKS AND SUBSEQUENT SCHEMES**

36.1 Additional Works Services

36.1.1. Where the Province requires any Additional Works to be carried out, the provisions of Part 2 of Schedule 13 [Province Changes] will apply.

36.1.2 Upon completion, any Additional Works will become part of the Concession Highway for all purposes of this Agreement and the definitions of “New Highway”, “Off-Site Facilities”, “Site”, “Concession Highway” and “Project Facilities” in paragraph 1 of Schedule 1 [Definitions and Interpretation] will be deemed to be amended as appropriate to include references to such Additional Works.

36.2 [Not used]

36.3 Subsequent Schemes

Where the Concessionaire desires a Subsequent Scheme to be carried out, the provisions of Part 1 of Schedule 14 [Subsequent Schemes] will apply.

36.4 Improvements

Where the Concessionaire desires to make any Improvement to the Project Facilities, the provisions of Part 2 of Schedule 14 [Improvements] will apply.

37. **FORCE MAJEURE AND ELIGIBLE FORCE MAJEURE**

37.1 Relief from Liability

37.1.1 The Parties will be relieved from liability under this Agreement to the extent that by reason of Force Majeure or Eligible Force Majeure they are not able to perform their obligations under this Agreement.

37.1.2 Nothing in Section 37.1.1 will affect any entitlement of the Province to make Availability/Performance Deductions or any Availability/Performance Deductions made in accordance with the calculations of the Performance Payment (and monthly payments in respect thereof) required to be made pursuant to Section 32 [Calculation

of Payments] and Schedule 10 [Payments] as a result of any failure to perform any obligation of the Concessionaire under this Agreement. For greater certainty, while the Concessionaire is unable to perform any such obligation due to Force Majeure or Eligible Force Majeure as a result of which any entitlement to make any Availability/Performance Deduction arises, such Availability/Performance Deductions will be discounted for the purposes of Section 26 [Monitoring of Performance] but will continue to be counted for the purpose of calculating any deduction from the Performance Payments (and monthly payments in respect thereof).

37.2 Notice

The Party intending to claim relief shall give written notice to the other Parties within 7 days of the Party becoming aware of the event of Force Majeure or Eligible Force Majeure informing the other Parties that it intends to claim relief. Such notice will contain such relevant information relating to such failure to perform as is available, including the actions being taken to remedy such failure to perform and an estimate of the period of time required to remedy such failure to perform.

37.3 Obligation to Mitigate and Remedy

As soon as practicable after the occurrence of an event of Force Majeure or Eligible Force Majeure the Party affected will take all necessary steps to mitigate the effects of the event of Force Majeure or Eligible Force Majeure (as the case may be) and to remedy the failure to perform. For greater certainty, any amounts reasonably expended in accordance with this Section 37.3 [Obligation to Mitigate and Remedy] will be taken into consideration in calculating any compensation payable to the Concessionaire.

37.4 Consequences of Eligible Force Majeure

Subject to Section 37.5 [Right to Terminate], if an event of Eligible Force Majeure has occurred, then:

- 37.4.1 the Concessionaire will give notice thereof to the Province's Representative together with details of the effect thereof and the proposed steps to rectify the damage and the costs thereof;
- 37.4.2 the Concessionaire and the Province will enter into discussions concerning the event of Eligible Force Majeure and the consequences thereof with the intent that as soon as reasonably possible after the cessation of the event of Eligible Force Majeure rectification work and other performance of the Undertakings can be commenced;
- 37.4.3 following agreement between the Concessionaire and the Province on the rectification works to be carried out, or in default of agreement upon a decision

under the Disputes Resolution Procedure, the Concessionaire will, subject to Section 37.4.4, carry out such rectification works; and

- 37.4.4 if and to the extent that the costs of such rectification works are not recoverable pursuant to the insurances required to be taken out in accordance with Section 20.1.1 or any other insurance maintained by the Concessionaire as set out in Section 20.11.11, such uninsured rectification works, notwithstanding any other provision of this Agreement (including paragraph (d) of the definition of Compensation Event in Schedule 1 [Definitions and Interpretation]), will be treated as though the Province had requested a Province Change in respect of such works and the provisions of Part 2 of Schedule 13 [Province Changes] will apply, except that the Province will not be entitled to withdraw any such request for a Province Change or Province Change Confirmation nor to withhold any Province Change Confirmation.

37.5 Right to Terminate

37.5.1 If the occurrence of an event of Eligible Force Majeure:

- 37.5.1.1 renders either the Concessionaire or the Province unable to carry out all or substantially all of its obligations pursuant to this Agreement for a continuous period of more than 180 days from the date upon which the Party affected gives notice of the occurrence of the event of Eligible Force Majeure to the other Parties; or
- 37.5.1.2 has a material adverse effect on the performance by either the Concessionaire or the Province of its obligations pursuant to this Agreement for a continuous period of more than 180 days from the date on which the Party affected gives notice of the occurrence of the event of Eligible Force Majeure to the other Parties,

then the Party affected (subject, where the Party affected is the Concessionaire, to Section 37.5.3) may, following consultation between the Province and the Concessionaire for a further period of not less than 60 days to reach a solution acceptable to all Parties and provided that the effects of the relevant event of Eligible Force Majeure continue, terminate this Agreement in accordance with Section 42.2.1.

37.5.1A If and to the extent that the Concessionaire receives insurance proceeds in connection with an event of Force Majeure:

- 37.5.1A.1 that renders either the Concessionaire or the Province unable to carry out all or substantially all of its obligations pursuant to this Agreement for a continuous period of more than 365 days from the date upon which the party affected gives notice of the occurrence of the event of Force Majeure to the other Parties; or

37.5.1A.2 that has a material adverse effect on the performance by either the Concessionaire or the Province of its obligations pursuant to this Agreement for a continuous period of more than 365 days from the date on which the party affected gives notice of the occurrence of the event of Force Majeure to the other Parties,

then the Party affected (subject, where the Party affected is the Concessionaire, to Section 37.5.3) may, provided that the effects of the relevant event of Force Majeure continue, terminate this Agreement in accordance with Section 42.2.1.

37.5.1B If the Concessionaire does not receive insurance proceeds in connection with an event of Force Majeure:

37.5.1B.1 that renders either the Concessionaire or the Province unable to carry out all or substantially all of its obligations pursuant to this Agreement for a continuous period of more than 180 days from the date upon which the Party affected gives notice of the occurrence of the event of Force Majeure to the other Parties; or

37.5.1B.2 that has a material adverse effect on the performance by either the Concessionaire or the Province of its obligations pursuant to this Agreement for a continuous period of more than 180 days from the date on which the Party affected gives notice of the occurrence of the event of Force Majeure to the other Parties,

then the Party affected (subject, where the Party affected is the Concessionaire, to Section 37.5.3) may provided that the effects of the relevant event of Force Majeure continue, terminate this Agreement in accordance with Section 42.2.1.

37.5.2 Without prejudice to Section 37.5.1, if the occurrence of an event of Eligible Force Majeure results in damage to the Works or the Project Facilities in respect of which the cost of restoration, replacement or reinstatement exceeds or is reasonably estimated to exceed \$10 million (index linked), then the Province may terminate this Agreement in accordance with Section 42.2.2.

37.5.2A Without prejudice to Section 37.5.1, if any costs or other amounts (including any amount payable by the Province to the Concessionaire in respect of any Revenue Loss and including the amount of any Availability/Performance Deductions that the Province would have been entitled to make but for paragraph (c) of the definition of Excepted Closure in paragraph 1 of Schedule 1 [Definitions and Interpretation]) for which the Province would be responsible in respect or as a result of the occurrence of an event of Eligible Force Majeure, including in respect of uninsured rectification works pursuant to Section 37.4.4, exceed or are reasonably estimated to exceed \$5,000,000 (index linked), then the Province may terminate this Agreement in accordance with Section 42.2.2 unless the Concessionaire waives any claim in

respect of and agrees to be responsible for and to pay all of such costs and other amounts.

37.5.3 If the Concessionaire gives notice to the Province under Section 42.2.1 terminating this Agreement pursuant to Section 37.5.1, 37.5.1A or 37.5.1B, then the Province has the option either to accept such notice or to respond in writing on or before the date falling 15 Working Days after the date of its receipt stating that it requires this Agreement to continue. If the Province gives the Concessionaire such response, then:

37.5.3.1 the Concessionaire, insofar as it is able to do so, will continue to perform the Undertakings in accordance with the provisions of this Agreement;

37.5.3.2 the Province will pay to the Concessionaire the Performance Payment from the day after the date on which this Agreement otherwise would have terminated under Section 42.2.1 and for so long as the effects of the relevant event of Force Majeure or Eligible Force Majeure continue as if the Undertakings were being fully performed and the traffic flow on the Concession Highway were the traffic flow that would be reasonably expected had the event of Force Majeure or Eligible Force Majeure not occurred, and will indemnify the Concessionaire in respect of all third party liabilities, losses, claims, costs and expenses (including any costs of clean-up) arising from and attributable to the event of Force Majeure or Eligible Force Majeure; and

37.5.3.3 this Agreement will not terminate until expiry of notice (of at least 30 days) from the Province to the Concessionaire stating that the Province wishes this Agreement to terminate.

37.5A Termination for Total Failure of Crossing

If the New Crossing is damaged by reason of an event other than an event of Eligible Force Majeure such that the Concessionaire will be or is unable to perform the Undertakings for a continuous period of more than 180 days from the date of the event, then the Province may, terminate this Agreement in accordance with the provisions of Section 42.6.1.

37.6 Limit on Liability

For greater certainty, except as expressly set out in this Section 37 [Force Majeure and Eligible Force Majeure] (other than this Section 37.6 [Limit on Liability]) no Party to this Agreement nor any of their respective agents, contractors or subcontractors of any tier or employees of any of them will have any liability to another Party in relation to any Loss or Claim which such Party suffers or incurs as a result of any event of Force Majeure or Eligible Force Majeure.

38. COVENANTS, REPRESENTATIONS, WARRANTIES AND DISCLAIMERS**38.1 Covenants, Representations and Warranties by the Concessionaire**

Without prejudice to any covenants, representations, warranties or conditions implied by law, the Concessionaire covenants, represents, warrants and undertakes that:

- 38.1.1 the design of the Works, the Decommissioning and any other works the subject of a Proposal or otherwise carried out in the course of the Undertakings will in all respects meet the Technical Requirements and all other requirements of this Agreement;
- 38.1.2 the Works and any other works the subject of a Proposal or otherwise carried out in the course of the Undertakings will comprise only materials and goods which are of sound and merchantable quality and have been manufactured or prepared in accordance with the Technical Requirements and with the quality assurance procedures established pursuant to Section 23 [Quality Management], and all workmanship will be in accordance with Good Industry Practice applicable at the time of construction;
- 38.1.3 the Works and any other works the subject of a Proposal or otherwise carried out in the course of the Undertakings when constructed will comply in all respects with the Construction Output Specifications, the Construction Requirements, the design as reviewed in accordance with Section 11 [Design and Construction] or Section 14.6 [Maintenance and Other Works] (as the case may be) and the Design and Certification Procedure;
- 38.1.4 subject to the terms of the Design and Certification Procedure, the design of the Works, the Decommissioning and any other works the subject of a Proposal or otherwise carried out in the course of the Undertakings will be carried out by or under the supervision of the Designer, and the persons carrying out any design and/or supervision will be suitably qualified and experienced so to do and in particular have adequate previous experience of the part of the design they are carrying out or supervising;
- 38.1.5 it is a limited partnership, validly existing under the laws of British Columbia and Canada and duly authorized to carry on business in British Columbia;
- 38.1.6 it has full capacity, power and authority to enter into this Agreement and perform its obligations hereunder and to carry out the Undertakings;
- 38.1.7 the entry into and performance by it of this Agreement do not and will not:
 - 38.1.7.1 conflict with its constitutional documents; or

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- 38.1.7.2 conflict with any document which is binding upon it or any of its assets to the extent that such conflict would have or be reasonably likely to have a material adverse effect on the performance by the Concessionaire of its obligations under this Agreement;
- 38.1.8 there has been no material adverse change in the financial condition of the Concessionaire since it was established or in the financial condition of SNC-Lavalin Group Inc. since (a) its interim consolidated financial statements (including notes to the interim financial statements) for the quarter ended March 31, 2005, and (b) the issuance of Dominion Bond Rating Service's credit rating report dated February 24, 2005 **DELETED**
- 38.1.9 the Financial Terms together with the equity funding to be provided by SNC-Lavalin Inc pursuant to the Credit Agreement are the basis on which the Concessionaire will finance the Project;
- 38.1.10 each of the Project Documents (and each Collateral Agreement associated therewith) is in full force and effect and constitutes the valid, binding and (except to the extent that the effectiveness of any enforcement action may be limited by bankruptcy, insolvency or similar laws affecting creditors' rights generally, including principles of equity) enforceable obligation of the Concessionaire and its Affiliates, the copies of the Project Documents which the Concessionaire has delivered to the Province are true and complete copies of such documents, and there are not in existence any other agreements or documents replacing or relating to any of the Project Documents which would materially affect the interpretation or application of any of the Project Documents except as expressly referred to in the Project Documents;
- 38.1.11 in respect of any of the items required to be made available to the Province under Section 49.1 [Design and Other Data] either:
- 38.1.11.1 each of them is original; or
- 38.1.11.2 if any such item is not original, the Concessionaire has obtained, or prior to such item being acquired or brought into existence in any manner whatsoever will have obtained, all rights necessary in order to enable:
- 38.1.11.2.1 such item to be so acquired or brought into existence and to be used for the purposes of the Project by the Concessionaire or any of its agents, contractors or subcontractors of any tier or employees of any of them; and

38.1.11.2.2 the Concessionaire to comply with its obligations under this Agreement (including under Section 49 [Intellectual Property],

and in any event, no such item infringes or will infringe any third party's copyright, moral rights, design rights, trade mark or other intellectual property rights.

38.2 Disclaimer

38.2.1 The Province and its representatives have made available or caused to be made available to the Concessionaire prior to the date hereof, or may after the date hereof make available or cause to be made available, certain materials, documents and data related to the design or construction of the Works, the Existing Highway, the Project Facilities, the Site, the Adjacent Areas, the Graving Dock Site, traffic records and forecasts and other matters which are or may be relevant to the Project and the obligations undertaken by the Concessionaire under this Agreement (the "Disclosed Data"). The Disclosed Data includes all such materials, documents and data which were provided to the Concessionaire (whether by the Province or by any other person on behalf of the Province) in connection with the RFQ, the RFP and the BAFO stage (including all such materials, documents and data contained on the DVD or made available through the Data Room) and the design drawings provided in autoCAD.

38.2.2 Except as otherwise expressly provided in this Agreement, neither the Province nor BCTFA will have any liability to the Concessionaire (whether in contract, tort, by statute or otherwise howsoever and whether or not arising out of any negligence on the part of the Province or BCTFA or any of their respective employees, contractors or agents) in respect of any inaccuracy, error, omission, unfitness for purpose, defect or inadequacy of any kind whatsoever in the Disclosed Data.

38.2.3 Neither the Province nor BCTFA gives any representation, warranty or undertaking that the Disclosed Data represents or includes all of the information in its possession or control (either during the procurement process for the Project or at or after the date of execution of this Agreement) relevant or material to the Project, the Existing Highway, the Project Facilities, the Site, the Adjacent Areas or the Graving Dock Site or the obligations undertaken by the Concessionaire under this Agreement. Without limiting the generality of the foregoing, neither the Province nor BCTFA will have any liability to the Concessionaire (whether in contract, tort, by statute or otherwise howsoever and whether or not arising out of any negligence on the part of the Province or BCTFA or any of their respective employees, contractors or agents) be liable to the Concessionaire in respect of any failure to disclose or make available (whether before or after the execution of this Agreement) to the Concessionaire any information, documents or data, or any failure to keep the Disclosed Data up to date, or any failure to inform the Concessionaire (whether before or after execution of this Agreement) of any inaccuracy, error, omission, unfitness for purpose, defect or

inadequacy of any kind whatsoever in the Disclosed Data (other than a failure to inform the Concessionaire in relation to the items of Disclosed Data identified in Sections 38.2.5.1, 38.2.5.2 and 38.2.6, the Concessionaire acknowledging that the Province has informed it of the limits to which such Disclosed Data may be relied on as set out in Sections 38.2.5 and 38.2.6).

38.2.4 The Concessionaire acknowledges, represents, warrants and confirms that:

- 38.2.4.1 it has conducted its own analysis and review of the Disclosed Data disclosed prior to the Commencement Date and without prejudice to any rights it may have under Sections 38.2.5 and 38.2.6 has before the execution of this Agreement satisfied itself, to the extent reasonably possible in accordance with Good Industry Practice, as to the accuracy, completeness and fitness for purpose of all such Disclosed Data upon which it places reliance;
- 38.2.4.2 it will not be entitled to make and will not make any claim against the Province or BCTFA whether in damages or for extensions of time or additional payments or other relief under this Agreement on any grounds relating to the Disclosed Data, including on the grounds of any misunderstanding or misapprehension in respect of the Disclosed Data or the matters referred to in Section 6.1 [Site Inspection and Investigations] or Section 38.2.4.1 or, except as otherwise expressly provided in this Agreement, on the grounds that incorrect or insufficient information relating thereto or to the Existing Highway, the Project Facilities, the Site or the Adjacent Areas or the Graving Dock Site was given to it by any person, whether or not in the employ of the Province or BCTFA. Nor, except as otherwise expressly provided in this Agreement, will the Concessionaire be relieved from any risks or obligations imposed on or undertaken by it under this Agreement on any such ground;
- 38.2.4.3 the Ministry is a regulatory body with respect to the safety and fitness for purpose of the Works and the Decommissioning and nothing herein shall fetter the Ministry's authority to act as a regulatory body;
- 38.2.4.4 subject to this Agreement, and to its rights under Laws and Regulations, it will have no remedy for any action, determination or position of the Province or Ministry acting in its capacity as a regulatory body in matters respecting safety or fitness for purpose of the Works and the Decommissioning; and
- 38.2.4.5 the Concessionaire's investigation of the conditions affecting the Works and the Decommissioning, the Disclosed Data and the matters referred to in Section 6.1 [Site Inspection and Investigations] has been based on its own examination, knowledge, information, and judgement and not upon

any statement, representation, or information made or given by the Province.

