

KICKING HORSE CANYON PROJECT

PHASE 2

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

**TRANS-PARK HIGHWAY GENERAL PARTNERSHIP,
A GENERAL PARTNERSHIP ESTABLISHED UNDER
THE LAWS OF THE PROVINCE OF BRITISH COLUMBIA**

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THIS CONCESSION AGREEMENT (this “Agreement”) is made as of the 28th day of October, 2005.

AMONG:

**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

BC TRANSPORTATION FINANCING AUTHORITY,
a corporation continued under the *Transportation Act*,
S.B.C. 2004, c. 44

(“**BCTFA**”)

OF THE SECOND PART

AND

TRANS-PARK HIGHWAY GENERAL PARTNERSHIP,
a general partnership established under
the laws of the Province of British Columbia
(the “**Concessionaire**”)

OF THE THIRD PART

WHEREAS:

- (A) The Province has identified the Kicking Horse Canyon section of the Trans-Canada Highway as a significant transportation corridor within British Columbia.
- (B) The Province recognizes that the Kicking Horse Canyon section of the Trans-Canada Highway requires improvements and upgrading to further the objectives of the Province.
- (C) The Province desires to have the private sector invest and participate in the Project to facilitate the improvement and upgrade of the Kicking Horse Canyon section of the Trans-Canada Highway and, in accordance with that policy, interested persons were invited to submit proposals for the Project.
- (D) The Concessionaire has been selected to carry out the Project and facilitate the improvement and upgrade of the Kicking Horse Canyon section of the Trans-Canada Highway in accordance with and subject to the terms and conditions set forth in this Agreement.
- (E) This Agreement is entered into as, and constitutes, a concession agreement under and as defined in the Transportation Investment Act.
- (F) The agreements referred to in Section 2.3.1 have been entered into on or prior to the date hereof.

NOW THEREFORE in consideration of 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 Operations 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 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 Operations, 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 the provisions set out in Section 42.3 [Termination on Relevant Change in Law], 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 and with reference to subsection 28(3) thereof, the Province confirms that Treasury Board has not set any conditions to be observed before this Agreement is entered into.

1.8 Business Opportunities

- 1.8.1 The Province reserves the right to all commercial and other opportunities for the Project Facilities and 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 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 or as incidental to carrying out Business Opportunities which have been approved by the Province in accordance with Section 1.8.1, 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 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 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 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 due diligence as required in accordance with the provisions of Section 1.9.1.

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 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.

Where such information refers to the quality control, assurance requirements and acceptance of the work involving “the Ministry” or “Ministry Representative” as generally applied to conventional design / bid / build construction contracts, these references will be modified to be consistent with the terms and conditions in this Agreement in respect of quality control, assurance, audit and acceptance of the work by “the Province” or “the Province’s Representative”.

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 The provisions establishing the higher quality, manner or method of performing the Operations, 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, prevail.
- 2.1.4 In the case of any conflict, ambiguity or inconsistency between provisions in the Design and Construction Output Specifications, the O,M&R 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 Design and Construction Output Specifications and the Concessionaire's Design and Construction Requirements, the Design and Construction Output Specifications will prevail (provided that no such conflict, ambiguity or inconsistency will be deemed to exist with respect to provisions of the Concessionaire's Design and Construction Requirements that provide for or require a higher standard of quality or performance or broader scope of work than the Design and 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&R Output Specifications and the O,M&R Requirements, the O,M&R 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&R Requirements that provide for or require a higher standard of quality or performance or broader scope of work than the O,M&R Output Specifications, and the Concessionaire's obligations hereunder will include compliance with all such provisions and requirements).
- 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 Design and Construction Output Specifications, the O,M&R Output Specifications or the Traffic Management Output Specifications and any document(s) incorporated by reference therein, the Design and Construction Output Specifications, O,M&R 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, to the extent that the Concessionaire Proposal Extracts can reasonably be interpreted as

requiring additional items or services or higher standards of quality or performance or broader scope of work than otherwise required, no such conflict, ambiguity or inconsistency will be deemed to exist and 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 seven 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 (whether by the terms of Section 2.1, by agreement between the Province and the Concessionaire or pursuant to the Disputes Resolution Procedure).