38.2.5 Notwithstanding the foregoing provisions of this Section 38.2 [Disclaimer] or any other provision of this Agreement, if a delay is caused to the progress of the Works or the Decommissioning or additional costs are incurred by the Concessionaire in performing the Works or the Decommissioning which in either case would not otherwise have been experienced or incurred by the Concessionaire in performing its obligations under this Agreement as a direct result of a factual error (as at the currency date of the relevant document) in:

- 38.2.5.1 any of the geotechnical investigation data and test results provided in borehole and test pit logs (but not interpolated digital terrain models, contours or cross-sections derived therefrom) provided as part of the Data Room; or
- 38.2.5.2 the condition inspection reports contained in section 3.1.7.1 of the Data Room, recognizing that these reports have been based on representative sampling of the structural components of the Existing Bridge using primarily visual inspection, supplemented with some physical testing and recognizing further that the reports were prepared for the purpose of describing the general condition of the Existing Bridge at the time of inspection and that the reports do not warrant that unseen or latent defects do not exist,

upon which the Concessionaire has reasonably and in accordance with Good Industry Practice relied in the design or construction of the Works or the design or completion of the Decommissioning, then the delay or additional costs incurred by the Concessionaire, to the extent they could not reasonably have been avoided or mitigated by the Concessionaire, will be treated as a Compensation Event and the provisions of Section 12.6 [Delay] and Part 4 of Schedule 13 [Compensation Events] will apply accordingly. For greater certainty, the Concessionaire will not be entitled to relief under this Section 38.2.5:

- 38.2.5.3 with respect to factual errors in such geotechnical information or condition inspection reports that were produced by a third party if such third party has acknowledged in writing that the Concessionaire may rely on the information or if the Concessionaire otherwise has any independent right of recourse against the third party with respect to the error in the information;
- 38.2.5.4 for any delay or additional costs that result from any interpretation of or extrapolation from or assumption made on the basis of any geotechnical information or information in the condition inspection reports which was factually correct as at the date of the relevant document or from any

action taken or omitted on the basis of any such interpretation, extrapolation or assumption;

- 38.2.5.5 if it does not carry out its own inspections to verify the condition of the Existing Bridge at the location of applied construction loads and to verify that applied construction loads do not exceed the capacity of the Existing Bridge determined from the as-built drawings and the condition inspection reports; or
- 38.2.5.6 if the Concessionaire in fact carried out an inspection under Section 38.2.5.5 and failed to identify a factual error or deficiency or has undertaken further investigations or site examinations with respect to the subject matter of the information containing the factual error and has failed to identify the factual error and such factual error would normally have been identified by competent professionals undertaking such inspections using Good Industry Practice.

Any Dispute between the Province and the Concessionaire regarding the application of this Section 38.2.5 will be referred for resolution to the Disputes Resolution Procedure.

38.2.6 Notwithstanding the foregoing provisions of this Section 38.2 [Disclaimer] or any other provision of this Agreement, if the Concessionaire has reasonably and in accordance with Good Industry Practice relied in the design or construction of the Works or the design or completion of the Decommissioning on the Existing Bridge having been constructed in general conformance with the as-built drawings contained in section 3.1.1 of the Data Room, recognizing that the Existing Bridge has been repaired and otherwise modified throughout its life as partially indicated on the drawings contained in sections 3.1.2.2, 3.1.3.2, 3.1.4.2, 3.1.5.1 and 3.1.6.1 of the Data Room, and if a delay is caused in the progress of the Works or the Decommissioning or additional costs are incurred by the Concessionaire in performing the Works or the Decommissioning which in either case would not otherwise have been experienced or incurred by the Concessionaire in performing its obligations under this Agreement as a result of such reliance, then the delay or additional costs incurred by the Concessionaire, to the extent they could not reasonably have been avoided or mitigated by the Concessionaire, will be treated as a Compensation Event and the provisions of Section 12.6 [Delay] and Part 4 of Schedule 13 [Compensation Events] will apply accordingly. For greater certainty, the Concessionaire will not be entitled to relief under this Section 38.2.6:

- 38.2.6.1 for any delay or additional costs that result from any unreasonable interpretation of or extrapolation from or assumption made on the basis of the drawings referred to above or from any action taken or omitted on the basis of any such interpretation, extrapolation or assumption; or

- 38.2.6.2 if it does not carry out its own verification through inspection, physical testing and additional design analysis of the condition and capacity of the Existing Bridge to accept the construction loads resulting from the Concessionaire's design or construction methodology.

In this Section 38.2.6 Good Industry Practice shall include making appropriate allowances for construction material and quality control practices in effect at the time of the original construction of the Existing Bridge in 1956; and the subsequent effects of the passage of time, including the effects of deterioration and fatigue; and undertaking reasonable inspection, physical testing and design analysis to confirm the condition and capacity of the Existing Bridge to accept construction loads resulting from the Concessionaire's design of or construction methodology for the Works and the Decommissioning.

Any Dispute between the Province and the Concessionaire regarding the application of this Section 38.2.6 will be referred for resolution to the Disputes Resolution Procedure.

38.3 Savings

38.3.1 Any covenant, representation, warranty or undertaking made or given by the Concessionaire under any provision of this Agreement is without prejudice to any covenant, representation, warranty or undertaking made or given by the Concessionaire under any other provision of this Agreement.

38.3.2 All covenants, representations, warranties and undertakings made or given by the Concessionaire under any provision of this Agreement survive the execution, expiry or earlier termination of this Agreement and, without limiting any other provision of this Agreement, are not affected by any investigation by or on behalf of the Province.

39. INDEMNITIES

39.1 Concessionaire's Indemnities

Without limiting its duties, obligations and liabilities under the *Transportation Investment Act*, except to the extent that the Concessionaire is entitled to an indemnity from the Province under Section 39.3 [Province's Indemnities] and except as otherwise specifically provided in this Agreement, the Concessionaire shall indemnify and save harmless the Province, BCTFA and their respective employees and agents from and against any and all Claims and Losses which may be suffered, sustained or incurred at any time or times (whether before or after the expiration or sooner termination of this Agreement) where the same are based upon or arise out of or from anything done or omitted to be done by the Concessionaire, any Contracting Affiliate or any of their respective agents, employees, contractors and subcontractors of any tier or the employees of any of them pursuant to this Agreement, including for or in respect of:

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- 39.1.1 death or personal injury;
- 39.1.2 any Loss or damage to property, whether real or personal (including the Existing Highway or any other property belonging to the Province or BCTFA or for which either such Party is responsible);
- 39.1.3 any Loss or damage to the Works, works relating to the Decommissioning or the Project Facilities or any materials or Plant to be used in the construction of the Works, works relating to the Decommissioning or the Project Facilities from any cause (other than as provided in Section 37 [Force Majeure]);
- 39.1.4 any Loss or Claim suffered by the Concessionaire or any of its agents, contractors or subcontractors of any tier or the employees of any of them or any Contracting Affiliate or by any User, any Marine User or any other third party which arises out of the execution of the Works, the Decommissioning or the operation, maintenance, rehabilitation, improvement or use of the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site or any part thereof (including any Claims in respect of environmental mitigation measures, but except in so far as the environmental mitigation measures relate to Existing Contamination);
- 39.1.5 any Loss or Claim arising out of or in connection with a breach of the provisions of Section 29 [Delegation of Obligations, Rights, Powers and Functions] or as a result of any failure by the Concessionaire to perform any of the Delegated Obligations or any exercise by the Concessionaire of any of the Delegated Rights, Powers and Functions (except in so far as Section 29.6.2 applies);
- 39.1.6 any Loss or Claim which is to be borne by the Concessionaire in accordance with Section 10 [Security of the Site] or which arises out of or in connection with any measures taken or not taken by the Concessionaire or by the Province or BCTFA at the request of the Concessionaire against or in connection with Protesters or Trespassers **DELETED**
- 39.1.7 any Loss or Claim arising out of any act or omission of the Concessionaire or any of its agents, contractors or subcontractors of any tier or employees of any of them or any Contracting Affiliate which directly or indirectly causes any breach of any statutory duties or obligations;
- 39.1.8 any Loss or Claim arising out of or in connection with compliance or failure to comply with or any breach of or failure to maintain in good standing any of the Permits Relating to Land or Permits, Licences and Approvals or, subject to Section 3.5 [Permits, Licences and Approvals] and to paragraphs **DELETED** any failure to obtain or renew any Permit, Licence or Approval required to be obtained or renewed by the Concessionaire;
- 39.1.9 any Loss or Claim arising out of or resulting from Contamination (including for greater certainty any Legal Requirement of any Governmental Authority in respect
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thereof and so that any reference herein to Contamination will be deemed to include a reference to migration and/or leaching of Contamination):

39.1.9.1 resulting from the execution of the Undertakings;

39.1.9.2 which affects at any time the execution of the Works or the Decommissioning;

39.1.9.3 which affects at any time the Undertakings and/or the Project Facilities, the Site and the Adjacent Areas and, while it is in occupation of the same, the Graving Dock Site or any part thereof (including for greater certainty any effects of a Relevant Lawful Requirement) except to the extent to which:

(a) the effects of that Contamination upon the Undertakings and/or the Project Facilities, the Site and the Adjacent Areas and, while it is in occupation of the same, the Graving Dock Site or the relevant part thereof; or

(b) such Relevant Lawful Requirement,

DELETED; provided, however, that to the extent that such Contamination constitutes or is caused by Existing Contamination or, in the case of the Site and the Adjacent Areas, Third Party Contamination and was not knowingly contributed to by any act or omission of the Concessionaire or any of its agents, contractors or subcontractors of any tier or any of its or their employees (in the case of Existing Contamination, after the Concessionaire had knowledge of the Existing Contamination), this indemnity will not apply to such Losses or Claims; and/or

39.1.9.4 **DELETED**

39.1.10 any Loss or Claim arising out of or in connection with any breach of the Concessionaire's obligations under Section 8.13 [Environmental Obligations of the Province and the Concessionaire] or Section 8.18 [Environmental Matters];

39.1.11 any Loss or Claim arising out of or in connection with any breach of the Concessionaire's obligations under Section 8.15 [MOT Section Works];

39.1.12 any Loss or Claim arising out of or in connection with any breach of the Concessionaire's obligations under Section 9 [Health and Safety];

39.1.13 any Loss or Claim arising out of or in connection with the DFO Initial Authorization, the Water Act Approval or the NWPA Approvals including the amendment of, and performance of obligations pursuant to, the DFO Initial

Authorization, the Water Act Approval or the NWPA Approvals, except in so far as the Province is obliged to meet any of the requirements of the DFO Initial Authorization as set out in Schedule 12 [Concessionaire's Environmental Obligations]; and

39.1.14 any Loss or Claim arising out of or in connection with any breach of the Concessionaire's obligations under Section 8.6A [Graving Dock Site].

39.2 Exceptions

The Concessionaire will not be responsible or be obliged to indemnify the Province or BCTFA for any Claims or Losses referred to in Section 39.1 [Concessionaire's Indemnities] or in any other indemnity from the Concessionaire contained in this Agreement to the extent that:

39.2.1 they arise as a direct result of the Concessionaire acting on and in accordance with the instructions of the Province or BCTFA or as a result of a Province Change;

39.2.2 they were caused by the negligent or wilful act or omission of the Province or BCTFA or any of their respective agents, contractors or subcontractors of any tier or a breach by the Province to pay the basic rent and any interruption fee referred to and in accordance with the terms of the Graving Dock Lease, recognizing that all the other terms of the Graving Dock Lease are to be performed by the Concessionaire pursuant to Section 8.6A;

39.2.3 the Province and BCTFA have been fully and effectively indemnified in respect of any such Claim or Loss under the insurances required to be maintained by the Concessionaire pursuant to this Agreement; or

39.2.4 the Province is entitled to rely upon the protections afforded under Section 8 of the *Transportation Investment Act*,

except, in the case of Sections 39.2.1 and 39.2.2, to the extent any such Loss or Claim arises out of or results from any negligent act or omission of the Concessionaire, its agents, contractors or subcontractors of any tier or its or their employees.

39.3 Province's Indemnities

Subject and without prejudice to the limitations on liability provided for in the *Transportation Investment Act* (but without derogating from any rights or protections available pursuant to subsection 8(7) of the said Act), the Province will indemnify and hold the Concessionaire harmless in respect of any Loss or Claim to the extent resulting from any negligent or willful act or omission of the Province or BCTFA or any of their respective agents, employees or other contractors (not being employed by the Concessionaire) (except in so far as such negligent act or omission was caused by the negligence or wilful

misconduct of the Concessionaire, its agents, employees or subcontractors) and except in respect of:

- 39.3.1 the matters referred to in Sections 39.1.6 to the extent any such Loss or Claim has not been caused or contributed to by the failure of the Province or BCTFA to perform its obligations in accordance with Section 8 [Land];
- 39.3.2 acts or omissions occurring prior to the date of this Agreement;
- 39.3.3 any matters referred to in Section 38.2 [Disclaimer], save for those expressly set out in Sections 38.2.5 and 38.2.6 to the extent set out therein; and
- 39.3.4 without prejudice to Section 39.4 [Limited Indemnity for Existing Contamination], any Loss, Claim, criminal penalty or fine arising out of or resulting from Contamination (or migration and/or leaching of Contamination) (including any Legal Requirement of any Governmental Authority in respect thereof).

39.4 Limited Indemnity for Existing Contamination

Subject and without prejudice to the limitations on liability provided for in the *Transportation Investment Act* (but without derogating from any rights or protections available pursuant to subsection 8(7) of the said Act) and without prejudice to the obligations of the Province pursuant to the provisions of Section 8.13.A, the Province will indemnify and hold the Concessionaire harmless in respect of any Loss or Claim arising from any damage, injury or other harm suffered by any person or property which was caused by the presence of Existing Contamination on such property or Existing Contamination which migrated or leached into or onto such property except to the extent such migration or leaching of such Existing Contamination (and/or damage, injury or other harm suffered) was knowingly caused or contributed to by any act or omission of the Concessionaire or any of its agents, contractors or subcontractors of any tier or any of its or their employees after the Concessionaire had knowledge of the Existing Contamination.

39.5 Disclaimer

Except as expressly provided in Section 39.3 [Province's Indemnities] and Section 39.4 [Limited Indemnity for Existing Contamination], neither the Province nor BCTFA will under any circumstances be liable to the Concessionaire or any of its agents, Contracting Affiliates, contractors or subcontractors of any tier or any of its or their employees whether in contract, tort, by statute or otherwise and whether or not arising from any negligence on the part of the Province or BCTFA or any of their respective employees, contractors or agents, for any Claims or Losses of any person arising out of or in the course of or in connection with the Undertakings, the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site. This Section 39.5 [Disclaimer] will not apply in relation to:

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- 39.5.1 any failure by the Province to make proper payment to the Concessionaire in accordance with the terms of this Agreement; and
 - 39.5.2 a breach by the Province to pay the basic rent and any interruption fee referred to and in accordance with the terms of the Graving Dock Lease recognizing that all the other terms of the Graving Dock Lease are to be performed by the Concessionaire pursuant to Section 8.6A;
 - 39.5.3 any liability of the Province or BCTFA for any breach of its obligations under this Agreement, except where (and to the extent that) the Concessionaire has an express remedy under this Agreement in respect of such breach, which remedy will be exhaustive of the Concessionaire's rights in respect of such breach.

39.6 Conduct of Claim

- 39.6.1 This Section 39.6 [Conduct of Claim] shall apply to the conduct of claims, made by a third person against a party having, or claiming to have, the benefit of an indemnity pursuant to this Agreement. The party having or claiming to have, the benefit of the indemnity is referred to as the "Beneficiary" and the Party giving the indemnity is referred to as the "Indemnifier".
- 39.6.2 If the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is or may become entitled to, indemnification under this Section 39 [Indemnities], the Beneficiary shall give notice in writing to the Indemnifier as soon as reasonably practicable and in any event within 30 days of receipt of same. Such notice shall specify with reasonable particularity, to the extent that information is available, the factual basis for the claim and the amount of the claim.
- 39.6.3 Subject to Section 39.6.4, on the giving of such notice by the Beneficiary, where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all, but not part only, of the liability arising out of the claim, the Indemnifier shall (subject to providing the Beneficiary with a secured indemnity to the Beneficiary's reasonable satisfaction against all costs and expenses that the Beneficiary may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier's own expense and take conduct of any defence, dispute, compromise or appeal of the claim and of any incidental negotiations. The Beneficiary shall give the Indemnifier all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. The Beneficiary shall have the right to employ separate counsel in respect of such claim and the reasonable fees and expenses of such counsel shall be to the account of the Indemnifier only where representation of the Indemnifier and Beneficiary would be inappropriate due to any actual or potential conflicting interests between the Indemnifier and Beneficiary.
- 39.6.4 With respect to any claim conducted by the Indemnifier:

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- 39.6.4.1 the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
- 39.6.4.2 the Indemnifier shall not bring the name or reputation of the Beneficiary into disrepute;
- 39.6.4.3 the Indemnifier shall not pay, compromise or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;
- 39.6.4.4 the Indemnifier shall not admit liability or fault to any third party without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed; and
- 39.6.4.5 the Indemnifier shall use all reasonable efforts to have the Beneficiary named as a beneficiary under any release given by the persons bringing the claim to which this Section 39.6.4 relates.
- 39.6.5 The Beneficiary shall be free to pay or settle any such claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Agreement if:
- 39.6.5.1 the Indemnifier is not entitled to take conduct of the claim in accordance with Section 39.6.3;
- 39.6.5.2 the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim within 30 days of the notice from the Beneficiary under Section 39.6.2 or notifies the Beneficiary that the Indemnifier does not intend to take conduct of the claim; or
- 39.6.5.3 the Indemnifier fails to comply in any material respect with Section 39.6.4.
- 39.6.6 The Beneficiary shall be free at any time to give notice to the Indemnifier that the Beneficiary is retaining or taking over, as the case may be, the conduct of any defence, dispute, compromise or appeal of any claim, or of any incidental negotiations, to which Section 39.6.3 applies. For greater certainty, the Concessionaire acknowledges and agrees that where the Province is the Beneficiary, the Province may retain or take over such conduct in any matter involving confidentiality or any matter involving public policy. On receipt of such notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all relevant documentation and all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Section 39.6.6, then the Indemnifier shall be released from any liabilities arising under the applicable indemnity hereunder in respect of the applicable claim.