2.3 Project Documents

- 2.3.1 Prior to the execution of this Agreement the Concessionaire has provided to the Province copies of the following documents, which copies have been initialled by the Parties for the purposes of identification:

- 2.3.1.1 the Partnership Agreement between the Partners;
- 2.3.1.2 the certified Statement of Registration of a General Partnership or Proprietorship for the Concessionaire issued by the British Columbia Ministry of Finance, Corporate and Personal Property Registries and the Notice of Articles and Articles for each of the Partners;
- 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-Build Contract Guarantee;
- 2.3.1.7 the Performance Securities;
- 2.3.1.8 the Operating and Maintenance Contract;
- 2.3.1.9 Collateral Agreements from the Contractor and Operator;
- 2.3.1.10 the Interface Agreement;

- 2.3.1.11 the heads of terms for the Third Party Subordinated Funding Agreement; and
 - 2.3.1.12 the Equity Contribution Agreement.
- 2.3.2 The Concessionaire will (and will use all reasonable efforts to ensure that each Contracting Affiliate will) perform its obligations under and observe all 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 except where such termination is, in accordance with the terms of such Project Document, as a result of the default by the other party thereto or the expiry of the term thereof;
 - 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 except to the extent that it would be commercially reasonable to do so and provided that any such action or inaction, as the case may be, would not be materially adverse to the interests of the Province;
 - 2.3.2.3 in any material respect depart from, waive or fail to enforce any rights it may have under, any Project Document to which it is a party except to the extent that it would be commercially reasonable to do so and provided that any such action or inaction, as the case may be, would not be materially adverse to the interests of the Province;
 - 2.3.2.4 enter into any agreement or document which would materially affect the interpretation or application of any Project Document to which it is a party in a way that is materially adverse to the interests of the Province;
 - 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 or enter into, make or agree to any material amendment to or variation of any such Funding Agreement; or
 - 2.3.2.6 without limiting any of the foregoing, enter into any transaction which is an Exempt Refinancing (other than an Exempt Refinancing referred to in paragraph (b), (c) or (g) of the definition of “Exempt Refinancing” in Section 1 of Schedule 1 [Definitions and Interpretation]),

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, unless in respect of a course of action described in any of Section 2.3.2.1 to 2.3.2.6 inclusive, the Province has otherwise consented to or approved in writing such course of action (including under a Project Document to which the Province is a party).

- 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; or
 - 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].
- 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);
 - 2.3.4.2 it is a Permitted Borrowing; or
 - 2.3.4.3 it is a Refinancing referred to in paragraph (a) of the definition of "Exempt Refinancing" in Section 1 of Schedule 1 [Definitions and Interpretation].
- 2.3.5 Without limiting the generality of Section 2.3.2, the Concessionaire will ensure that:
- 2.3.5.1 each Project Document to which it is a party; and
 - 2.3.5.2 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 on the grounds set out in paragraph 3.1 of Part 2 of Schedule 8 [Review Procedure]; provided, however, that in the case of a Refinancing referred to in paragraph (a) of the definition of "Exempt Refinancing" in Section 1 of Schedule 1 [Definitions and Interpretation], the Province will not be entitled to object on the grounds that the Refinancing would or might reasonably be expected to increase any liability of the Province or BCTFA or adversely affect the financial position, liquidity or solvency of the Concessionaire or any of its Partners or their Shareholders unless the Refinancing would or might reasonably be expected to increase the liability of the Province or BCTFA to an extent greater than contemplated in the Base Case Financial Model or result in the financial position, liquidity or solvency of the Concessionaire or any of its Partners or their Shareholders being worse than contemplated in the Base Case Financial Model.
- 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, any agreement is entered into which would affect the interpretation or application of any of the Project Documents, or any Funding Agreement other than those listed in Section 2.3.1.3 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.

2.3.8 The Concessionaire covenants and agrees to use all reasonable efforts to cause the parties thereto to enter into and execute and deliver the Interface Agreement not later than 90 days after the date of execution of this Agreement.

2.3.9 [Not Used]

2.3.10 The Concessionaire will not enter into the Third Party Subordinated Funding Agreement unless the Third Party Subordinated Funding Agreement has been submitted to the Province's Representative and there has been no objection in accordance with the Review Procedure. The Province's Representative may only object to the Third Party Subordinated Funding Agreement on the following grounds:

2.3.10.1 that the Third Party Subordinated Funding Agreement is not substantially in accordance with the 'heads of terms' therefor including that the loans payable thereunder do not require repayment in full on or before September 30, 2009 and/or that the indebtedness is secured against any property or assets of the Concessionaire including the Concessionaire's interest in the Project and this Agreement; and

2.3.10.2 on the grounds set out in paragraph 3.1 of Part 2 of Schedule 8 [Review Procedure].

2.4 Instruments Required Under the Transportation Investment Act

Other than as referred to in or contemplated by this Agreement, the Direct Agreement, and the Collateral Agreements, there are no other instruments required to be provided by the Concessionaire under Section 3(m) of the Transportation Investment Act.

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 during the Contract Period;

3.1.3 conduct the other Operations during the Contract Period; and

3.1.4 finance the activities referred to in Sections 3.1.1 to 3.1.3,

at its own cost and risk without recourse to public funds or Province guarantees of any kind, whether direct or indirect, (other than as expressly provided in this Agreement).

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 Site and the Adjacent Areas or any changes in uses of all or any part or

parts of the Project Facilities, 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.

3.3 Public Use

- 3.3.1 At all times during the Contract Period the Concessionaire will keep the Concession Highway open for public use except for Lane Closures or diversions of traffic flow:
- 3.3.1.1 by the Concessionaire in accordance with the provisions of the Traffic Management Requirements and Section 15.2B [Schedules of Lane Closures] 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;
 - 3.3.1.4 by any other Governmental Authority pursuant to any Legal Requirement; and
 - 3.3.1.5 in the case of those portions of the Concession Highway on which the Phase 1 Works are being undertaken by the Phase 1 Section Contractor, by the Phase 1 Section Contractor pursuant to the provisions of the Phase 1 Section Contract or as otherwise required in connection with the carrying out of the Phase 1 Section Works.
- 3.3.2 Except as may otherwise be expressly provided in this Agreement, 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 diversion, including any Lane Closure or diversion referred to in Section 3.3.1, or as a result of the exercise of any other rights or powers or the lawful 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 any part thereof.
- 3.3.3 All Operations 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 Accesses and 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 or another Governmental Authority which is subordinate to the Province levies tolls specifically on members of the general public for the use of some or all of the Concession Highway or any Accesses and Connecting Road that is under the jurisdiction of the Province or such other Governmental Authority, as the case may be, by a vehicle travelling thereon 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 Operations are at all times performed:
- 3.4.1.1 in an efficient, effective and 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, except in compliance with Laws and Regulations;
 - 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 Operations the Concessionaire will not, and will ensure that its contractors or subcontractors of any tier will not, knowingly do or omit or permit anything to be done or omitted that might reasonably be expected to detract, or that the Province gives notice to the Concessionaire would detract, from the image and reputation of the Province as a highway authority.

3.5 Permits, Licences and Approvals

- 3.5.1 Except as may otherwise be specifically provided in this Agreement, the Concessionaire will at its sole cost:
- 3.5.1.1 obtain and renew all Permits, Licences and Approvals; and
 - 3.5.1.2 comply with and maintain in good standing each Permit, Licence and Approval in accordance with its terms.
- 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 or on any person other than the Concessionaire, 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) or the other person and the

Concessionaire will be responsible for, and will indemnify and hold the Province, BCTFA or such other person (as the case may be) harmless in respect of, the satisfaction and performance of all such conditions, liabilities and obligations and 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 Where the Concessionaire is unable to apply for or to renew or extend or to complete the process of obtaining one of the Permits, Licences and Approvals required to be obtained, renewed or extended by the Concessionaire without obtaining information or assistance from the Province or BCTFA, or without submitting the application for such Permit, Licence or Approval or renewal or extension in the Province's or BCTFA's name, each of the Province and BCTFA will at the Concessionaire's cost provide such information and assistance as the Concessionaire may reasonably request and it may reasonably be able to provide 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, will be responsible for and will indemnify and hold the Province and BCTFA harmless in respect of all costs of obtaining, renewing, 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 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 contractors or subcontractors of any tier) and the Province or BCTFA.
- 3.5.4 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:
- 3.5.4.1 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, Laws and Regulations or requirements of Governmental Authorities; and/or
- 3.5.4.2 any failure of the Concessionaire to obtain and, as applicable, renew all necessary Permits, Licences and Approvals required by applicable Laws and Regulations or Governmental Authorities.

3.6 Agreements with Governmental Authorities

- 3.6.1 Without limiting any other provision of this Agreement, the Concessionaire, subject to Section 3.6.2, will enter into or cause to be entered into such agreements with Governmental Authorities or other persons required in connection with the Project or as are necessary to enable the Concessionaire to perform the Operations in accordance with the terms 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).