39.6.7 If the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers, whether by payment, discount, credit, saving, relief or other benefit or otherwise, a sum or anything else of value (the “Recovery Amount”) which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to the Indemnifier whichever is the lesser of:

39.6.7.1 an amount equal to the Recovery Amount less any out-of-pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and

39.6.7.2 the amount paid to the Beneficiary by the Indemnifier in respect of the claim under the relevant indemnity,

provided that there shall be no obligation on the Beneficiary to pursue any Recovery Amount and that the Indemnifier is repaid only to the extent that the Recovery Amount, aggregated with any sum recovered from the Indemnifier, exceeds the loss sustained by the Beneficiary except, however, that if the Beneficiary elects not to pursue a Recovery Amount, the Indemnifier shall be entitled to require an assignment to it of the right to do so.

39.6.8 Any person taking any of the steps contemplated by this Section 39.6 [Conduct of Claim] shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Agreement.

39.7 Limits On Liability

39.7.1 Without prejudice to the Province’s rights under the Payment Mechanism or the Parties’ rights in respect of payments provided for herein and subject and without prejudice to the provisions of the *Transportation Investment Act*, the indemnities under this Agreement shall not apply and there shall be no right to claim damages for breach of this Agreement, in tort or on any other basis whatsoever, to the extent that any loss claimed by either Party is for loss of profits, loss of use, loss of production, loss of business or loss of business opportunity or is a claim for consequential loss or for indirect loss of any nature suffered or allegedly suffered by either Party (collectively, “Indirect Losses”) except that the Province may claim against the Concessionaire under the indemnities contained in this Agreement for Indirect Loss as follows:

39.7.1.1 if and to the extent that the Concessionaire receives insurance proceeds in connection with such Claim or would have received insurance proceeds in connection with such Claim if, after the claim had arisen, the Concessionaire had acted in accordance with Good Industry Practice in the management of the Claim;

39.7.1.2 if the Concessionaire does not receive insurance proceeds in accordance with Section 39.7.1.1, the Concessionaire's liability for Indirect Losses shall be limited as follows:

39.7.1.2.1 the Claim must have arisen as a result of the negligence or wilful misconduct of the Concessionaire as determined by a court of competent jurisdiction (it being acknowledged that the Province may not withhold any payments from the Concessionaire during such court action until the final appeal has been heard other than, if otherwise entitled, pursuant to the Payment Mechanism);

39.7.1.2.2 the Claim must relate to a claim made by a third party against the Province; and

39.7.1.2.3 to \$500,000 (indexed linked and proportionately reduced where the relevant Contract Year is less than 12 months) in the aggregate per Contract Year.

39.7.2 Subject to the indemnities provided herein, the Province and BCTFA shall not be liable in tort to the Concessionaire or any Contracting Affiliate, and the Concessionaire or any Contracting Affiliate shall not be liable in tort to the Province or BCTFA in respect of any negligent act or omission of any such person relating to or in connection with this Agreement and no such person shall bring such a claim against any of the others.

39.8 Costs and Expenses

Where in accordance with any provision of this Agreement, a Party is entitled to claim indemnification from another Party for any costs, expenses or other amounts, the indemnifying Party will be obligated to provide indemnification only to the extent that the costs, expenses or other amounts claimed were reasonably incurred having regard to all relevant circumstances at the time. Any Dispute as to whether any such costs, expenses or other amounts were reasonably incurred as aforesaid will be determined in accordance with the Disputes Resolution Procedure.

40. DEFAULT

40.1 Events of Default

For the purposes of this Agreement, "Event of Default" means any one or more of the following events or circumstances:

40.1.1 the occurrence of any act of insolvency in respect of the Concessionaire, other than as a consequence of a breach by the Province of its payment obligations hereunder, including:

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- 40.1.1.1 the Concessionaire admits its inability to pay its debts generally as they become due, or makes a general assignment for the benefit of creditors, or commits any other act of bankruptcy (within the meaning of the *Bankruptcy and Insolvency Act* (Canada) or equivalent or analogous applicable law of any jurisdiction in which it is incorporated or resident);
- 40.1.1.2 a receiver, manager, administrator, administrative receiver, receiver and manager, trustee, custodian or other similar official or any other like person (other than any Appointed Representative under the terms of the Direct Agreement) is appointed by or on behalf of or at the instance of a creditor of the Concessionaire with respect to the Concessionaire or any material part of the property, assets or undertaking of the Concessionaire, or any creditor of the Concessionaire takes control, or takes steps to take control, of the Concessionaire or any material part of the property, assets or undertaking of the Concessionaire;
- 40.1.1.3 any execution, sequestration, extent or other process of any court becomes enforceable against the Concessionaire or any distress or analogous process is levied against any property of the Concessionaire that materially and adversely affects the Concessionaire's ability to perform its obligations hereunder;
- 40.1.1.4 any proceedings are instituted against the Concessionaire that results in the Concessionaire being declared or ordered bankrupt or in administration, liquidation, winding-up, reorganization, compromise, arrangement, adjustment, protection, relief or composition of it or with respect to it or its debts or obligations, or any such proceedings are instituted by the Concessionaire seeking any such result and such proceedings have or will have a material and adverse effect on the Works and the Decommissioning or any other of the Undertakings (where such proceedings have not been withdrawn, stayed, discharged, or are otherwise of no further effect, within 90 days of being instituted) under any applicable law (including the *Bankruptcy and Insolvency Act* (Canada) and the *Companies' Creditors Arrangement Act* (Canada)) relating to bankruptcy, insolvency or reorganization of or relief with respect to debtors or debtors' obligations or assets or other similar matters, or seeking the appointment of a receiver, manager, administrator, administrative receiver, receiver and manager, trustee, custodian or other similar official or like person for the Concessionaire or with respect to any material part of the property, assets or undertaking of the Concessionaire and, in the case of any such proceeding instituted against the Concessionaire (but not instituted by it), either such proceeding shall remain unstayed for a period of 90 days or any of the actions sought in such proceeding (including the entry of an order

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- for relief against it or the appointment of a receiver, manager, administrator, administrative receiver, receiver and manager, trustee, custodian or other similar official or like person for the Concessionaire or any material part of its property, assets or undertaking) shall occur; provided, however, that this Section 40.1.1.4 will not apply to any arrangement for the restructuring or amendment of facilities provided by the Funders authorized in accordance with Section 59 [Refinancing];
- 40.1.1.5 any resolutions are passed or other partnership actions of the Concessionaire are taken to authorize any of the actions set forth in Sections 40.1.1.1, 40.1.1.2, 40.1.1.3 or 40.1.1.4;
- 40.1.1.6 the Concessionaire ceases performing a substantial portion of its business, or a substantial portion of such business is suspended or is not being performed, whether voluntarily or involuntarily, that has or would reasonably be expected to have a material adverse effect on the performance by the Concessionaire of its obligations under this Agreement;
- 40.1.1.7 the Concessionaire suffers any event, or any event or set of circumstances occurs or comes about, analogous to any of the foregoing events or sets of circumstances set out this Section 40.1.1 in any jurisdiction in which the Concessionaire is registered, incorporated or resident;
- 40.1.2 breach of Section 45.3 [Change in Control];
- 40.1.3 the Concessionaire sells, transfers, leases or otherwise disposes of the whole or any part (which is material in the context of the performance of the Concessionaire's obligations under this Agreement) of its undertaking, property or assets by a single transaction or a number of transactions (whether related or not and whether at the same time or over a period of time and other than in respect of the grant of security pursuant to Section 45.2.2) if the disposal might reasonably be expected to have a material adverse effect on the financial position of the Concessionaire or the performance by the Concessionaire of its obligations under this Agreement;
- 40.1.4 the repudiation of this Agreement by the Concessionaire;
- 40.1.5 the Concessionaire commits a breach of any of its obligations under this Agreement (other than a breach in respect of which a Default Notice is issued pursuant to Section 26.1 [Breach of this Agreement], provided such breach is remedied within the Remedial Period, or a breach in respect of which any Availability/Performance Deduction is made pursuant to Schedule 10 [Payments]) which materially and adversely affects the performance of the Undertakings, including the Concessionaire (otherwise than as a direct and unavoidable consequence of a breach by the Province or BCTFA of its obligations under this Agreement):

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- 40.1.5.1 failing to pursue Completion of the Works and Decommissioning diligently in accordance with Section 12.5 [Achievement of Completion];
- 40.1.5.2 abandoning the Works or Decommissioning for a period or periods that cumulatively exceed 30 days;
- 40.1.5.3 ceasing to maintain, operate and rehabilitate the Project Facilities, the Site and the Adjacent Areas, or any material part of any of them in accordance with the provisions of this Agreement; or
- 40.1.5.4 breaching any provision of Section 8.6A [Graving Dock Site];
and such breach is not remedied within 30 days of receipt of notice of the same from the Province;
- 40.1.6 the Concessionaire receiving a total of 3 or more Availability/Performance Deductions Warning Notices in any rolling 3 year period;
- 40.1.6A the Concessionaire receiving a total of 5 or more Warning Notices in any rolling 3 year period;
- 40.1.7 the total of all Availability/Performance Deductions in any rolling 6 month period exceeds 30% of the Maximum Performance Payments for such rolling 6 month period;
- 40.1.8 any of the representations and warranties in Section 38.1 [Covenants, Representations and Warranties by the Concessionaire] being materially untrue or incorrect if such untruth or incorrectness has or will have or could reasonably be expected to have at any time a material adverse effect on the performance by the Concessionaire of its obligations under this Agreement and such breach is not remedied within 30 days of receipt of notice of the same from the Province;
- 40.1.9 any of the Project Documents:
- 40.1.9.1 or this Agreement (other than as a result of a reason relating solely to the Province or BCTFA in the case of this Agreement) ceases to be in full force and effect or no longer constitutes the valid, binding and enforceable obligation of any of the parties thereto other than the Province or BCTFA (except in accordance with its terms or where a substitute agreement has been entered into in accordance with Section 2.3.2, Section 2.3.2B or Section 2.3.3); or
- 40.1.9.2 is materially amended, varied or departed from (other than in accordance with Section 2.3.2, Section 2.3.2B or Section 2.3.3),
and the occurrence of any of the events referred to in Sections 40.1.9.1 or 40.1.9.2 could reasonably be expected to materially adversely affect the financial position of the Concessionaire or the performance by the Concessionaire of its obligations under this Agreement or any right of the Province under this Agreement or its ability to enforce any such right or to perform its obligations under this Agreement or any statutory function or duty or give rise to or be in breach of any Laws and

Regulations or any Legal Requirement and such breach is not remedied within 30 days of receipt of notice of the same from the Province;

- 40.1.10 the Concessionaire fails to pay any sum due to the Province hereunder (which sum is not in dispute) and such failure continues for 60 days where the aggregate value of all sums due to the Province for the time being and which have been outstanding for more than 30 days after notice of non-payment exceeds \$250,000 (index linked);
- 40.1.11 failure to achieve the Substantial Completion Date by the Substantial Completion Longstop Date or failure to achieve the Completion Date by the Completion Longstop Date;
- 40.1.12 failure to take out and maintain or cause to be taken out and maintained the insurance set out in Part 1 of Schedule 11 [Insurance Requirements] in accordance with the provisions of Section 20 [Insurance] except in respect of a risk that is Uninsurable and such breach is not remedied within 30 days of receipt of notice of the same from the Province;
- 40.1.13 except to the extent caused by an event of Force Majeure or a Compensation Event, the Province properly exercising its remedial rights 5 times under Section 26.5 [Province's Remedial Rights] in each case following Default Notices given within any rolling 2 year period in respect of defaults by the Concessionaire as referred to in Section 26.5 [Province's Remedial Rights], provided that for the purposes of this Event of Default there will not be taken into account any exercise of such rights which is successfully challenged by the Concessionaire on reference to the Disputes Resolution Procedure;
- 40.1.14 any breach of Section 57 [Prohibited Acts];
- 40.1.15 any breach of Section 59 [Refinancing]; or
- 40.1.16 any failure to comply with Schedule 21 [Privacy Protection] in a material respect.
- 40.2 Notification of Events of Default

The Concessionaire will notify the Province of the occurrence and details of any Event of Default and of any event or circumstance which would, with the passage of time or otherwise, constitute or give rise to an Event of Default, in either case promptly upon the Concessionaire becoming aware of the occurrence thereof.

40.3 Remedies

- 40.3.1 On the occurrence of an Event of Default, or at any time after the Province becomes aware of an Event of Default, and if the occurrence of an Event of Default is disputed by the Concessionaire in good faith, then following confirmation pursuant to the Disputes Resolution Procedure that an Event of Default has occurred, the Province may, subject to Section 40.4 [Remedy Provisions] and the provisions of the Direct Agreement do any or all of the following:

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- 40.3.1.1 apply any sums standing to the credit of the Retention Account in accordance with Section 19.7.11;
- 40.3.1.2 apply any sums then held by the Province as Payment Retentions under Part 6 of Schedule 10 [Payment Retentions] in accordance with Part 6 of Schedule 10 [Payment Retentions];
- 40.3.1.3 [Not used]
- 40.3.1.4 in the case of the Events of Default referred to in Sections 40.1.1 to 40.1.4 (inclusive), 40.1.5.4 and 40.1.15 and any other Event of Default which is incapable of remedy (other than the Event of Default in Section 40.1.14), terminate this Agreement in its entirety by notice having immediate effect;
- 40.3.1.5 in the case of any Event of Default other than one under Section 40.1.14 and those referred to in Section 40.3.1.4, and provided that such Event of Default has not been remedied to the Province's reasonable satisfaction, serve notice of default on the Concessionaire requiring the Concessionaire at the Concessionaire's option either:
- (a) to remedy the breach or breaches referred to in such notice of default within 30 days of such notice (or such longer period as may be agreed by the Province in its absolute and unfettered discretion); or
 - (b) to put forward within 30 days of such notice a reasonable program for the remedying of the breach or breaches, such program to specify in reasonable detail the manner in which such breach or breaches is or are proposed to be remedied and the latest date by which it is proposed that such breach or all such breaches will be remedied, in which case the provisions of Section 40.4.3 shall apply *mutatis mutandis*.
- 40.3.1.6 in the case of the Event of Default under Section 40.1.14:
- (a) where the breach is occasioned by the Concessionaire or by an employee of the Concessionaire who is not acting independently of the Concessionaire or by any person duly authorized to act for and on behalf of the Concessionaire (but for greater certainty excluding any person (and any sub-contractor of any such person) referred to in Section 40.3.1.6(c)), terminate this Agreement in its entirety by notice having immediate effect;
 - (b) where the breach is occasioned by an employee of the Concessionaire who is acting independently of the

Concessionaire, then unless the Concessionaire causes the termination of such employee's employment within 30 days of notification to the Concessionaire of the breach and (if necessary), employs a replacement to perform such terminated employee's functions within such 30-day period, terminate this Agreement in its entirety by notice having immediate effect;

- (c) where the breach is occasioned by the Contractor, the Operator, the Designer or the Audit Team (each of the foregoing being a "SubContractor") or by an agent or by an employee of a SubContractor who is not acting independently of that SubContractor, and such person intended thereby to benefit the Concessionaire, then unless the Concessionaire causes the termination of the engagement or employment of the relevant SubContractor within 30 days and provides details of a proposed replacement in accordance with Section 45.4.2 (*mutatis mutandis*) within 40 days, in each case, of notification to the Concessionaire of the breach or such longer period as the Province may in its absolute and unfettered discretion by notice permit, terminate this Agreement in its entirety by further notice given after the end of such 30 day or 40 day period (as the case may be), such further notice having immediate effect;
- (d) where the breach is occasioned by an employee of a SubContractor who is acting independently of that SubContractor, then unless such SubContractor causes the termination of such employee's employment within 30 days of notification to the Concessionaire of the breach and the SubContractor (if necessary), employs a replacement to perform such terminated employee's functions within such 30 day period, terminate this Agreement in its entirety by notice having immediate effect; and
- (e) where the breach is occasioned by any person other than as referred to in Section 40.3.1.6(a) to Section 40.3.1.6(d), inclusive, and whether or not any benefit to the Concessionaire or the employer of the person occasioning the breach was intended, then unless the Concessionaire causes the termination of the employment of such person (and, in the case of a person other than a person employed by the Concessionaire or a SubContractor, the termination of the engagement or employment of that person's employer) within 30 days of notification to the Concessionaire of the breach or such longer period as the Province may in its absolute and unfettered discretion by notice permit, terminate this Agreement in its entirety by further notice

given after the end of such 30 day period, such further notice having immediate effect.

40.4 Remedy Provisions

40.4.1 In the case of an Event of Default referred to in Sections 40.1.1.3, 40.1.1.6, 40.1.1.7 (where the Event of Default referred to in Section 40.1.1.7 is analogous to an Event of Default referred to in Sections 40.1.1.3 or 40.1.1.6), 40.1.2, 40.1.3, 40.1.5, 40.1.6, 40.1.6A, 40.1.7, 40.1.8, 40.1.9, 40.1.10, 40.1.12, 40.1.14 or 40.1.16, the Province shall, prior to being entitled to take any of the actions set out in Section 40.3 [Remedies], give notice of default to the Concessionaire and to any person specified in the Direct Agreement to receive such notice and the Concessionaire shall be entitled in its discretion either:

40.4.1.1 within 15 days of receipt of such notice of default (or if a longer period is required having regard to the nature and extent of the Event of Default and/or the actions proposed to be taken by the Concessionaire in any plan and schedule put forward pursuant to this Section 40.4.1 then such longer period as is acceptable to the Province acting reasonably) to remedy the Event of Default (or the circumstances which gave rise to the Event of Default) specified in the notice of default; or

40.4.1.2 within 7 days of such notice of default to put forward a reasonable plan and schedule for diligently remedying the Event of Default or for dealing with the events or circumstances which gave rise to the Event of Default and/or the consequences thereof, which plan and schedule shall specify in reasonable detail the manner in which, and the latest date by which, such Event of Default is proposed to be remedied or the events or circumstances which gave rise to the same and/or the consequences thereof are proposed to be dealt with, which latest date shall in any event be within 15 days of the notice of default, or if a longer period is required having regard to the nature and extent of the Event of Default and/or the actions proposed to be taken by the Concessionaire in any plan and schedule put forward pursuant to this Section 40.4.1.2 then such longer period as is acceptable to the Province, acting reasonably;

and in either case thereafter perform its obligations to achieve all material elements of such plan and schedule in accordance with its terms within the time for the performance of its obligations thereunder.