- 3.6.2 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; provided, however, that the Concessionaire will not be relieved of any of its obligations under Section 3.6.1 or any other provision of this Agreement as a result of any such determination by the Province or assistance provided by the Concessionaire, and provided further that if the Province or BCTFA incurs or will incur any liability or obligation under any such agreement, the form and substance of the agreement will be subject to the prior approval of the Province and/or BCTFA (as the case may be) (which approval may be granted or withheld by the Province or BCTFA in its absolute and unfettered discretion) and, as between the Province and/or BCTFA (as the case may be) and the Concessionaire, the Concessionaire will be responsible for such liabilities and the performance of such obligations and will indemnify and hold the Province and/or BCTFA (as the case may be) harmless in respect thereof in a manner satisfactory to each of the Province and/or BCTFA (as the case may be).
- 3.6.3 Where the Concessionaire, despite its reasonable efforts, is unable to enter into or cause to be entered into an agreement with a Governmental Authority which is required in connection with the Project or is necessary to enable the Concessionaire to perform the Operations, each of the Province and BCTFA will at the Concessionaire's cost provide such information and assistance as the Concessionaire may reasonably request and it may reasonably be able to provide to assist the Concessionaire in entering into or causing to be entered into such agreement. The Concessionaire, notwithstanding any such assistance provided by the Province or BCTFA, will be responsible for and will indemnify and hold the Province and BCTFA harmless in respect of all costs of entering into or causing to be entered into such agreements.

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, 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, the Operator and the Designer) pay or provide for the payment when due of all accounts in connection with the performance of the Operations (including all accounts for the supply of labour, materials and services in connection with the construction of the Works and any other works carried out in the course of the Operations) 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 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 procured or 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 procured or 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 or directly from a supplier 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.

5. FINANCIAL BASE CASE

- 5.1 A copy of the Base Case Financial Model, certified by a knowledgeable senior officer or director of the Concessionaire as being a true and correct copy of the final Base Case Financial Model and accompanied by a copy of the financial model audit report issued in respect of the final Base Case Financial Model, is attached as Part 1 of Schedule 2 [Base Case Financial Model].
- 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 Base Case Financial Model or any revised Base Case Financial Model for purposes of this Project. The Province will only transfer such licence or grant such sublicense to a person to whom the Province may novate, assign or otherwise transfer its rights or obligations under this Agreement under Section 45.6 [Province Assignment]. The Province acknowledges that the Base Case Financial Model, any revised Base Case Financial Model, 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 **OPERATIONS**

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 that, prior to executing this Agreement, it has:

- 6.1.1 inspected and examined to its satisfaction the Project Facilities, the Site and the Adjacent Areas and their surroundings and, where applicable, the existing structures, improvements and works in, on, over or under the Site and the Adjacent Areas, including the Existing Highway;
- 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 and the Adjacent Areas, the nature of the ground and subsoil, the form and nature of the Project Facilities, the Site and the Adjacent Areas, the risk of injury or damage to property adjacent to or in the vicinity of the Project Facilities, the Site and the Adjacent Areas 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 Operations;
- 6.1.3 satisfied itself as to:
 - 6.1.3.1 the means of communication with the various parts of and access to and through the Project Facilities, 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] for the purposes of performing the Operations;
 - 6.1.3.2 the possibility of 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 prevent any nuisance or interference, whether public or private, being caused to any third parties in the performance of the Operations;
 - 6.1.3.4 the risks of interference by Protesters or Trespassers;
 - 6.1.3.5 any other contingencies, restrictions, conditions or constraints which would or might interfere with, limit or affect the ability of the Concessionaire to carry out the Operations which could be ascertained through the exercise of reasonable due diligence;
 - 6.1.3.6 all aspects of the design, construction, completion, commissioning and testing of the Works and all information necessary to perform the Works,

- including the design of the Works, the condition of the Project Facilities, the Site and the Adjacent Areas, and the labour and material required;
- 6.1.3.7 the historical traffic volumes and traffic dynamics and the effect that traffic may have on the Works; and
 - 6.1.3.8 the possibility of environmental timing windows and the effect that they may have on the Works Schedule;
- 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 Concessionaire's Design and Construction Requirements, the Traffic Management Requirements or the O,M&R Requirements or which the Concessionaire intends to rely upon, adopt or make use of;
- 6.1.5 reviewed and satisfied itself with respect to:
- 6.1.5.1 the terms of the CEAA Screening Report, CEAA Approval and the Concessionaire's Environmental Obligations;
 - 6.1.5.2 the Design and Construction Output Specifications, the Concessionaire's Design and Construction Requirements, the O,M&R Output Specifications, the O,M&R Requirements, the Traffic Management Output Specifications and the Traffic Management Requirements;
 - 6.1.5.3 the nature and extent of the Phase 1 Section Works and the impact of the conduct of the Phase 1 Section Works on the carrying out of the Operations; and
 - 6.1.5.4 the requirements of Section 9 [Health and Safety];
- 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 6.1.2 to 6.1.5 inclusive; and
- 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 Concessionaire's Design and Construction Requirements, the Traffic Management Requirements or the O,M&R Requirements or its obligation to carry out the Operations in accordance with the provisions of this Agreement; and
 - 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.

The representation and warranty given in this Section 6.1 [Site Inspection and Investigations] will not constitute an actionable warranty by the Concessionaire in favour of the Province or give rise to a right of termination on the part of the Province, but the Province may rely on such

warranty for the purpose of defending or contesting any action brought against the Province 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 and 6.1.6, may not be relied upon as a defence against an otherwise valid claim by the Concessionaire pursuant to Section 38.2.5 or an otherwise valid claim by the Concessionaire in respect of a Compensation Event referred to in paragraph (k) or (l) of the definition of "Compensation Event" in Section 1 of Schedule 1 [Definitions and Interpretation]).

The provisions of any subsection of this Section 6.1 [Site Inspection and Investigations] are without limitation to the provisions of any other subsection of this Section 6.1.

7. [NOT USED]

8. LAND

8.1 Access for Concessionaire

8.1.1 Without prejudice to but subject to the provisions of Sections 8.1.2, 8.1.3, 8.2 [Duration], 8.3 [Limitations], 8.8.1A, 8.15 [Phase 1 Section Works] and 10 [Security of the Site], the Province grants to the Concessionaire, for itself and its contractors, subcontractors, agents and employees, a non-exclusive 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 to permit the Concessionaire to carry out the Operations or any of them, in each case subject to the provisions of this Agreement and to:

- 8.1.1.1 all rights of public passage or access existing over any part of the Project Facilities, the Site or the Adjacent Areas from time to time, except that the Concessionaire may designate discrete portions of the Project Facilities, the Site and the Adjacent Areas as are reasonably necessary to carry out the Works as construction areas and to restrict public access to such areas;
- 8.1.1.2 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 Project Facilities, the Site or the Adjacent Areas;
- 8.1.1.3 the rights of Users to use the Concession Highway or any part or parts thereof and of the public to use any Accesses and Connecting Roads or other private and public roads or highways;
- 8.1.1.4 the rights of access referred to in Section 14.4.1;
- 8.1.1.5 the right of any relevant highway authority to have access for the execution on or near the Project Facilities, the Site or the Adjacent Areas of any work in fulfilling any function of such highway authority under any Laws and Regulations;
- 8.1.1.6 the Concession Highway Encumbrances;

- 8.1.1.7 the terms and conditions of any Rights in respect of land comprising any part or parts of the Site and the Adjacent Areas;
 - 8.1.1.8 all rights over Crown land; and
 - 8.1.1.9 the terms of the Orders and the Requirements of Interested Parties.
- 8.1.2 The Concessionaire acknowledges that it has not finally determined the scope of the Adjacent Areas required by it and that, subject to Section 8.1.3, the Province will not be obliged to provide the Concessionaire access to the Adjacent Areas pursuant to Section 8.1.1.
- 8.1.3 Provided that such Adjacent Area falls within the area over which the Province has a map reserve for highway purposes, the Province will use its reasonable efforts to provide the Concessionaire access to that Adjacent Area in accordance with Section 8.1.1 within one month of the Concessionaire providing the Province with a drawing setting out the location of the proposed Adjacent Area. If the Province is able to do so, the Province will issue a notice to the Concessionaire declaring such additional land to be part of the Adjacent Areas for the purposes of this Agreement.