40.4.2 Where the Concessionaire puts forward a plan and schedule in accordance with Section 40.4.1.2 that has a date for the Event of Default to be remedied that is beyond 30 days from the notice of default or which specifies action to be taken by the Concessionaire beyond the date falling 15 days from the notice of default, the Province shall have 15 days from the receipt of the same in which to notify the Concessionaire that the Province does not accept such plan and schedule, failing

which the Province shall be deemed to have accepted such plan and schedule. Where the Province notifies the Concessionaire that it does not accept such plan and schedule, providing its reasons in writing to the Concessionaire, the parties will endeavour within the following 7 days to agree on any necessary amendments to the program put forward.

40.4.3 If:

40.4.3.1 the Event of Default (or the events or circumstances giving rise to the same) notified in a notice of default given under Section 40.4.1 is or are not remedied:

40.4.3.1.1 before the expiry of the period referred to in Section 40.4.1.1 (if applicable); or

40.4.3.1.2 where the Concessionaire puts forward a plan and schedule pursuant to Section 40.4.1.2 which has been accepted by the Province, within the time for performance of its obligations thereunder,

then the Province may terminate this Agreement in its entirety by written notice with immediate effect, such notice to be given to the Concessionaire, and to any persons specified in the Direct Agreement to receive such notice;

40.4.3.2 such plan and schedule as put forward by the Concessionaire pursuant to Section 40.4.1.2 are rejected by the Province acting reasonably, then the Province may terminate this Agreement in its entirety by written notice with immediate effect, such notice to be given to the Concessionaire, and to any persons specified in the Direct Agreement to receive such notice.

40.4.4 Notwithstanding that the Province may give the notice referred to in Section 40.4.1, and without prejudice to the other rights of the Province in this Section 40.4 [Remedy Provisions], at any time during which an Event of Default is continuing, the Province may at any time at the Concessionaire's risk and expense take such steps as the Province considers appropriate, either itself or by engaging others (including a third party) to take such steps to perform or obtain the performance of the obligations of the Concessionaire or to take such other steps as the Province in its sole discretion considers appropriate to remedy such default, provided that the Province shall be responsible for any Availability/Performance Deductions incurred as a result of the steps taken pursuant to this Section 40.4.4.

40.4.5 Upon the occurrence of an Event of Default that the Concessionaire has remedied pursuant to this Section 40.4 [Remedy Provisions], such occurrence of an Event of Default shall thereafter cease to be an Event of Default and the Province shall not be entitled to terminate this Agreement for that occurrence of an Event of Default.

40.5 [Not Used].

40.6 Compensation

Upon a termination of this Agreement pursuant to Section 40.3 [Remedies] or Section 40.4.3, the Concessionaire will be entitled to compensation in accordance with Section 44.2 [Compensation on Termination for Concessionaire Default].

41. **TERMINATION BY THE CONCESSIONAIRE**

41.1 Concessionaire Termination Events

The following are Concessionaire Termination Events:

41.1.1 the Province or any other Governmental Authority sequesters, requisitions or otherwise seizes the Project Facilities, the Site and the Adjacent Areas or any material part of any of them otherwise than in the exercise of rights or obligations set out in, or expressly contemplated by, this Agreement;

41.1.2 a breach by the Province and BCTFA of any obligation or obligations under this Agreement which substantially frustrates or renders it impossible for the Concessionaire to perform its obligations under this Agreement for a continuous period of not less than 30 days;

41.1.3 the obligations of the Province and BCTFA under this Agreement are novated, assigned or otherwise transferred (whether by virtue of any Laws and Regulations or any scheme pursuant to any Laws and Regulations or otherwise) to another person other than:

41.1.3.1 any ministry or department of the Province; or

41.1.3.2 any person whose obligations under this Agreement are guaranteed by the Province or any ministry or department of the Province in a form reasonably satisfactory to the Concessionaire and the Senior Funders and who has the legal capacity and authority (and represents to the Concessionaire and the Senior Funders that it has the capacity and authority) to effect the delegations referred to in Section 29 [Delegation of Obligations, Rights, Powers and Functions];

41.1.4 the Province fails to pay any sum due to the Concessionaire hereunder (which sum is not in dispute), whether as a result of a failure to appropriate or otherwise, and such failure continues for 30 days after the Province has been notified by the Concessionaire that such sum has not been paid where the aggregate value of all sums due to the Concessionaire for the time being and which have been outstanding for more than 30 days after notice of non-payment exceeds \$50,000 (index linked).

41.2 Termination Procedure

- 41.2.1 Upon the occurrence of a Concessionaire Termination Event and so long as such Concessionaire Termination Event is subsisting, the Concessionaire may at its option serve notice on the Province of the occurrence of such Concessionaire Termination Event. If the relevant matter or circumstance has not been rectified or remedied by the Province or otherwise within 30 days of such notice, the Concessionaire may serve a further notice on the Province terminating this Agreement with immediate effect (subject to the provisions of the Direct Agreement).
- 41.2.2 Upon a termination of this Agreement pursuant to Section 41.2.1, the Concessionaire will be entitled to compensation in accordance with Section 44.1 [Compensation on Termination for Province Default or Convenience].
- 41.2.3 The Concessionaire may give notice to the Province terminating this Agreement only in accordance with the provisions of this Section 41.2 [Termination Procedure], Section 42.2.1 or Section 42.3.1.

42. NON-DEFAULT TERMINATION

42.1 Expiry of Term

This Agreement will terminate automatically upon the End of Term unless it has previously been terminated in accordance with the provisions of this Agreement.

42.2 Termination for Eligible Force Majeure

- 42.2.1 In the circumstances referred to in Sections 37.5.1, 37.5.1A or 37.5.1B and so long as such circumstances continue, either the Province or (subject to Section 37.5.3) the Concessionaire may terminate this Agreement by notice to the other having immediate effect.
- 42.2.2 In the circumstances referred to in Sections 37.5.2 or 37.5.2A, the Province may terminate this Agreement by notice to the Concessionaire having immediate effect.
- 42.2.3 In the event of any termination pursuant to Section 42.2.1 or 42.2.2, the Province will pay to the Concessionaire the amounts determined in accordance with Section 44.3 [Compensation on Termination for Eligible Force Majeure or Relevant Change in Law].

42.3 Termination on Relevant Change in Law

- 42.3.1 If a Relevant Change in Law comes into effect which renders illegal or impossible (but not merely more expensive) the performance of all or substantially all of the Concessionaire's obligations under this Agreement, then either the Concessionaire or the Province may give notice to the other of its intention to terminate this

Agreement following which the Concessionaire and the Province will consult with each other to try to find a solution acceptable to both Parties for a period of 60 days, and if no such solution is found within that period then either the Concessionaire or the Province may terminate this Agreement with immediate effect by a further notice to the other.

42.3.2 In the event of any termination pursuant to Section 42.3.1, the Province will pay to the Concessionaire the amounts determined:

42.3.2.1 in accordance with Section 44.1 [Compensation on Termination for Province Default or Convenience] if the Relevant Change in Law was effected by the Province; or

42.3.2.2 Section 44.3 [Compensation on Termination for Eligible Force Majeure or Relevant Change in Law] in any other case.

42.4 Termination for Failure to Obtain Lieutenant Governor in Council Approval

42.4.1 The Province, where required to do so in accordance with Section 27.3 of the Direct Agreement, will and in such event will be entitled to terminate this Agreement by notice to the Concessionaire having immediate effect. The Province will not exercise the right of termination provided for in this Section 42.4.1 except where it is required to do so in accordance with Section 27.3 of the Direct Agreement.

42.4.2 In the event of any termination pursuant to Section 42.4.1, the Province will pay to the Concessionaire the amount determined in accordance with Section 44.4 [Compensation on Termination for Prohibited Acts or for Failure to Obtain Lieutenant Governor in Council Approval].

42.5 Termination for Convenience

42.5.1 The Province may in its absolute and unfettered discretion and for any reason whatsoever terminate this Agreement at any time on 180 days' notice to the Concessionaire.

42.5.2 In the event of notice being given by the Province in accordance with Section 42.5.1, the Province will, at any time before the expiration of such notice, be entitled to direct the Concessionaire, where the Works or any part or parts of the Works or any other Undertakings or any elements of the Undertakings have not been commenced, to refrain from commencing any such Works or Undertakings or from allowing third parties to commence the same.

42.5.3 In the event of any termination pursuant to Section 42.5.1, the Province will pay to the Concessionaire the amounts determined in accordance with Section 44.1 [Compensation on Termination for Province Default or Convenience].

42.6 Termination for Total Failure of Crossing

42.6.1 Subject to Section 20.6A [Serious Damage or Destruction], in the circumstances referred to in Section 37.5A [Termination for Total Failure of Crossing] and so long as such circumstances continue, the Province may terminate this Agreement by notice to the Concessionaire having immediate effect.

42.6.2 If the event under Section 37.5A [Termination for Total Failure of Crossing] occurs and a notice under Section 42.6.1 has been delivered to the Concessionaire, the Province will pay the Concessionaire:

42.6.2.1 if the events referred to in Section 37.5A [Termination for Total Failure of Crossing] were caused by a breach by the Concessionaire of its obligations under this Agreement, the amounts determined in accordance with Section 44.2 [Compensation on Termination for Concessionaire Default]; and

42.6.2.2 in any other case, the amounts determined in accordance with Section 44.3 [Compensation for Eligible Force Majeure or Relevant Change in Law].

42.7 Termination for Serious Damage or Destruction

42.7.1 In the circumstances referred to in Section 20.6A [Serious Damage or Destruction], the Province may terminate this Agreement by notice to the Concessionaire having immediate effect.

42.7.2 In the event of any termination pursuant to Section 20.6A [Serious Damage or Destruction], the Province will pay to the Concessionaire:

42.7.2.1 if the events referred to in Section 20.6A [Serious Damage or Destruction] were caused by a breach by the Concessionaire of its obligations under this Agreement, the amounts determined in accordance with Section 44.2 [Compensation on Termination for Concessionaire Default]; and

42.7.2.2 in any other case, the amounts determined in accordance with Section 44.3 [Compensation for Eligible Force Majeure or Relevant Change in Law].

42A. **EXCLUSIVE REMEDIES**

42A.1 The remedies conferred on the Parties under this Agreement and the Project Documents are exclusive. The Parties shall not be entitled to exercise any right or remedy not specifically provided for in this Agreement or the Project Documents. Each and every remedy provided in this Agreement and the Project Documents is

cumulative to the extent that it is in addition to every other remedy given hereunder or in any Project Document. The exercise by a Party of any one or more of their remedies does not preclude the simultaneous or later exercise by such Party of any or all other such remedies hereunder or in any Project Document.

- 42A.2 Without limiting the generality of Section 42A.1 and for greater certainty, a Party's rights of termination under this Agreement are to be construed independently and no right of termination limits any other right of termination. No Party has any right to terminate this Agreement except as expressly set out herein.
- 42A.3 Without limiting the generality of Section 42A.1 or Section 42A.2 and for greater clarity, if a right of termination or other right or remedy arises under more than one Section of this Agreement, the relevant Party may in its absolute and unfettered discretion exercise all or any of its available rights or remedies under this Agreement separately or concurrently or in any order it deems fit in its absolute and unfettered discretion.

43. **EFFECT OF TERMINATION**

43.1 **Step-in Rights**

43.1.1 Without prejudice to Section 26.5 [Province's Remedial Rights], if the Province has given notice of default or notice of termination under Section 40.3 [Remedies], Section 40.4.3, Section 42.2 [Termination for Eligible Force Majeure], Section 42.3 [Termination on Relevant Change in Law], Section 42.5 [Termination for Convenience] or Section 42.6 [Termination for Total Failure of Crossing] or if the Concessionaire has given notice of termination under Section 41.2 [Termination Procedure], Section 42.2 [Termination for Eligible Force Majeure] or Section 42.3 [Termination on Relevant Change in Law], and, in any such case, members of the public are unable to use the Existing Highway, the Project Facilities or any part thereof either safely, without undue delay or at all, then:

43.1.1.1 the Province may by 7 days' notice to the Concessionaire exclude the Concessionaire from the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site without thereby avoiding this Agreement or releasing the Concessionaire from any of its obligations or liabilities under this Agreement, except to the extent that the performance by the Concessionaire of such obligations or liabilities requires that the Concessionaire be in occupation of the Project Facilities, the Site the Adjacent Areas and/or the Graving Dock Site; and

43.1.1.2 whether or not the Province exercises the right under Section 43.1.1.1, the Province may, other than where the Concessionaire has commenced and is diligently proceeding to remedy such default in accordance with

Section 40.4 [Remedy Provisions], take, or engage others to take, such steps in relation to the performance of the Undertakings or any part or parts thereof as it may think fit to protect the position of such members of the public, and (other than where the Concessionaire has served a notice of termination under Section 41.2 [Termination Procedure] properly in accordance with the provisions of this Agreement or the Province has served a notice of termination under Section 42.5 [Termination for Convenience]) the Province may recover all direct costs of so doing (including the relevant administrative expenses of the Province, including an appropriate sum in respect of general staff costs and overheads) to the date on which termination takes effect and is fixed in accordance with the provisions of this Section 43 [Effect of Termination] from the Concessionaire (but without prejudice to any rights which the Province has apart from this Section 43.1 [Step-in Rights]).

- 43.1.2 For greater certainty, subject to the exercise by the Province of any right under Section 43.1.1 or Section 26.5 [Province's Remedial Rights], the Parties will continue to perform their obligations under this Agreement notwithstanding the giving of any notice of default or notice of termination until the termination of this Agreement becomes effective in accordance with the provisions of this Section 43 [Effect of Termination].

43.2 Disputed Termination

- 43.2.1 Notwithstanding the provisions of Sections 40.3 [Remedies], 40.4.3, 41.2 [Termination Procedure], 42.2 [Termination for Eligible Force Majeure] and 42.3 [Termination on Relevant Change in Law], where either the Concessionaire or the Province has given notice of termination of this Agreement (other than a notice of termination given pursuant to Section 42.5 [Termination for Convenience]) and the other Party has within 14 days of receipt of such notice referred the question of whether or not the purported termination is wrongful to the Disputes Resolution Procedure, termination of this Agreement will not take effect pursuant to such notice of termination unless and until it is agreed by the Parties or finally determined in accordance with the Disputes Resolution Procedure that such termination is not wrongful.
- 43.2.2 If at any time a notice of termination has been received (other than a notice of termination given pursuant to Section 42.5 [Termination for Convenience]) and a reference to the Disputes Resolution Procedure has not been made pursuant to Section 43.2.1, then either the Concessionaire or the Province may (within the 14 day period referred to in Section 43.2.1) apply to the Court for injunctive or declaratory relief (whichever shall be appropriate) in respect of such purported termination and/or refer to the Court the question whether this Agreement has been wrongfully terminated and, if so, the damages accruing therefrom, in which event such matter shall be dealt with by the Court and not pursuant to the Disputes

Resolution Procedure. Termination of this Agreement will not take effect until it has been finally determined by the Court whether or not injunctive or declaratory relief is to be granted. Any Court proceedings will be conducted by the Concessionaire and the Province with due expedition.

- 43.2.3 If the Province has given notice of termination of this Agreement to the Concessionaire and has exercised the right referred to in Section 43.1.1.1 to exclude the Concessionaire from the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site, then unless the Province indicates to the contrary by notice to the Concessionaire within 15 days of the determination under the Disputes Resolution Procedure or by the Court, as the case may be, (in which event the damages referred to in paragraph 43.2.2 will not exceed the losses reasonably and properly incurred by the Concessionaire having regard to the terms of this Agreement in respect of any unavoidable temporary cessation of operations between the date on which termination would otherwise have taken effect in accordance with Sections 43.2.1 and/or 43.2.2 and the date of such notice) such termination will be final notwithstanding a determination under the Disputes Resolution Procedure or by the Court that such termination was wrongful and the Concessionaire will not be entitled to have access to any part of the Project Facilities, the Site, the Adjacent Areas or the Graving Dock Site but without prejudice to any other rights the Concessionaire may have as a result of such wrongful termination including a Claim for Indirect Losses.

43.3 Savings

- 43.3.1 Except as otherwise expressly provided in this Agreement:

43.3.1.1 termination of this Agreement will be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination (including the right of the Province to recover damages from the Concessionaire where the termination has arisen as a result of an Event of Default and the rights of the Concessionaire referred to in Section 43.2.3); and

43.3.1.2 termination of this Agreement will not affect the continuing rights and obligations of the Concessionaire and the Province under Sections 16.4 [Removal of Identification Signs], 19.7 [Retention Account], 20.6 [Claims], 20.7 [Application of Proceeds], 20.8 [Uninsurable Risks], 24 [Reports and Information], 25 [Records], 30.2 [Claims Against Third Parties], 32 [Calculation Of Payments], 33 [Invoicing And Payment], 39 [Indemnities], 44 [Compensation on Termination], 48 [Taxes], 49 [Intellectual Property], 50 [Confidentiality], 52 [Disputes Resolution Procedure], 58 [Governing Law and Jurisdiction], Schedules 15 [Records and Reports] and 16 [Disputes Resolution Procedure] and this Section 43 [Effect of Termination] or under any other Section which is expressed to survive termination or which is required to give effect to

such termination or the consequences of such termination. Except as provided in this Section 43.3 [Savings], all rights and obligations of the Province and the Concessionaire under this Agreement will cease and be of no further force and effect upon termination of this Agreement.

- 43.3.2 Notwithstanding any breach of this Agreement by a Party and without prejudice to any other rights which any other Party may have in relation thereto, the other Party may elect to continue to treat this Agreement as in full force and effect and to enforce its rights hereunder, and failure of a Party to exercise any right hereunder including any right to terminate this Agreement and any right to claim damages will not be deemed a waiver of such right for any continuing or subsequent breach.

43.4 Transfer of Assets, etc

On the termination of this Agreement (or, in the case of Section 43.4.5 and where the Province has exercised its step-in rights under Section 43.1.1, on and for the duration of the exercise by the Province of such step-in rights):

- 43.4.1 the Licence will automatically terminate;

- 43.4.2 if prior to the issue of the Completion Certificate, the Concessionaire will transfer to and there will vest in the Province or, at the direction of the Province, in BCTFA such part of any Works for which title has not already been transferred to the Province or BCTFA pursuant to Section 4 [Transfer of Title], and if the Province so elects:

- 43.4.2.1 Design-Build Contract will be novated to the Province or, at the direction of the Province, to BCTFA or where termination occurs as a result of a Concessionaire Event of Default, a third party designated by the Province and any guarantee(s) in favour of the Concessionaire in respect of the Contractor's obligations under the Design-Build Contract and the benefit of any Performance Securities relating to the Design-Build Contract will be assigned to the Province or BCTFA or such third party, as the case may be, (and upon such election the Concessionaire will take all necessary steps as soon as reasonably practicable to cause such novation and assignment to the Province or BCTFA or such third party, as the case may be) and all Plant and all materials on the Site, the Adjacent Areas or the Graving Dock Site or adjacent thereto or in the vicinity thereof will remain available to the Province and BCTFA for the purposes of completing the Works and the Decommissioning; and

- 43.4.2.2 the Construction Plant will remain available to the Province and BCTFA for the purposes of completing the Works and the Decommissioning, subject to payment therefor of a reasonable rental charge;

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- 43.4.3 the Concessionaire will hand over to and there will vest in the Province or, at the direction of the Province, in BCTFA any interest of the Concessionaire in the Project Facilities not already vested in the Province or BCTFA, which in the case of the termination of this Agreement in accordance with Section 42.1 [Expiry of Term] will be in the state required in accordance with Section 19 [End of Term];
- 43.4.4 if the Province so elects, the Operating and Maintenance Contract and any other contracts or subcontracts designated by the Province will be novated to the Province or, at the direction of the Province, to BCTFA or, where termination occurs as a result of a Concessionaire Event of Default, a third party designated by the Province and any guarantee(s) in favour of the Concessionaire in respect of the Operator's or other contractor's or subcontractor's obligations thereunder including the benefit of any Performance Securities relating to the Operating and Maintenance Contract will be assigned to the Province or BCTFA or such third party, as the case may be, (and upon such election the Concessionaire will take all necessary steps as soon as reasonably practicable to cause such novation and assignment to the Province or BCTFA or such third party, as the case may be);
- 43.4.5 the Province or, at the direction of the Province, BCTFA or, where termination occurs as a result of a Concessionaire Event of Default, a third party designated by the Province will have an option to purchase or (where the Province has exercised its step-in rights under Section 43.1.1) to rent from the Concessionaire or any of its Affiliates at a fair market value (as between willing counterparties, with any disputes as to such fair market value being determined pursuant to the Disputes Resolution Procedure) and free from any security interest all or any part of the stocks of material, road vehicles, spare parts, equipment and machinery (including Construction Plant) and other moveable property owned by the Concessionaire or any of its Affiliates and reasonably required in connection with the design, construction, operation, maintenance and/or rehabilitation of the Project Facilities and not otherwise transferred or to be transferred to the Province pursuant to any other provision of this Agreement;
- 43.4.6 the Concessionaire will deliver to the Province or its designee "as built drawings" showing all alterations made since Substantial Completion to or for the Project Facilities, the Site and the Adjacent Areas;
- 43.4.7 the Concessionaire will deliver to the Province operation and maintenance manuals for the Project Facilities, including in respect of communications, signalling and other systems in service at the Expiry Date;
- 43.4.8 the Concessionaire will cause the benefit of all manufacturer's warranties in respect of mechanical and electrical equipment included in the Project Facilities to be assigned to the Province or, at the direction of the Province, to BCTFA;
- 43.4.9 the Concessionaire will deliver to the Province or its designee the records referred to in Section 25.4.5; and

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- 43.4.10 in order to facilitate a decision by the Province as to whether it wishes to novate any contract referred to in this Section 43.4 [Transfer of Assets, etc], the Concessionaire will within 7 days of receipt of a notice from the Province requiring it to do so give notice to the Province of:
- 43.4.10.1 any dispute which exists in relation to the contract, including copies of any correspondence and other documentation relating thereto;
 - 43.4.10.2 any sum which the Concessionaire is aware is due and payable by either party under the relevant contract as at the date of the notice; and
 - 43.4.10.3 any material unperformed obligations and outstanding liabilities of either party under the relevant contract of which the Concessionaire is aware as at the date of the notice.

43.5 Handover

On the termination of this Agreement for any reason:

- 43.5.1 the Concessionaire will cooperate fully with the Province and any successor concessionaire, contractor or operator of the Project Facilities, the Site and the Adjacent Areas or any successor concessionaire or contractor in respect of any Decommissioning works in order to achieve a smooth and orderly transfer of the operation of the Undertakings, so as to protect the safety of and avoid undue delay or inconvenience to the members of the public;
- 43.5.2 the Concessionaire will as soon as reasonably practicable remove from the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site all materials, Construction Plant, temporary buildings, road vehicles, spare parts and other property not required by the Province or BCTFA pursuant to Section 43.4.2 or acquired or rented by the Province or BCTFA pursuant to Section 43.4.5 or acquired or to be acquired by the Province pursuant to any other provision of this Agreement, and if it has not done so within 30 days after any notice from the Province requiring it to do so the Province may (without being responsible for any Loss) remove and sell any such property and will hold any proceeds less all costs incurred to the credit of the Concessionaire; and
- 43.5.3 the Concessionaire will as soon as reasonably practicable vacate the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site and leave the Project Facilities, the Site, the Adjacent Areas and the Graving Dock Site in a clean and orderly condition.

44. **COMPENSATION ON TERMINATION**

44.1 **Compensation on Termination for Province Default or Convenience**

44.1.1 If the Concessionaire terminates this Agreement pursuant to Section 41.2 [Termination Procedure] or the Province terminates this Agreement pursuant to Section 42.5 [Termination for Convenience], the Province will pay to the Concessionaire the Province Default Termination Sum as set out in Section 44.1.2.

44.1.2 Subject to Sections 44.1.4 to 44.1.6, the “Province Default Termination Sum” will be an amount equal to the aggregate of:

44.1.2.1 the Base Senior Debt Termination Amount;

44.1.2.2 Employee Termination Payments and any Subcontractor Breakage Costs; and

44.1.2.3 an amount which when taken together with:

44.1.2.3.1 Distributions) paid by the Concessionaire on Unitholders on or before the Termination Date; and

44.1.2.3.2 [not used],

taking account of the actual timing of all such payments, gives a real internal rate of return on the equity capital subscribed and contributed equal to the Financial Base Case Equity IRR, the intention being to provide the Unitholders with the Financial Base Case Equity IRR for the entire duration of this Agreement, provided always that if such amount is less than zero, the Province Default Termination Sum shall be deemed to be zero.

44.1.3 On payment of the amount referred to in Section 44.1.2, the Province will have the option to require the Concessionaire to transfer, without any further compensation and free from Encumbrances, all of its right, title and interest in and to the Assets to the Province or as directed by the Province.

44.1.4 If the aggregate of the amounts referred to in Sections 44.1.2.1 and 44.1.2.3 is less than the Revised Senior Debt Termination Amount, then the Province Default Termination Sum will be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in Section 44.1.2.2, provided always that:

44.1.4.1 the amount referred to in Section 44.1.2.2 will only be paid to the extent that the Concessionaire has demonstrated to the reasonable satisfaction of the Province that the amount will not be paid in payment (in whole or in part) of any Distribution; and

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- 44.1.4.2 if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Subcontractor Breakage Costs will be paid in respect of the Design-Build Contract or the Operating and Maintenance Contract in circumstances where there is an event of default under such contract which would entitle the Concessionaire to terminate such contract.
- 44.1.5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the Concessionaire has wilfully, or through gross negligence, failed to comply with its obligations under Section 2.6.2.1 of the Direct Agreement, then in addition to the deduction of the Distributions referred to in paragraph (h) of the definition of “Revised Senior Debt Termination Amount”, the Province will be entitled to set off the value of that Distribution against the Province Default Termination Sum, provided that the amount of the Province Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.
- 44.1.6 If the Concessionaire has wilfully or through gross negligence failed to comply with its obligations under Section 2.6.2.2 of the Direct Agreement and there has been an overstatement of the cash balances by the Concessionaire as at that date which has caused the Province to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Section 44.1 [Compensation on Termination for Province Default or Convenience], then the Province Default Termination Sum will be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Province Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.
- 44.1.7 The Province will pay the Province Default Termination Sum in accordance with Section 44.7 [Payment of Early Termination Payments].
- 44.2 Compensation on Termination for Concessionaire Default
- 44.2.1 Except where Section 44.4 [Compensation on Termination for Prohibited Acts] or Section 44.5 [Compensation on Termination for Breach of Funding Agreement Obligations] applies, if the Province terminates this Agreement pursuant to Section 40 [Default], Section 42.6 [Termination for Total Failure of Crossing] (in the circumstances set out in Section 42.6.2.1) or Section 42.7 [Termination for Serious Damage or Destruction] (in the circumstances set out in Section 42.7.2.1):
- 44.2.1.1 the Province will pay to the Concessionaire either the Adjusted Highest Qualifying Bid Price according to the rebidding procedure pursuant to Section 44.2.3 or the Adjusted Estimated Fair Value according to the no rebidding procedure pursuant to Section 44.2.4, as applicable; and

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- 44.2.1.2 on termination, the Province will have the option to require the Concessionaire to transfer, without any further compensation and free from Encumbrances, all of its right, title and interest in and to the Assets to the Province or as directed by the Province.
- 44.2.2 The Province will be entitled at its option to rebid the provision of the Undertakings in accordance with Section 44.2.3 and the provisions of that Section will apply if:
- 44.2.2.1 the Province notifies the Concessionaire on or before the date falling 30 days after the Termination Date; and
- 44.2.2.2 there is a Liquid Market unless:
- 44.2.2.2.1 the Senior Funders have exercised their right to step-in under Section 4.1 [Step-In] of the Direct Agreement and they have not subsequently exercised their right to step-out under the Direct Agreement without first transferring the Concessionaire's rights and liabilities under this Agreement to a Suitable Substitute Concessionaire in accordance with the provisions of the Direct Agreement; or
- 44.2.2.2.2 the Senior Funders have effected the transfer of the Concessionaire's rights and liabilities under this Agreement to a Suitable Substitute Concessionaire in accordance with the provisions of the Direct Agreement,
- but otherwise the Province will require a determination in accordance with the no rebidding procedure pursuant to Section 44.2.4 and the provisions of that Section will apply.
- 44.2.3 Rebidding Election
- If the Province elects to rebid the provision of the Undertakings under Section 44.2.2, then the following provisions will apply:
- 44.2.3.1 The objective of the rebidding procedure will be to establish and pay to the Concessionaire the Adjusted Highest Qualifying Bid Price, as a result of the Bidding Process.
- 44.2.3.2 The Province will (subject to any Legal Requirements preventing it from doing so) use its reasonable efforts to complete the Bidding Process as soon as practicable.

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- 44.2.3.3 The Province will, as soon as reasonably practicable, notify the Concessionaire of the qualification criteria and the other requirements and terms of the Bidding Process, including the timing of the Bidding Process, and will act reasonably in setting such requirements and terms.
- 44.2.3.4 The Concessionaire authorizes the release of any information by the Province under the Bidding Process which would otherwise be prevented under Section 50 [Confidentiality] that is reasonably required as part of the Bidding Process.
- 44.2.3.5 The Concessionaire may, at its own cost, appoint a person (the “Bidding Process Monitor”) to monitor the Bidding Process for the purpose of monitoring and reporting to the Concessionaire and the Senior Funders on the Province’s compliance with the Bidding Process and making representations to the Province. The Bidding Process Monitor will not disclose any confidential information to the Concessionaire or any other person (and will provide an undertaking to the Province to such effect as a condition of its appointment), but will be entitled to advise the Concessionaire as to whether it considers that the Province has acted in accordance with the Bidding Process, and correctly determined the Adjusted Highest Qualifying Bid Price.
- 44.2.3.6 The Bidding Process Monitor will enter into a confidentiality agreement with the Province in a form acceptable to the Province, acting reasonably, and will be entitled to attend all meetings relating to the Bidding Process, inspect copies of all bid documentation and bids and make written representations to the Province regarding compliance with the Bidding Process. All such representations will be made by the Bidding Process Monitor in a timely manner as the Bidding Process proceeds. The Province will not be bound to consider or act upon any such representations, but acknowledges that such representations may be referred to by the Concessionaire in the event that the Concessionaire refers a Dispute relating to the Adjusted Highest Qualifying Bid Price to dispute resolution in accordance with Section 52 [Disputes Resolution Procedure].
- 44.2.3.7 For all or any part of a Payment Period falling within the period from the Termination Date to the Compensation Date the Province will pay to the Concessionaire:
- 44.2.3.7.1 the Post Termination Service Amount for each completed Payment Period, on or before the date falling 14 days after the end of that Payment Period; and

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- 44.2.3.7.2 the Post Termination Service Amount for the period from the end of the last completed Payment Period until the Compensation Date, on or before the date falling 30 days after the Compensation Date.
- 44.2.3.8 If any Post Termination Service Amount is negative, then the amount by which the Post Termination Service Amount is negative will be carried forward and will be set off against any future positive Post Termination Service Amounts. If any such amount has not been set off on or before the Compensation Date, then it will be taken into account in the calculation of the Adjusted Highest Qualifying Bid Price or Adjusted Estimated Fair Value, as applicable.
- 44.2.3.9 The Province will require bidders to bid on the basis that proceeds payable as a result of any outstanding claims under material property damage insurance policies will be dealt with in accordance with the relevant provisions of this Agreement.
- 44.2.3.10 As soon as practicable after bids have been received, the Province will (acting reasonably) determine the Qualifying Bids and will notify the Concessionaire of the Adjusted Highest Qualifying Bid Price.
- 44.2.3.10A If either only one Qualifying Bid is received or no Qualifying Bids are received, the Province will follow the no rebidding procedure in accordance with Section 44.2.4.
- 44.2.3.11 If the Concessionaire refers a Dispute relating to the Adjusted Highest Qualifying Bid Price to dispute resolution in accordance with Section 52 [Disputes Resolution Procedure], the Province will, irrespective of such Dispute, be entitled to enter into a New Agreement. The Province will pay the Adjusted Highest Qualifying Bid Price on or before the date falling 30 days after it has been determined in accordance with Section 52 [Disputes Resolution Procedure] and the Province will pay interest to the Concessionaire at the No Default Interest Rate on any amount of Adjusted Highest Qualifying Bid Price which had been withheld, from the date specified in Section 44.2.3.12 until the date specified in this Section 44.2.3.11.
- 44.2.3.12 Subject to Sections 44.2.3.11 and 44.2.3.15, the Province will pay to the Concessionaire an amount equal to the Adjusted Highest Qualifying Bid Price no later than the date falling 30 days after the date of the New Agreement. If the Adjusted Highest Qualifying Bid Price is zero or less than zero, then the provisions of this Section 44.2.3 shall not apply and the provisions of Section 44.2.4 shall apply.

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- 44.2.3.13 Subject to Section 43.2.3 and Section 44.2.3.11, the discharge by the Province of its payment obligation in Sections 44.2.3.11 and/or 44.2.3.12 will be in full and final settlement of all the Concessionaire's claims and rights against the Province for breaches and/or termination of this Agreement and any of the Project Documents whether under contract, tort, restitution or otherwise, save for any liability of the Province which arose prior to the Termination Date (but not from the termination itself) that has not already been taken into account in the Adjusted Highest Qualifying Bid Price.
- 44.2.3.14 Subject to Sections 44.2.3.15 and 44.2.3.18, if the Province has not paid an amount equal to the Adjusted Highest Qualifying Bid Price to the Concessionaire on or before the date falling 180 days after the Termination Date, then the following provisions of this Section 44.2.3 [Rebidding Election] will not apply to that termination and the provisions of Section 44.2.4 [No Rebidding Procedure] will apply instead.
- 44.2.3.15 If the Adjusted Highest Qualifying Bid Price is zero or a negative number, then the Province will have no obligation to make any payment to the Concessionaire and with effect from the time that the Province gives notice of that event to the Concessionaire the Province will be released from all liability to the Concessionaire for breaches and/or termination of this Agreement and any of the Project Documents whether under contract, tort, restitution or otherwise, save for any liability of the Province which arose prior to the Termination Date (but not from the termination itself) that has not already been taken into account in determining the Adjusted Highest Qualifying Bid Price.
- 44.2.3.16 If the Adjusted Highest Qualifying Bid Price is negative, then the amount by which the Adjusted Highest Qualifying Bid Price is negative will be due and payable by the Concessionaire to the Province no later than the date falling 30 days after the date of the New Agreement.
- 44.2.3.17 The Province may elect at any time prior to the receipt of a Qualifying Bid to follow the no rebidding procedure in accordance with Section 44.2.4 by notifying the Concessionaire that this election has been made.
- 44.2.3.18 If the Province has received all bids from bidders under the Bidding Process, has received a Qualifying Bid and completed the Bidding Process, it will notify the Concessionaire and pay to the Concessionaire an amount equal to the Adjusted Highest Qualifying Bid Price within 30 days of such notification.

44.2.4 No Rebidding Procedure

If either the Province is not entitled to rebid the provision of the Undertakings under Section 44.2.2 or either only one Qualifying Bid is received or no Qualifying Bids are received under Section 44.2.3 [Rebidding Election] or the Province elects to require a determination in accordance with this Section 44.2.4 [No Rebidding Procedure], then the following procedure will apply:

44.2.4.1 unless it takes longer than 60 days to agree or determine an Estimated Fair Value pursuant to this Section 44.2.4 or unless the provisions of Section 44.2.4.2 apply, the Concessionaire will not be entitled to receive any Post Termination Service Amount.

44.2.4.2 If the Province elects or is obliged pursuant to the terms of Section 44.2.3 to require a determination in accordance with this Section 44.2.4 [No Rebidding Procedure] after it has elected to follow the rebidding procedure under Section 44.2.3 [Rebidding Election], then the Province will continue to pay to the Concessionaire each Post Termination Service Amount until the Compensation Date, in accordance with Section 44.2.3.7.