8.2 Duration

Subject to Sections 8.3 [Limitations], 8.8.3, 26.5 [Province's Remedial Rights] and 43.1 [Step-In Rights], the commencement and duration of the licence given under Section 8.1 [Access for Concessionaire] will be:

- 8.2.1 from the Commencement Date; or
- 8.2.2 in the case of those parts of the Site and the Adjacent Areas referred to in Sections 8.1.3 and 8.8.1A, from the date of the notice from the Province,

and thereafter until the end of the Contract Period. The Province acknowledges and agrees that, except as otherwise expressly provided in this Agreement, no breach by the Concessionaire of this Agreement will result in the suspension, cancellation or termination of the licence referred to in Section 8.1 [Access for Concessionaire].

8.3 Limitations

- 8.3.1 The licence referred to in Section 8.1 [Access for Concessionaire] will subsist for the purposes of carrying out the Operations and for no other purposes. The rights of access and use given under Section 8.1 [Access for Concessionaire] are by way of non-exclusive 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 granted to the Concessionaire 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 Operations 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 Compulsory Acquisition 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 and BCTFA in respect of such land will be limited accordingly.

8.4 Additional Access

- 8.4.1 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 8.4.3 and 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 by the Province and BCTFA pursuant to Section 8.1 [Access for Concessionaire]. 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 an amendment to the CEAA Screening Report or the CEAA Approval or an application for a new CEAA Approval or any certificate under any Environmental Laws.
- 8.4.2 The Concessionaire acknowledges that the Province has entered into the Existing CP Rail Agreements and will enter into the CP Rail Agreement to provide for access to and use of that portion of the CP Rail Lands necessary in connection with the Operations. The Concessionaire will cooperate with and provide all reasonably requested information available to it to the Province to enable the Province to negotiate and enter into the CP Rail Agreement. The Concessionaire will observe and comply with and cause all of its agents, contractors and subcontractors of any tier and employees of any of them to observe and comply with the terms and conditions set out in the Existing CP Rail Agreements and the CP Rail Agreement, and the Concessionaire will not in the course of exercising its rights or performing its obligations under this Agreement take or omit to take or permit to be taken or omitted any action that would breach any of the terms of or requirements contained in the Existing CP Rail Agreements or the CP Rail Agreement.
- 8.4.3 The Province will use commercially reasonable efforts to provide the Concessionaire with access to the Required CP Rail Lands, in accordance with and subject to the terms of the CP Rail Agreement. The Concessionaire, at its expense and in accordance with and subject to the terms of the Existing CP Rail Agreements and the CP Rail Agreement, will be responsible for obtaining, and will bear all costs and charges in respect of and any Losses or Claims arising from, any access to and use of

any other portions of the CP Rail Lands required to enable the Concessionaire to perform its obligations under this Agreement.

8.5 [Not Used]

8.6 Acquisition of Land by Concessionaire

8.6.1 Neither the Concessionaire nor any Partner or Shareholder or other Affiliate of the Concessionaire will acquire any land or Rights in respect of land to be used by the Concessionaire in complying with its obligations under this Agreement 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 to the CEAA Screening Report or the CEAA Approval or any application for a certificate under any Environmental Laws, but otherwise not to be unreasonably withheld).

8.6.2 Without prejudice to paragraph 2.5.7 of Part 3 of Schedule 14 [Subsequent Schemes], if the Concessionaire or any Partner or Shareholder 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 Partner or Shareholder 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 and BCTFA to provide access under this Section 8 [Land] and 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).

8.7 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 Site

8.8.1 The boundaries of the Site are as reflected in the drawings referenced in the definition of "Site" set out in Schedule 1 [Definitions and Interpretation], and the Concessionaire confirms that, subject to Sections 8.1.2 and 8.1.3, it is satisfied as to the adequacy and

sufficiency thereof for the purposes of the preliminary design of the Works as shown in the Construction Drawings contained in Part 5 of Schedule 5 [Construction Drawings] on the date of execution of this Agreement.

- 8.8.1A The Parties acknowledge that the Construction Drawings contained in Part 5 of Schedule 5 [Construction Drawings] on the date of this Agreement are preliminary in nature and that the Concessionaire may require additional land to be added to the Site once it has completed the 100% design of the Works. Provided that such land falls within the area over which the Province has a map reserve for highway purposes, the Province will use its reasonable efforts to provide the Concessionaire access to that additional land in accordance with Section 8.1.1 within one month of the Concessionaire providing the Province with a drawing setting out the location of the proposed additional land. If the Province is able to do so, the Province will issue a notice to the Concessionaire declaring such additional land to be part of the Site for the purposes of this Agreement.
- 8.8.2 Within two years after the Substantial Completion Date, the Province will prepare and complete such surveys as it considers necessary to 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 Project. 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 commercially 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.