44.2.4.3 In agreeing or determining the Estimated Fair Value the Parties will be obliged to follow the principles set out below:

44.2.4.3.1 all forecast amounts will be calculated in nominal terms at current prices, recognizing the adjustment for indexation in respect of forecast inflation between the date of calculation and the forecast payment date(s) as set out in this Agreement;

44.2.4.3.2 the total of all future payments of the full Performance Payment (without deductions) forecast to be made will be calculated and discounted to the Termination Date at the Discount Rate;

44.2.4.3.3 the total of all costs forecast to be incurred by the Province as a result of termination will be calculated and discounted at the Discount Rate and deducted from the payment calculated pursuant to Section 44.2.4.3.2, such costs to include (without double-counting):

44.2.4.3.3.1 a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the Financial Base Case;

44.2.4.3.3.2 the costs of performing or causing the performance of the Undertakings to the standard required by this Agreement (which costs will also include any transaction, procurement or other costs in performing or causing the performance of the Undertakings to such standard); and

44.2.4.3.3.3 any rectification costs required to deliver the Undertakings to the standards required by this Agreement (including any costs forecast to be incurred by the Province to complete construction or development work and additional operating costs required to restore operating services standards), less any insurance proceeds received or which will be received by the Province in respect of costs included in the calculation of such rectification costs,

in each case such costs to be forecast at a level that will deliver the Undertakings to the standards required by this Agreement to achieve the full Performance Payment (without deductions).

44.2.4.4 If the parties cannot agree on the Adjusted Estimated Fair Value on or before the date falling 30 days after the date on which the Province elected to require a determination in accordance with this Section 44.2.4, then the Adjusted Estimated Fair Value will be determined in accordance with the Disputes Resolution Procedure.

44.2.4.5 Subject to Section 44.2.4.7, the Province will pay to the Concessionaire an amount equal to the Adjusted Estimated Fair Value in accordance with Section 44.7 [Payment of Early Termination Payments].

44.2.4.6 Subject to Section 43.2.3 and Section 44.2.4.4, the discharge by the Province of its payment obligation in Section 44.2.4.5 is in full and final settlement of all the Concessionaire's claims and rights against the Province for breaches and/or termination of this Agreement and any of the Project Documents whether under contract, tort, restitution or otherwise, save for any liability of the Province which arose prior to the Termination Date (but not from the termination itself) that has not already been taken into account in determining the Adjusted Estimated Fair Value.

44.2.4.7 If the Adjusted Estimated Fair Value is zero or a negative number, then the Province will have no obligation to make any payment to the Concessionaire and with effect from the time that the Province gives notice of that event to the Concessionaire the Province will be released from all liability to the Concessionaire for breaches and/or termination of this Agreement and any of the Project Documents whether under contract, tort, restitution or otherwise, save for any liability of the Province which arose prior to the Termination Date (but not from the termination itself) that has not already been taken into account in determining the Adjusted Estimated Fair Value.

44.2.4.8 If the Adjusted Estimated Fair Value is negative, then the amount by which the Adjusted Estimated Fair Value is negative will be due and payable by the Concessionaire to the Province no later than the date falling 30 days after the Compensation Date.

44.3 Compensation on Termination for Eligible Force Majeure or Relevant Change in Law

44.3.1 If the Concessionaire or the Province terminates this Agreement pursuant to Section 42.2 [Termination for Eligible Force Majeure], Section 42.3 [Termination on Relevant Change in Law], Section 42.6 [Termination for Total Failure of Crossing] (in the circumstances set out in Section 42.6.2.2) or Section 42.7 [Termination for Serious Damage or Destruction] (in the circumstances set out in Section 42.7.2.2) or if the Province terminates this Agreement pursuant to Section 20.8.2.2 [Termination for Uninsurable Risks], the Province will pay to the Concessionaire the Force Majeure Termination Sum as set out in Section 44.3.2.

44.3.2 Subject to Section 44.3.4 to 44.3.6, the “Force Majeure Termination Sum” will be an amount equal to the aggregate of:

44.3.2.1 the Base Senior Debt Termination Amount;

44.3.2.2 [not used]

44.3.2.3 all amounts paid to the Concessionaire by way of subscription for Units less distributions and other Distributions paid to the Unitholders (except to the extent deducted under Section 44.3.2.2 above); and

44.3.2.4 Employee Termination Payments and Subcontractor Breakage Costs.

44.3.3 If the amount referred to in Sections 44.3.2.2 and 44.3.2.3 are less than zero, then, for the purposes of the calculation in Section 44.3.2, they will be deemed to be zero.

44.3.4 If the aggregate of the amounts referred to in Sections 44.3.2.1, 44.3.2.2 and 44.3.2.3 is less than the Revised Senior Debt Termination Amount, then the Force Majeure Termination Sum will be increased so that it is equal to the aggregate of the

Revised Senior Debt Termination Amount and the amount referred to in Section 44.3.2.4, provided always that:

- 44.3.4.1 the amount referred to in Section 44.3.2.4 will only be paid to the extent that the Concessionaire has demonstrated to the reasonable satisfaction of the Province that the amount will not be paid in payment (in whole or in part) of any Distribution; and
 - 44.3.4.2 if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Subcontractor Breakage Costs will be paid in respect of the Design-Build Contract or the Operating and Maintenance Contract in circumstances where there is an event of default under such contract which would entitle the Concessionaire to terminate such contract.
- 44.3.5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and the Concessionaire has wilfully, or through gross negligence, failed to comply with its obligations under section 2.6.2.1 of the Direct Agreement, then in addition to the deduction of the Distributions referred to in paragraph (h) of the definition of Revised Senior Debt Termination Amount in Schedule 1 [Definitions and Interpretation], the Province will be entitled to set off the value of that Distribution against the Force Majeure Termination Sum, provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.
- 44.3.6 If the Concessionaire has wilfully or through gross negligence failed to comply with its obligations under section 2.6.2.2 of the Direct Agreement and there has been an overstatement of the cash balances by the Concessionaire as at that date which has caused the Province to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Section 44.3 [Compensation on Termination for Eligible Force Majeure or Relevant Change in Law], then the Force Majeure Termination Sum will be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.
- 44.3.7 On payment of the Force Majeure Termination Sum, the Province will have the option to require the Concessionaire to transfer, without any further compensation and free from Encumbrances, all of its right, title and interest in and to the Assets to the Province or as directed by the Province.
- 44.3.8 The Province will pay the Force Majeure Termination Sum in accordance with Section 44.7 [Payment of Early Termination Payments].

44.4 Compensation on Termination for Prohibited Acts or for Failure to Obtain Lieutenant Governor in Council Approval

44.4.1 If the Province terminates this Agreement pursuant to Section 40 [Default] as a result of the occurrence of the Event of Default referred to in Section 40.1.14 or if the Province terminates this Agreement pursuant to Section 42.4 [Termination for Failure to Obtain Lieutenant Governor in Council Approval], the Province will pay to the Concessionaire the Prohibited Acts Termination Sum as set out in Section 44.4.2.

44.4.2 The “Prohibited Acts Termination Sum” will be an amount equal to the Revised Senior Debt Termination Amount.

44.4.3 On payment of the Prohibited Acts Termination Sum, the Province will have the option to require the Concessionaire to transfer, without any further compensation and free from Encumbrances, all of its right, title and interest in and to the Assets to the Province or as directed by the Province.

44.4.4 The Province will pay the Prohibited Acts Termination Sum in accordance with Section 44.7 [Payment of Early Termination Payments].

44.5 Compensation on Termination for Breach of Funding Agreement Obligations

44.5.1 If the Province terminates this Agreement pursuant to an Event of Default for failing to comply with Section 2.3.2 in connection with any of the Funding Agreements (or based on any Event of Default referred to in Sections 40.1.5 or 40.1.8 arising in relation to any of the Funding Agreements) or failing to comply with Section 59 [Refinancing], the Province will pay to the Concessionaire a termination sum equivalent to the Prohibited Acts Termination Sum calculated in accordance with the provisions of Section 44.4 [Compensation on Termination for Prohibited Acts].

44.5.2 On payment of the Prohibited Act Termination Sum, the Province will have the option to require the Concessionaire to transfer, without any further compensation and free from Encumbrances, all of its right, title and interest in and to the Assets to the Province or as directed by the Province.

44.5.3 The Province will pay such termination sum in accordance with Section 44.7 [Payment of Early Termination Payments].

44.6 Gross-Up of Termination Payments

If any amount of compensation payable by the Province under Sections 44.1 [Compensation on Termination for Province Default or Convenience], 44.3 [Compensation on Termination for Eligible Force Majeure or Relevant Change in Law], Section 44.4 [Compensation on Termination for Prohibited Acts] and Section 44.5 [Compensation on Termination for Breach of Funding Agreement Obligations] is subject to Taxes payable to a Canadian

Governmental Authority, then the Province will pay to the Concessionaire such additional amount as will put the Concessionaire in the same after-tax position as it would have been in had the payment not been subject to such Taxes, taking account of any relief, allowance, deduction, set off or credit in respect of Taxes (whether available by choice or not) which may be available to the Concessionaire to reduce the Taxes to which the payment is subject.

44.7 Payment of Early Termination Payments

The Province will pay the Termination Sum to the Concessionaire on or before the date falling 60 days after the Notice Date.

44.8 Rights of Set-Off

The Province's obligations to make any payment of compensation to the Concessionaire pursuant to this Section 44 [Compensation on Termination] are subject to the Province's right of set-off under Section 33.9 [Set-Off], except that where termination is a result of a Concessionaire Termination Event pursuant to Section 41.2 [Termination Procedure], Eligible Force Majeure pursuant to Section 42.2 [Termination for Eligible Force Majeure] or a Relevant Change in Law pursuant to Section 42.3 [Termination on Relevant Change in Law] or is a termination pursuant to Section 42.5 [Termination for Convenience] or Section 57 [Prohibited Acts] or in respect of the Event of Default referred to in Section 40.1.5 or any Event of Default referred to in Section 44.5 [Compensation on Termination for Breach of Funding Agreement Obligations] or where the termination is pursuant to Section 42.6 [Termination for Total Failure of Crossing] and compensation is payable under Section 42.6.2.2 or where the termination is pursuant to Section 42.7 [Termination for Serious Damage or Destruction] and compensation is payable under Section 42.7.2.2, the Province will only be entitled to set-off any amount it would otherwise be entitled to set-off against any payment of compensation if and to the extent that such compensation exceeds the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount, as the case may be, at that time.

44.9 Full and Final Settlement

44.9.1 Any payment made pursuant to this Section 44 [Compensation on Termination] in respect of a termination of this Agreement is in full and final satisfaction of any claim of the Province and the Concessionaire in relation to termination of this Agreement or any of the Project Documents whether under contract, tort, restitution or otherwise, save for any liability which arose prior to the Termination Date (but not from the termination itself) that has not already been taken into account in determining the relevant compensation amount. The compensation payable under this Section 44 [Compensation on Termination] is the sole and exclusive remedy of the Concessionaire and the Province on any termination of this Agreement and the Concessionaire and the Province are excluded from all other rights or remedies in respect thereof.

44.9.2 Section 44.9.1 shall be without prejudice to any liabilities arising under or in respect of any breach by either Party of their obligations under any of the continuing rights and obligations set out in Section 43.3.1.2.

44.10 Costs

The costs and expenses to be taken into account in the calculation of all termination sums due pursuant to this Section 44 [Compensation on Termination] will only be such costs and expenses to the extent that they are reasonable and proper in quantum and have been or will be reasonably and properly incurred.

44.11 Undisputed Amounts

If the calculation of any termination amount is disputed, then any undisputed amount will be paid in accordance with this Section 44 [Compensation on Termination] and the disputed amount will be dealt with in accordance with the Disputes Resolution Procedure.

44.12 Outstanding Senior Debt Amounts

44.12.1 The Province is entitled to rely on a certificate of the Agent as conclusively establishing the amount of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount outstanding at any relevant time.

44.12.2 If a receipt or other acknowledgement is given by the Agent acknowledging or otherwise confirming receipt of payment or payments in respect of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as applicable), such receipt or other acknowledgement will discharge the Province's obligation to pay such portion of compensation due to the Concessionaire that is equal to the amount acknowledged or confirmed.

**PART VI
MISCELLANEOUS**

45. **ASSIGNMENT, SUBCONTRACTING AND CHANGE IN CONTROL**

45.1 Binding on Successors and Assigns

This Agreement is binding on and enures to the benefit of the Parties and their respective successors and permitted assigns.

45.2 Assignment

45.2.1 Subject to Section 45.2.2, the Concessionaire will not, and will ensure that no Contracting Affiliate will, in any such case without the prior consent of the Province, which consent shall not be unreasonably withheld or delayed, assign, novate, transfer, sublet, licence or create or allow to subsist any Encumbrance, trust or interest in:

45.2.1.1 this Agreement (including any rights pursuant to Section 8.1 [Access for Concessionaire over the Site and Adjacent Areas]), the Operating and Maintenance Contract, the Design-Build Contract or any other contract entered into by the Concessionaire in performing its obligations under this Agreement; or

45.2.1.2 any sums from time to time standing to the credit of the Retention Account,

or any part thereof or any benefit or interest therein or thereunder.

45.2.2 The provisions of Section 45.2.1 do not apply:

45.2.2.1 in relation to the assignment of the benefit of any of the agreements referred to in Section 45.2.1.1 by way of security in accordance with the Funding Agreements, provided that in the case of an assignment of the benefit of this Agreement or any part thereof or any benefit or interest therein or thereunder any assignee shall have entered into the Direct Agreement or such other similar agreement in relation to the exercise of its rights as the Province may reasonably require; or

45.2.2.2 to the novation of this Agreement to a Suitable Substitute Concessionaire on one occasion only in accordance with the provisions of the Direct Agreement.

45.2.3 Without prejudice to Sections 45.4.1, 45.4.2 and 45.4.3, the Concessionaire will ensure that:

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- 45.2.3.1 the Designer is not permitted to assign and does not assign the Design Subcontract or the appointment of the Designer (as the case may be) or any part thereof or any benefit or interest therein or thereunder;
 - 45.2.3.2 the Contractor is not permitted to assign and does not assign the Design-Build Contract or any part thereof or any benefit or interest therein or thereunder; and
 - 45.2.3.3 the Contractor is not permitted to assign and does not assign the Design Subcontract or any part thereof or any benefit or interest therein or thereunder,

without the Concessionaire having obtained the prior consent of the Province, which consent shall not be withheld where the proposed assignee has equivalent qualifications and experience to the Designer or the Contractor, as the case may be.

- 45.2.4 Without prejudice to Sections 45.4.1, 45.4.2 and 45.4.4, the Concessionaire will ensure that the Operator is not permitted to assign and does not assign the Operating and Maintenance Contract or any part thereof or any benefit or interest therein or thereunder without the Concessionaire having obtained the prior consent of the Province, which consent shall not be withheld where the proposed assignee has equivalent qualifications and experience to the Operator.

45.3 Change in Control

- 45.3.1 Subject to Section 45.3.4, on or before the date of issue of the Completion Certificate, no Change in Control of the Concessionaire or of the general partner of the Concessionaire will be permitted without the prior written consent of the Province, provided that such consent will not be unreasonably withheld or delayed in the following circumstances in the case of a reorganization for bona fide fiscal purposes of the Concessionaire and/or the general partner of the Concessionaire where the ultimate control of the Concessionaire and the general partner of the Concessionaire does not change, provided in each case, however, that neither the person acquiring control nor any of its Affiliates is a Restricted Person. In any other circumstances in which the Province's consent is required to be obtained pursuant to this Section 45.3.1, the Province may not unreasonably withhold or delay its consent to a Change in Control.
- 45.3.2 Subject to Section 45.3.4, following the date of issue of the Completion Certificate, no Change in Control of the Concessionaire or of the general partner of the Concessionaire or any Unitholder will be permitted where the person acquiring control or any of its Affiliates is a Restricted Person.
- 45.3.3 For purposes of this Section 45.3 [Change in Control], "Change in Control" means, with respect to a person, any change in ownership, whether direct or

indirect and whether beneficial or otherwise, of the direct or indirect power to vote or transfer, any of the shares or units of ownership of that person having, directly or indirectly, the power to direct or cause the direction of the management, actions or policies of that person.

45.3.4 A Change in Control of the Concessionaire or the general partner of the Concessionaire which arises from any bona fide open market transactions in any shares or other securities of the Concessionaire or such general partner (including, for greater certainty, a transaction involving an initial public offering of shares or other securities) effected on a recognized public stock exchange will not constitute a Change in Control for the purposes of this Section 45.3 [Change in Control].

45.4 Subcontracting

45.4.1 Neither the engagement nor employment of the following persons (each of which for greater certainty will be considered a Significant Appointment) will be terminated and, in the case of the Audit Team and the Designer, the Concessionaire will ensure that the Contractor or the Operator (as the case may be) will not terminate the engagement or employment of such person, without the prior consent of the Province (such consent not to be unreasonably withheld or delayed) to the appointment of any proposed substitute and the terms of engagement or employment of the proposed substitute:

45.4.1.1 the Contractor;

45.4.1.2 the Designer;

45.4.1.3 any Reviewer;

45.4.1.4 the Operator;

45.4.1.5 the Quality Management Representative; and

45.4.1.6 the Audit Team.

45.4.2 If any of the persons referred to in Section 45.4.1 ceases to act at any time, the Concessionaire will, unless otherwise agreed by the Province, acting reasonably, forthwith appoint (or, in the case of the Audit Team and the Designer, cause the Contractor or the Operator (as the case may be) forthwith to appoint) a replacement, subject to the prior approval of the Province (such approval not to be unreasonably withheld or delayed) both as to the substitute to be appointed and the terms of engagement or employment of the proposed substitute. No replacement for any of the persons referred to in Section 45.4.1 will perform any of the Undertakings until the Concessionaire has provided the Province with a certified copy of the appointment of the replacement and a Collateral Agreement in the appropriate form set out in Schedule 22 [Collateral Agreements].

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- 45.4.3 Without prejudice to any obligation under Section 23 [Quality Management] and without prejudice and subject to Sections 45.4.1, 45.4.2 and 45.4.5, the design, construction, completion, commissioning and testing of the Works and the design and completion of the Decommissioning may be subcontracted by the Contractor without the consent of the Province, subject always to compliance with the Design and Certification Procedure.
- 45.4.4 Without prejudice to any obligation under Section 23 [Quality Management] and without prejudice and subject to Sections 45.4.1, 45.4.2 and 45.4.5, the operation, maintenance and rehabilitation of the Project Facilities may be subcontracted by the Operator without the consent of the Province, subject always to compliance with the Design and Certification Procedure.
- 45.4.5 The Concessionaire will not permit any subcontractor to be appointed to carry out any Undertakings in addition to those subcontractors referred to in Section 45.4.1 if such appointment would be a Significant Appointment until:
- 45.4.5.1 the Province has approved the appointment (such approval not to be unreasonably withheld or delayed) both as to the person concerned and to the terms of engagement or employment; and
- 45.4.5.2 if required by the Province, the Concessionaire has provided the Province with a collateral agreement from such subcontractor in a form satisfactory to the Province (acting reasonably),
- nor (whether or not a Significant Appointment) until a waiver of liability (where required by the Province) has been provided by any such subcontractor to the Province in relation to the Disclosed Data in a form satisfactory to the Province (acting reasonably).
- 45.4.6
- 45.4.6.1 Any appointments made in respect of the persons identified in Section 45.4.1 will be made on terms, in circumstances and pursuant to arrangements (including methods of working) which:
- 45.4.6.1.1 in respect of the appointments identified in Sections 45.4.1.3, 45.4.1.5 and 45.4.1.6 ensure that the independence and integrity of the person appointed is maintained in carrying out and fulfilling the functions of that appointment as envisaged by and under this Agreement;
- 45.4.6.1.2 ensure the ability of the person appointed to comply with and fulfil the other requirements relating to the functions (including required qualifications) of that

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- appointment set out in this Agreement and are reasonably sufficient to ensure the satisfaction of the Concessionaire's obligations relating to the Works, the Decommissioning and the Maintenance Works (as the case may be);
- 45.4.6.1.3 are in accordance with Good Industry Practice; and
- 45.4.6.1.4 will not have the effect of being likely to materially prejudice the Province's rights and/or entitlements under this Agreement or the effectiveness of enforcement of such rights and/or entitlements.
- 45.4.6.2 The Concessionaire will ensure the delivery of curriculum vitae showing the relevant qualifications and experience of each member of the team or person proposed to be appointed to fulfil the role of any person identified in Section 45.4.1 or any other appointment which would be a Significant Appointment and the delivery of the proposed terms of engagement and arrangements applicable to fulfilling that role to which such appointments will be subject, to the Province for approval prior to their appointment.
- 45.4.6.3 Without limitation, it will be reasonable for the Province to withhold its approval or consent pursuant to any of Sections 45.4.1, 45.4.2 and/or 45.4.5 if:
- 45.4.6.3.1 any person intended to be so engaged (individually or as part of the team of persons constituting the relevant persons set out in Section 45.4.1) to fulfil the functions of that appointment does not meet the requirements stipulated for that role in this Agreement or is not, in the opinion of the Province reasonably held, suitably qualified or does not have sufficient experience, expertise or resources to properly fulfil the functions of that appointment; and/or
- 45.4.6.3.2 any person intended to be so engaged (individually or as part of the team of persons constituting the relevant persons set out in Section 45.4.1) to fulfil the functions of that appointment is not, in the opinion of the Province reasonably held, of sound financial standing or does not have the financial capability to properly fulfil the functions of that appointment; and/or

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- 45.4.6.3.3 any person intended to be so engaged (individually or as part of the team of persons constituting the relevant persons set out in Section 45.4.1) to fulfil the functions of that appointment or any Affiliate of such person is a Restricted Person; and/or
- 45.4.6.3.4 the appointment would not meet the requirements of Section 45.4.6.1.
- 45.4.6.4 The Concessionaire will ensure that no appointment to fulfil the role of any person identified in Section 45.4.1 is made to which an objection is made in accordance with Section 45.4.6.3 unless such objection is withdrawn by agreement between the Parties or it is determined pursuant to the Disputes Resolution Procedure that such objection was not in accordance with Section 45.4.6.3.
- 45.4.6.5 Where any person identified in Section 45.4.1 is an employee of the Concessionaire, the Operator or the Contractor, such employee will be specifically designated for the purpose of that role and the Concessionaire will ensure and cause the Operator or the Contractor (as the case may be) to ensure that such employee is and continues for the duration of his/her engagement in relation to the Project to be instructed and enabled to act in a fair, impartial and independent manner in carrying out that role.

45.5 Consents

Save as provided otherwise in this Section 45 [Assignment, Subcontracting and Change in Control], any consent or permission to be given by the Province under this Section 45 [Assignment, Subcontracting and Change in Control] will be in its absolute and unfettered discretion and upon such terms as it may in its absolute and unfettered discretion determine.

45.6 Assignment by Province and BCTFA

- 45.6.1 Subject to Section 45.6.2, the Province and BCTFA agree with the Concessionaire (but not otherwise) that they will not novate, assign or otherwise transfer any of their respective rights or obligations under this Agreement unless the Concessionaire has given its prior consent to the novation, assignment or other transfer (which consent will be in the Concessionaire's absolute and unfettered discretion and upon such terms as it may in its absolute and unfettered discretion determine).
- 45.6.2 The Province and BCTFA may novate, assign or otherwise transfer any of their respective rights or obligations under this Agreement:

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- 45.6.2.1 without complying with Section 45.6.1, but without prejudice to Section 41.1.3, if and to the extent that the relevant novation, assignment or other transfer is made pursuant to a Legal Requirement binding on the Province or BCTFA, as the case may be; or
- 45.6.2.2 in any other case, without complying with Section 45.6.1 if and to the extent that the novatee, assignee or other transferee falls within Section 41.1.3.1 or Section 41.1.3.2 of this Agreement provided that, in the case of a novation, assignment or transfer of the Province's or BCTFA's obligations under this Agreement, the novatee, assignee or transferee enters into a novation of this Agreement.
- 45.6.3 Upon any novation, assignment or transfer by the Province or BCTFA permitted in accordance with the provisions of Section 45.6.1 or Section 45.6.2.2, the Province or BCTFA, as the case may be, will be released from all of its obligations and liabilities hereunder including any liability which may arise as a result of termination of this Agreement, save that where the Province or BCTFA novates, assigns or transfers this Agreement pursuant to Section 41.1.3.1 to a ministry or department of the Province, the Province will be bound by the Agreement as represented by the relevant ministry or department. For greater certainty, where the Province guarantees the obligations of any person pursuant to Section 41.1.3.2, this Section 45.6.3 will not operate to nullify the effects of that guarantee.
- 45.6.4 Any novation, assignment or transfer which is a Concessionaire Termination Event described in Section 41.1.3 will not (unless the Concessionaire fails to issue a notice pursuant to Section 41.2.1 confirming that such novation, assignment or transfer is considered by the Concessionaire acting reasonably to be a Concessionaire Termination Event in respect of which it would issue a notice terminating this Agreement within 14 days of being notified of such novation, assignment or transfer (as the case may be) or fails to issue a notice terminating this Agreement as a consequence of that Concessionaire Termination Event within 60 days of such notice) release the Province or BCTFA, as the case may be, from any obligation or liability under this Agreement including any liability which may arise as a result of termination of this Agreement.

46. **NOTICES**

46.1 **Requirement for Writing**

Wherever in this Agreement provision is made for the giving, making or issuing of any notice, endorsement, consent, request, approval, certificate, report or determination by any person (a "Notice"), unless otherwise specified such Notice will be in writing and the words "notice", "notify", "endorse", "consent", "request", "approved", "certify", "report" or "determined" and derivations thereof are to be construed accordingly.

46.2 Addresses

Any Notice will be duly given if signed by or on behalf of a duly authorized officer of the person giving the Notice and (a) personally delivered to, (b) sent by a recognized express mail or courier service (with delivery receipt requested), or (c) sent by confirmed facsimile transmission with telephone confirmation, to the following addresses:

Province and BCTFA

Ministry of Transportation
5th Floor, 940 Blanshard Street
Victoria BC V8W 9T5
Facsimile: (250) 387 6431
Attention: Assistant Deputy Minister, Highways

Concessionaire

Okanagan Lake Concession Limited Partnership
c/o 2800 – 666 Burrard Street
Vancouver
V6C 2Z7
Facsimile: 604 687 1612
Attention: President

Province's Representative

Stanley R. Cowdell
Westmar Consultants Inc.
400 – 233 West 1st Street
North Vancouver BC V7M 1B3
Facsimile: 604 985 2581

Concessionaire's Representative

Tom A. Tasaka
VP - Transportation
SNC-Lavalin Inc.
Ste. 1300 - 1075 West Georgia Street
Vancouver V6E 3C9

Facsimile: 604 605 5936

Where any Notice is provided or submitted to a Party via facsimile, an original of the Notice sent via facsimile will also promptly be personally delivered or sent by a recognized express mail or courier service, with delivery receipt requested.

46.3 Changes

Any Party may change its address for notice to another address in British Columbia by prior notice to the other Parties with a copy to the Province's Representative and the Concessionaire's Representative. The Province's Representative or the Concessionaire's Representative may change its address for Notice to another address in British Columbia by prior notice to the Parties.

46.4 Receipt

Any Notice will be deemed to have been received:

46.4.1 if sent by personal delivery or by an express mail or courier service, when delivered;

46.4.2 if sent by facsimile, upon sending, subject to:

46.4.2.1 confirmation of uninterrupted transmission by a transmission report; and

46.4.2.2 there having been no telephonic communication by the recipient to the sender (any such telephonic communication to be confirmed in writing) that the facsimile has not been received in legible form:

(i) within 3 hours after sending, if sent on a Working Day and between the hours of 9.00 a.m. and 4.00 p.m.; or

(ii) by noon on the next following Working Day if sent after 4.00 p.m. on a Working Day but before 9.00 a.m. on the next following Working Day.

47. CONSENTS AND APPROVALS

47.1 Review Procedure

47.1.1 Any proposed document (including any Design Data) or proposed course of action on the part of the Concessionaire which, under the terms of this Agreement, is required to be submitted to the Review Procedure will be dealt with in accordance with the provisions of Part 2 of Schedule 8 [Review Procedure].

47.1.2 Without prejudice to Section 47.3 [Effect of Consents, Approvals and Inspections], notwithstanding the application of the Review Procedure, the Concessionaire will not be entitled to recover from the Province any Losses or Claims which arise out of or in connection with any inadequacy, error or failure of

any matter which has been subject to the Review Procedure and any comments or objections made by the Province's Representative in the course thereof. The Concessionaire will use all reasonable efforts to obtain from the Designer, Contractor, Operator, Reviewer and any other person identified by the Province, prior to any such party carrying out any part of the Undertakings, waivers of liability in favour of the Province and the Province's Representative and BCTFA and in form and substance satisfactory to the Province, acting reasonably, in respect of any such Losses and Claims. No comments or objections or absence of comments or objections on any matter in the course of the Review Procedure will relieve the Concessionaire of any of its obligations under this Agreement in connection with the Undertakings.

47.2 Reasonableness

Unless otherwise specified, where any agreement, certificate, consent, permission, expression of satisfaction or other approval (an "Approval") is to be given by a Party or any person on behalf of a Party (including by the Province's Representative or the Concessionaire's Representative) under the terms of this Agreement, the same will not be unreasonably withheld or delayed.

47.3 Effect of Consents, Approvals and Inspections

47.3.1 Neither the giving of any Approval nor knowledge of the terms of any agreement or document (including the Project Documents) nor the review of any document or course of action pursuant to the Review Procedure by or on behalf of the Province or the Province's Representative will relieve the Concessionaire of any of its obligations under this Agreement or of its duty to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the Approval, knowledge or review under the Review Procedure.

47.3.2 Without prejudice to Section 47.3.1, no examination or lack of examination by the Province's Representative of the Concessionaire's drawings, documents, calculations or details relating to the design, construction, completion, commissioning, testing and maintenance of the Works, the design and completion of the Decommissioning, or the operation, maintenance, rehabilitation or improvement of the Project Facilities, the Site and the Adjacent Areas or otherwise nor any comment, objection, rejection or Approval expressed by such person in regard thereto, either with or without modifications, will in any respect relieve or absolve the Concessionaire from any obligations or liability under or in connection with this Agreement whether in relation to accuracy, safety, suitability, adequacy of performance or practicality of its design or howsoever otherwise arising.

47.3.3 Without prejudice to Section 47.3.1, the Concessionaire's responsibility under this Agreement will not be relieved or absolved or otherwise modified as a result of any inspection or audit by the Province's Representative under this Agreement or

the failure of the Province's Representative to make any inspection or audit under this Agreement,

47.3.4 Any Approval shall be final, subject to being opened up, reviewed or revised:

47.3.4.1 if errors or further relevant facts are revealed after the Approval has been given; or

47.3.4.2 in accordance with the provisions of Schedule 16 [Disputes Resolution Procedure], where applicable.

47.3.5 Without prejudice to Section 47.3.4, any endorsement, decision, opinion, instruction, notice, statement of objection, finding, determination, requirement or certificate of the Province's Representative will be final, subject to the exercise by a Party of any rights of objection under this Agreement and to the terms of the Disputes Resolution Procedure.

48. **TAXES**

48.1 The Performance Payments and all other payments hereunder, including any compensation for termination hereunder, include all applicable Taxes, except only PST and GST.

48.2 The Province may apply for a global or general exemption, waiver, remission, or refund of some or all Taxes which may otherwise be applicable in relation to this Agreement. The Concessionaire will assist the Province in making any applications for such global or general exemption, waiver, remission or refund and will provide the Province with such documentation as the Province may reasonably require to support such application, and the Province will reimburse the Concessionaire the reasonable costs and expenses paid by the Concessionaire in providing such assistance or documentation. Any exemption, remission, refund or other recovery of Taxes obtained by the Province through such global or general exemption, waiver, remission or refund of Taxes will accrue to the sole benefit of the Province.

48.3 All invoices for payments under this Agreement that include payment for any supply of property or services that are subject to PST will separately identify the relevant taxable property or service and the value thereof and the amount of PST included in the relevant payment.

48.4 Notwithstanding anything herein contained or the promulgation or implementation of any Legal Requirements pursuant to which the Concessionaire is required to pay property taxes in respect of any portions of the Concession Highway, the Province will pay when due and payable all property taxes assessed in respect of the Concessionaire's occupation of, access to or use of the Site, the Adjacent Areas and the Project Facilities.

49. INTELLECTUAL PROPERTY

49.1 Design and Other Data

The Concessionaire will:

- 49.1.1 make available to the Province and BCTFA without charge in paper based or machine readable form as required by the Province or BCTFA all materials, documents and data of any nature (including all Design Data) acquired or brought into existence in any manner whatsoever by the Concessionaire (and/or any of the Concessionaire's agents, contractors or subcontractors of any tier or employees of any of them) for the purposes of the design or construction of the Works, the design and completion of the Decommissioning, the operation, maintenance, rehabilitation or improvement of the Project Facilities, the Site and the Adjacent Areas or the conduct of the other Undertakings and which might reasonably be required by the Province and/or BCTFA whether during or after the Contract Period for the purposes of exercising rights or carrying out duties under this Agreement or carrying out any statutory or other duty or function;
- 49.1.2 upon receipt of same by the Concessionaire, make available to the Province and BCTFA all other such materials, documents and data acquired or brought into existence by third parties as may reasonably be required for the purposes referred to in Section 49.1.1;
- 49.1.3 require the Designer to assign all ownership rights, including copyright, in the Design and the Design Data to the Province or, if so directed by the Province, to BCTFA and will deliver to the Province's Representative the Design Data upon the earlier of a demand by the Province or the Expiry Date; and
- 49.1.4 use all reasonable efforts to obtain and forward to the Province's Representative with the Design and the Design Data a waiver of moral rights from each individual who has created any portion of the requested Design or Design Data.

49.2 Licences

49.2.1 The Concessionaire:

- 49.2.1.1 hereby grants to each of the Province and BCTFA a perpetual, unrestricted, transferable and assignable, non-exclusive, worldwide, irrevocable and non-terminable royalty-free licence (carrying the right to grant sub-licences) to use for any purpose (whether during or after the Contract Period) relating to the design, construction, completion, commissioning or testing of the Works, the design and completion of the Decommissioning, the operation, maintenance, rehabilitation or improvement of the Project Facilities, the Site and the Adjacent Areas or the conduct of any other Undertakings or the carrying out of any

statutory or other duties or functions in respect of the Project Facilities, the Site and the Adjacent Areas all and any Intellectual Property which is or becomes vested in the Concessionaire (and/or any of the Concessionaire's agents, employees, contractors or subcontractors of any tier) and to make any alterations, adaptations or additions to the Design Data and the Traffic Data which is or becomes vested in the Concessionaire; and

49.2.1.2 where any Intellectual Property is vested in any third party, will grant and (where the Concessionaire is unable to so grant) will cause the grant of a like licence with effect (subject to Section 49.2.3) from the date hereof (having immediate effect from the grant thereof) to each of the Province and BCTFA for any purpose (whether during or after the Contract Period) relating to the design, construction, completion, commissioning or testing of the Works, the design and completion of the Decommissioning, the operation, maintenance, rehabilitation or improvement of the Project Facilities, the Site and the Adjacent Areas, the conduct of any other Undertakings or the carrying out of any statutory or other duties or functions in respect of the Project Facilities, the Site and the Adjacent Areas.

49.2.2 The Province hereby grants to the Concessionaire a non-transferable, non-exclusive, royalty-free licence (but with no right to grant sub-licences except to the persons identified in Section 45.4.1 and to other approved subcontractors for the time being in accordance with Section 45.4 for the purposes hereinafter stated) to use (during the Contract Period only) all and any Intellectual Property which is or becomes vested in the Province for any purpose relating to the design, construction, completion, commissioning or testing of the Works, the design and completion of the Decommissioning, the operation, maintenance, rehabilitation or improvement of the Project Facilities, the Site and the Adjacent Areas or the conduct of any other Undertakings.

49.2.3 With respect to Intellectual Property arising during the Contract Period, the licence granted pursuant to Section 49.2.1 or Section 49.2.2 will take effect immediately upon the coming into existence of such Intellectual Property.

49.2.4

49.2.4.1 The Concessionaire will use only the designated name, logo, trademarks and official marks set out in Part 4 of Schedule 7 [Concession Highway Intellectual Property] for the Concession Highway, in the style, layout and form set out therein. For that purpose (and only that purpose) the Province hereby grants to the Concessionaire a non-transferable, non-exclusive, royalty free licence to use the said name, logo, trademarks and official marks during the Contract Period only. The Concessionaire will not create, use or

register any other names, logos, trademarks or official marks in respect of the Concession Highway without the Province's prior consent, which consent shall not be unreasonably withheld or delayed.

49.2.4.2 The Province may at any time by notice to the Concessionaire add any name, logo, trademark or official mark to those (if any) set out in Part 4 of Schedule 7 [Concession Highway Intellectual Property], and upon the giving of such notice Part 4 of Schedule 7 [Concession Highway Intellectual Property] will be deemed to be amended to add the name, logo, trademark or official mark referred to in the notice.

49.2.5 The Province will maintain the designated number of the Concession Highway in accordance and consistent with the Province's policy and regulations applicable to Comparable Controlled Access Highways from time to time.