8.9 Site Materials

The Concessionaire may only excavate, extract, dispose of, exploit or otherwise deal with Site Materials:

- 8.9.1 in accordance with applicable Laws and Regulations and the terms of any relevant agreement or Compulsory Acquisition Order;
- 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 carrying out the Works in

accordance with the Design and Construction Output Specifications and the Concessionaire's Design and 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 the CEAA Approval or the CEAA Screening Report, and in accordance with all applicable Permits, Licences and Approvals including those obtained by or on behalf of the Concessionaire to permit such excavation, extraction, disposal of, exploitation or dealing with the Site Materials.

8.10 Gravel Pits

- 8.10.1 Subject to Section 8.10.2 and to the terms of any Gravel Licence, and to the limitations, terms and conditions set forth in this Agreement and in Part 7 of Schedule 4 [Gravel Pits and Gravel Licences], the Concessionaire may enter on, occupy and use the Gravel Pits for the purposes of construction staging and extraction, processing, storage and removal of Material (which term as used in this Section 8.10 [Gravel Pits] has the meaning ascribed to it in the Gravel Licence) for use by the Concessionaire or its contractors or subcontractors in order to perform the Operations. The Concessionaire will not use or permit the use of the Gravel Pits or Material extracted from the Gravel Pits for any other purpose.
- 8.10.2 The Province will grant to the Concessionaire non-exclusive Gravel Licences substantially in the form provided in Section B of Part 7 of Schedule 4 [Gravel Pits and Gravel Licences] for the Gravel Pits which the Concessionaire proposes to enter on, occupy and use in accordance with Section 8.10.1. The Province may terminate any Gravel Licence upon one year's prior written notice.
- 8.10.3 The Concessionaire will comply with, carry out and perform all requirements (including site remediation requirements) under applicable Laws and Regulations and Permits, Licences and Approvals (including the Gravel Licences) and under the CEAA Screening Report and the CEAA Approval in connection with or arising as a result of the entry on, occupation of, or the use of the Gravel Pits, including under the Gravel Licences, by the Concessionaire or any of its agents, contractors or subcontractors of any tier or the employees of any of them.
- 8.10.4 The Province makes no representation or warranty whatsoever in respect of the Material, including (despite the approximate quantities, approximate maximum quantities, usage conditions and distances set out in Section A of Part 7 of Schedule 4 [Gravel Pits and Gravel Licences]) in respect of the processes that may be required to process any of the Material, any objectionable matter or coatings, the gradation, quantity, quality or fitness for purpose of the Material in or comprising the Gravel Pits, or in respect of the Gravel Pits including any access to or suitability, condition or state of any such Gravel Pit.

- 8.10.5 Except to the extent provided herein or in the Gravel Licences to the contrary, neither the Gravel Licences nor anything contained in this Section 8.10 [Gravel Pits] or any other provision of this Agreement limits or restricts or will limit or restrict in any way the powers, rights or interests which the Province or any other Governmental Authority has under applicable Laws and Regulations or otherwise in or in respect of Material or the Gravel Pits, including the right to use and extract Material from the Gravel Pits or to licence other persons to enter on, occupy and use any of the Gravel Pits, including for the purpose of extracting Material from them.
- 8.10.6 For greater certainty, the Concessionaire may use Material from the Gravel Pits at the prices and on the terms provided for in the Gravel Licences and this Section 8.10 [Gravel Pits] or may use material from other sources at its discretion, provided always that such Material or material from other sources complies with the applicable requirements set out in the Design and Construction Output Specifications and the Concessionaire's Design and Construction Requirements.