49.3 Computerised Data

49.3.1 To the extent that any of the data, materials and documents referred to in Section 49.1 [Design and Other Data] are generated by or maintained on a computer or in any other machine readable format, the Concessionaire will obtain for the benefit of the Province and BCTFA either at no charge or at the lowest reasonable fee to the Province or BCTFA the grant of a licence or sub-licence for and supply of any relevant software or database on equivalent terms to the equivalent licence or sub-licence granted to the Concessionaire to enable the Province and BCTFA and their respective employees, agents, contractors, subcontractors and other nominees to access and otherwise use such data for the purposes set out in this Agreement or, following its termination, for the purposes of the construction, completion, commissioning or testing of the Works, the completion of the Decommissioning, the operation, maintenance, rehabilitation or improvement of the Project Facilities, the Site and the Adjacent Areas or the carrying out of any statutory or other duties or functions in respect of the Project Facilities, the Site and the Adjacent Areas.

49.3.2 Within 30 days after the execution of this Agreement the Concessionaire will submit to the Province's Representative in accordance with the Review Procedure its proposals (in accordance with Good Industry Practice) for backing-up and storage in safe custody of the data, materials and documents referred to in Section 49.1 [Design and Other Data]. The Concessionaire will comply with and cause the Contractor, Designer, Operator and any other contractor or subcontractor of the Concessionaire to comply with such procedures. The Concessionaire may vary its procedures for such back up and storage subject to submitting its proposals for change to the Province's Representative in accordance with the Review Procedure and to no objection being made thereto in accordance with the Review Procedure.

49.4 Further Assurances

The Concessionaire, the Province and BCTFA each undertakes at the request of the other to execute all documents and do all acts which may be necessary to bring into effect or confirm the terms of any licence or sub-licence contained or referred to in Section 49.2 [Licences] or Section 49.3 [Computerised Data].

49.5 Traffic Data

49.5.1 Without prejudice to any rights which the Concessionaire may have in the Traffic Data, the Province and BCTFA will be entitled without further consent from the Concessionaire:

49.5.1.1 to use the Traffic Data for the purposes of exercising rights or carrying out duties under this Agreement or carrying out any statutory or other duties or functions; and

49.5.1.2 to incorporate the Traffic Data in any traffic or other statistics prepared by or on behalf of the Province or BCTFA and to publish such statistics or the Traffic Data either generally or to a limited category of persons or otherwise to exploit such statistics or the Traffic Data and whether or not in return for any fee.

49.5.2 Without prejudice to any rights which the Province and BCTFA may have in the Traffic Data, the Concessionaire will be entitled without further consent from the Province or BCTFA to use the Traffic Data for the purposes of exercising rights or carrying out duties under this Agreement.

49.6 Termination

This Section 49 [Intellectual Property] will survive the expiry or termination of this Agreement irrespective of the reason for termination.

50. **CONFIDENTIALITY**

50.1 Confidential Information

Each Party agrees, for itself and its respective directors, officers, employees and agents, to keep confidential and not to disclose to any person (save as hereinafter provided) any of the terms of this Agreement or any confidential or proprietary information (including documents, computer records, specifications, formulae, evaluations, methods, processes, technical descriptions, reports and other data, records, drawings and information whether or not included in the Design Data or Traffic Data) provided to or arising or acquired by it pursuant to the terms or performance of this Agreement (including any such documents or information supplied in the course of proceedings under the Disputes Resolution Procedure) (collectively, the "Confidential Information").

50.2 Exceptions

Notwithstanding Section 50.1 [Confidential Information], a Party may disclose the whole or any part of the Confidential Information:

- 50.2.1 to its partners, directors, officers, employees, contractors, subcontractors, agents, or professional advisors to the extent necessary to enable it to perform (or to cause to be performed) or to protect or enforce any of its rights or obligations under this Agreement;
- 50.2.2 when required to do so by Laws and Regulations or by or pursuant to the rules or any order having the force of law of any court, association or agency of competent jurisdiction or any governmental agency, provided that, where allowed by Laws and Regulations, the other Party is given reasonable notification and a reasonable opportunity to contest such requirement prior to disclosure;
- 50.2.3 in the case of the Concessionaire, to any bank or financial institution from whom it is seeking or obtaining financing for the Project and to any professional advisors to the same;
- 50.2.4 to the extent that the Confidential Information has, except as a result of breach of confidentiality, become publicly available or generally known to the public at the time of such disclosure;
- 50.2.5 to the extent that the Confidential Information is already lawfully in the possession of the recipient or lawfully known to the recipient prior to such disclosure;
- 50.2.6 to the extent that it has acquired the Confidential Information from a third party who is not in breach of any obligation as to confidentiality to any other Party;
- 50.2.7 to the extent permitted by Section 49.2 [Licences]; or
- 50.2.8 in the case of the Province and BCTFA:
 - 50.2.8.1 to the extent permitted by Section 49.5.1.2;
 - 50.2.8.2 to the extent required for the purpose of the Decommissioning, the design, construction, completion, commissioning and testing of the Works, the operation, maintenance, rehabilitation or improvement of the Project Facilities, the Site and the Adjacent Areas or the carrying out of any statutory or other duties or functions in respect of the Project Facilities, the Site and the Adjacent Areas
 - 50.2.8.3 (without limiting Section 50.2.2) in relation to the outcome of the procurement process for the Project as may be required to be published;

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- 50.2.8.4 to any ministry, office or agency of the Province (including for greater certainty the Auditor General and the Office of the Comptroller General) where required for parliamentary, governmental, statutory or judicial purposes;
 - 50.2.8.5 whether or not falling within Section 50.2.8.3 or 50.2.8.4, to BCTFA, the Ministry, Partnerships BC and any other Governmental Authority (including any Public Authority); or
 - 50.2.8.6 as required pursuant to the *Freedom of Information and Protection of Privacy Act*,

and, in the cases of Sections 50.2.1 and 50.2.3, upon first obtaining from such person or entity to whom the disclosure is to be made an undertaking of strict confidentiality in relation to the Confidential Information in question.

50.3 Return of Confidential Information

On the Expiry Date each Party will return to each other Party such Confidential Information within its possession or control as may belong to such other Party, save that this Section 50.3 [Return of Confidential Information] will not apply to:

- 50.3.1 Confidential Information belonging to the Concessionaire necessary for the Decommissioning, the design, construction, completion, commissioning and testing of the Works and/or the operation, maintenance, rehabilitation or improvement of the Project Facilities, the Site and the Adjacent Areas and/or the carrying out of any statutory or other duties or functions in respect of the Project Facilities, the Site and the Adjacent Areas which Confidential Information may be so used or applied in the Decommissioning, the design, construction, completion, commissioning and testing of the Works and/or the operation, maintenance, rehabilitation or improvement of the Project Facilities, the Site and the Adjacent Areas and/or the carrying out of any statutory or other duties or functions in respect of the Project Facilities, the Site and the Adjacent Areas;
- 50.3.2 Traffic Data; or
- 50.3.3 Confidential Information that a Party is prevented from returning under any Laws and Regulations.

50.4 Continuation of Confidentiality Obligations

The obligations of the Parties under this Section 50 [Confidentiality] will continue for a period of 5 years following the Expiry Date notwithstanding such termination or expiry.

50.5 Freedom of Information and Protection of Privacy Act

The Concessionaire acknowledges that it is aware that the *Freedom of Information and Protection of Privacy Act* applies to this Agreement and to all contractual submissions and other documents and records relating to this Agreement and the procurement process in respect hereof and that the Province and BCTFA will fully comply with such Act. No action taken or required to be taken by the Province or BCTFA for the purpose of complying with such Act will be considered a breach of any obligation under this Agreement.

50.6 Public Communications Regarding Disputes

No party will, without the prior consent of the other Parties (which consent may be granted or withheld in the absolute and unfettered discretion of such other Party) publish alone or in conjunction with any other person any articles or other material relating to any Dispute arising under this Agreement nor impart any information regarding any such Dispute except to its professional advisors or to the Funders in accordance with the Funding Agreements (or any professional advisors of the same) in each case under obligations of confidentiality, except and to the extent that such publication arises out of any statutory or regulatory obligation applicable to the Concessionaire or the Province, as the case may be.

50.7 Remedies

Without prejudice to any other rights and remedies that any other Party would have, each of the Parties agrees that damages would not be an adequate remedy for any breach of this Section 50 [Confidentiality] and that the other Parties will be entitled to the remedies of injunction, specific performance and/or other equitable relief for any threatened or actual breach of this Section 50 [Confidentiality], subject, in the case of a claim for any such remedy against the Province, to the provisions of the *Crown Proceeding Act*, R.S.B.C. 1996, c.89.

51. AGENCY

51.1 No Delegation

For greater certainty, no provision of this Agreement will be construed as a delegation by the Province, the Minister or any other Statutory Decision Maker of any statutory power, function, right or authority to the Concessionaire save and except as expressly provided in Section 29 [Delegation Of Obligations, Rights, Powers And Functions].

51.2 No Agency, Crown Immunity

Save and except as otherwise expressly provided in this Agreement, the Concessionaire will not be or be deemed to be an agent of the Province or BCTFA and the Concessionaire will not hold itself out as having authority or power to bind the Province or BCTFA in any way. For greater certainty, the Concessionaire will not have the benefit of any Crown immunity

and, unless otherwise agreed by the Province in its absolute and unfettered discretion, will apply for and obtain all consents, licences and permissions which the Concessionaire would otherwise be obliged to obtain under any Laws and Regulations on the basis that the Concessionaire does not have the benefit of any Crown immunity.

51.3 Concessionaire Responsibility

51.3.1 As between the Parties, the Concessionaire will be responsible for the acts, defaults, omissions and neglect (to the extent arising from, relating to or otherwise being connected with the Project, the Project Facilities, the Site, the Adjacent Areas, the Graving Dock Site, the Undertakings and/or the performance of or failure to perform the Concessionaire's functions, obligations and/or responsibilities under this Agreement) of the Designer, Reviewer, Contractor, Operator, Quality Management Representative and any other contractor or subcontractor of the Concessionaire of any tier and the agents, employees or workers of any of them as fully as if they were the acts, defaults, omissions or neglect of the Concessionaire, its agents, employees or workers.

51.3.2 Any default by the Concessionaire in the performance of its obligations under any of the Collateral Agreements will constitute a default by the Concessionaire under and for all purposes of the Concession Agreement.

52. DISPUTES RESOLUTION PROCEDURE

Except where specifically prohibited by Sections 8.15.3 and 15.5.3.3 and paragraph 3.2 of Part 1 of Schedule 14 [Subsequent Schemes], all Disputes will be resolved in accordance with the provisions set out in Schedule 16 [Disputes Resolution Procedure]. Pending the resolution of any Dispute the Parties will continue to observe and perform all of their respective obligations under this Agreement and the Concessionaire will comply with any instructions given by the Province regardless of the nature of the Dispute and notwithstanding the referral of the Dispute for resolution under the Disputes Resolution Procedure. For greater certainty, nothing in this Section will require the Province to release the moneys standing to the credit of the Retention Account or release any security provided under Section 19.7.12 or release any Payment Retentions or any security provided under paragraph 9 of Part 6 of Schedule 10 [Payment Retentions] until a final decision is made pursuant to the Disputes Resolution Procedure as set out in Sections 19.7.7 to 19.7.9 or paragraph 5 of Part 6 of Schedule 10 [Payment Retentions] respectively. The Parties will forthwith give effect to and comply with any decision rendered in accordance with the Disputes Resolution Procedure. For greater certainty, no action by a Party (including the exercise of any discretion, the making of any determination or the granting or withholding of any agreement, consent or approval) which, in accordance with the terms of this Agreement, is in the absolute and unfettered discretion of that Party will be subject to the Disputes Resolution Procedure.

53. **WHOLE AGREEMENT**

This Agreement (including the Schedules) constitute the whole agreement and understanding of the Parties as to the subject matter hereof and there are no prior or contemporaneous agreements between the Parties with respect thereto, other than a waiver and release dated April 29, 2005 from SNC Lavalin Inc. to the Province and the Graving Dock Lease and any documents relating to the Graving Dock Lease.

54. **WAIVER**

Failure by any Party at any time to enforce any provision of this Agreement or to require performance by any other Party of any of the provisions of this Agreement will not be construed as a waiver of any such provision and will not affect the validity of this Agreement or any part thereof or the right of any Party to enforce any provision in accordance with its terms.

55. **AMENDMENTS**

No amendment to this Agreement will be binding unless it is in writing and signed by the duly authorized representative(s) of each of the Parties.

56. **CONFLICTS OF INTEREST**

The Concessionaire will ensure that no conflict of interest arises between its performance of the Undertakings and any other matter in which it or any of its Affiliates may be interested whether directly or indirectly.

57. **PROHIBITED ACTS**

57.1 Neither the Concessionaire nor any of its agents, contractors or subcontractors of any tier nor the employees of any of them:

57.1.1 will offer or give or agree to give any person in the service of the Province any gift or consideration of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to the obtaining or execution of this Agreement or for showing or forbearing to show favour or disfavour in relation to this Agreement; or

57.1.2 has caused any of the matters referred to in Section 57.1.1 to be done prior to the date of this Agreement.

57.2 Neither the Concessionaire nor to the knowledge of the Concessionaire, the Contractor or Operator:

57.2.1 will enter into this Agreement or any other agreement with the Province in connection with which commission has been paid or agreed to be paid by it or on its behalf or to its knowledge, unless before such agreement is made particulars of

any such commission and of the terms and conditions of any agreement for the payment thereof have been disclosed in writing to and consented to by the Province; or

57.2.2 has caused any such thing mentioned in Section 57.2.1 to be done prior to the date of this Agreement.

57.3 To the knowledge of the Concessionaire, none of the agents, contractors or subcontractors of any tier or the employees of the Concessionaire (other than the Contractor and Operator):

57.3.1 will enter into any agreement with the Province in relation to the Project in connection with which commission has been paid or agreed to be paid by it or on its behalf or to its knowledge, unless before such agreement is made particulars of any such commission and of the terms and conditions of any agreement for the payment thereof have been disclosed in writing to and consented to by the Province; or

57.3.2 has caused anything mentioned in Section 57.3.1 to be done prior to the date of this Agreement.

58. **GOVERNING LAW AND JURISDICTION**

58.1 Law

This Agreement will be governed by and construed in all respects in accordance with the laws of the Province of British Columbia and the laws of Canada applicable therein.

58.2 Jurisdiction

Subject to the provisions of Section 52 [Disputes Resolution Procedure], the Parties agree to submit to the non-exclusive jurisdiction of the Courts of the Province of British Columbia as regards any claim or matter arising in relation to this Agreement.

58.3 Agent for Service

The Concessionaire hereby appoints Davis & Company of Suite 2800 Park Place, 666 Burrard Street Vancouver, BC, Canada V6C 2Z7 (marked for the personal attention of Warren Downs) as its authorized agent for the purpose of accepting service of process for all purposes in connection with this Agreement.

59. **REFINANCING**

59.1 The Concessionaire will not carry out any Qualifying Refinancing unless the Concessionaire has obtained the prior consent of the Province, which consent will not be withheld if at the time the Qualifying Refinancing is contemplated and effected the Qualifying Refinancing will not materially and adversely affect the financial position of the Concessionaire or the ability of the Concessionaire to perform its obligations under the

Project Documents or this Agreement or have the effect of increasing in any material respect any liability of the Province or BCTFA, whether actual or contingent, present or future, known or unknown. Both the Concessionaire and the Province will at all times act in good faith with respect to any Refinancing.

- 59.2 The Province will be entitled to receive a 50 per cent share of any Refinancing Gain arising from a Qualifying Refinancing.
- 59.3 The Province will not withhold or delay its consent to a Qualifying Refinancing in order to obtain a greater than 50 per cent share of the Refinancing Gain.
- 59.4 The Concessionaire will not carry out any Refinancing without the prior consent of the Province in its absolute and unfettered discretion where any person with whom the Concessionaire proposes to carry out the Refinancing is a Restricted Person.
- 59.5 The Concessionaire will promptly provide the Province with full details of any proposed Qualifying Refinancing, including a copy of the proposed financial model relating to it (if any) and the basis for the assumptions used in the proposed financial model. The Province will (before, during and at any time after any Refinancing) have unrestricted rights of audit over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with that Refinancing (whether the Refinancing is a Qualifying Refinancing or not).
- 59.6 The Province will have the right to elect to receive its share of any Refinancing Gain:
- (a) at the same time as and in amounts equal to that part of any Distribution made after the date of the Refinancing which represents payment to the unitholders of their share of any Refinancing Gain;
 - (b) as a reduction in the Performance Payments over the remaining term of this Agreement; or
 - (c) a combination of either of the foregoing.

59.7 The Province and the Concessionaire will negotiate in good faith to agree upon the basis and method of calculation of the Refinancing Gain and payment of the Province’s share of the Refinancing Gain (taking into account how the Province has elected to receive its share of the Refinancing Gain under Section 59.6). If the parties fail to agree on the basis and method of calculation of the Refinancing Gain or the payment of the Province’s share, the Dispute will be determined in accordance with the Disputes Resolution Procedure.

59.8 Each Party will bear its own costs in relation to a Qualifying Refinancing.

60. **TIME**

Time is of the essence of this Agreement. If any Party expressly or impliedly waives the requirement that time will be of the essence, that Party may reinstate that requirement by delivering notice to the other Party or Parties who is or are affected.

61. **RELATIONSHIP OF PARTIES**

This Agreement is not intended to and does not create or establish between the Parties any relationship as partners, joint venturers, employer and employee, or of principal and agent. None of the Concessionaire or any of its representatives is or shall be deemed to be an employee or agent of the Province or BCTFA for any purpose.

IN WITNESS WHEREOF the parties hereto have executed this Agreement.

**HER MAJESTY THE QUEEN IN
RIGHT OF THE PROVINCE OF
BRITISH COLUMBIA, by a duly
authorized representative of the Minister
of Transportation in the presence of:**

By: _____
JOHN DYBLE
Deputy Minister,
Ministry of Transportation

**BC TRANSPORTATION FINANCING
AUTHORITY**

By: _____
JOHN DYBLE
Chief Executive Officer

**OKANAGAN LAKE CONCESSION LIMITED
PARTNERSHIP**

By: Its General Partner, Okanagan Lake Concession
Limited

Name: ANDRE DUFOUR
Title: Director