8.11 Ministry of Forests Protocol Agreement

In the course of carrying out the Operations 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 Disclosed Data) would require the Concessionaire to perform any additional obligations or to incur any additional costs or delay 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, 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, including, without limitation, the CEAA Screening Report and the CEAA Approval, 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 (in the case of trees or timber on Crown land) or BCTFA (in the case of trees or timber on land owned by 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 except that the Province will obtain and maintain licence to cut number L44062 for the Site and the Adjacent Areas for use by the Concessionaire and the Concessionaire is not required to obtain any Permit from the Ministry of Forests.
- 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 subject to and in accordance with directions received from the Province (in the case of trees or timber on Crown land) or BCTFA (in the case of trees or timber on land owned by BCTFA) and, if applicable, in accordance with the Forest Act. Prior to the Concessionaire cutting down or removing any trees or timber grown on, or making any use of forested lands comprised in, the Site or the Adjacent Areas, the Concessionaire will provide to the Province a cutting plan, arrange for a timber cruise by the Ministry of Forests and will promptly cold deck and stack all lumber by species. No payment will be made to the Concessionaire for any such logging or decking requirements or for any costs associated with the construction of any access roads required to be built. The Province will arrange for the Ministry of Forests to remove and dispose of the stacked lumber at such times and by such means as the Province may elect in its absolute and unfettered discretion, including without limitation, disposal of the timber to the existing timber rights holder or by way of sale to small contractors.
- 8.12.4 The Ministry of Forests schedule, timing and methods for removal of cold decked timber will in no event be considered cause for material delay or claim for additional payment under Section 12.6 [Delay].

8.13 Concessionaire's Environmental Obligations

- 8.13.1 The Concessionaire will observe and comply with, and cause all of its agents, contractors and subcontractors of any tier and employees of any of them to observe and comply with, the terms and conditions set out in the CEAA Screening Report and CEAA Approval, and the Concessionaire will not take or omit to take or permit any such persons to take or omit any action that would breach any of the provisions of or requirements contained in the CEAA Screening Report or the CEAA Approval.

- 8.13.2 Any amendments to the CEAA Screening Report or the CEAA Approval which are required as a result of the Concessionaire's design for the Works or any other works carried out by or on behalf of the Concessionaire in the course of performing the Operations will be at the cost and risk of the Concessionaire, whether the application for the amendment is made by or in the name of the Province or the Concessionaire or both of them. Without limiting the generality of the foregoing, the Concessionaire will be responsible for obtaining all regulatory approvals and satisfying all other requirements (including in respect of consultations, hearings, reviews, studies and reports and initial and ongoing mitigative works) in connection with or resulting from any such amendment and for all costs, fees, expenses and delays incurred in connection therewith or as a result thereof.
- 8.13.3 During the Contract Period the Concessionaire at its expense will comply with, observe, satisfy and perform all of the Concessionaire's Environmental Obligations.

8.14 First Nations Obligations

- 8.14.1A The Province acknowledges that, subject to Sections 8.14.1, 8.14.2 and 8.14.4, the Province retains responsibility for consultation and accommodation of aboriginal rights and title in relation to its decisions, including the decision to proceed with the Project.
- 8.14.1 The Concessionaire shall, to the extent required by law and in accordance with any policy established from time to time by the Province, carry out discussions with First Nations on issues with respect to the Project.
- 8.14.2 The Concessionaire shall work with the Province and First Nations to try to address the potential impact on the exercise of aboriginal rights arising from the Concessionaire's carrying out the terms of this Agreement, to the extent the exercise of aboriginal rights is not incompatible with the ability of the Concessionaire to carry out the terms of this Agreement or inconsistent with the rights granted under this Agreement.
- 8.14.3 The Concessionaire shall within 15 days of becoming aware of any First Nations claim in respect of the Site and the Adjacent Areas, the Concession Highway or the Project, provide written notice to the Province of such claim along with full written particulars of any such claim.
- 8.14.4 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 Nations 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.
- 8.14.5 Nothing in this Agreement will be interpreted as making the Concessionaire responsible for resolving any First Nations claims (whether present or future) or as accepting risks in relation to First Nations challenges of decisions of any Governmental Authority based on an alleged failure by such Governmental Authority to fulfill consultation and accommodation obligations.

8.15 Phase 1 Section Works

- 8.15.1 The Concessionaire acknowledges that the Phase 1 Section Contractor will continue performing all or part of the Phase 1 Section Works after the Commencement Date and until completion of the Phase 1 Section Works. For greater certainty, it is understood that the Phase 1 Section Contractor will be responsible for traffic management on the Phase 1 Section and on any portion of the Concession Highway upon which the Phase 1 Section Works are being undertaken during the carrying out of the Phase 1 Section Works.
- 8.15.2 The Concessionaire will consult and coordinate its activities with those of the Phase 1 Section Contractor and will carry out its activities pursuant to this Agreement (including with respect to the Works) so as not to prevent or unnecessarily hinder the Phase 1 Section Contractor from performing and completing the Phase 1 Section Works, and so that, to the greatest extent possible, the Works and the Phase 1 Section Works may be proceeded with in a coordinated and efficient manner with a minimum of disruption to the flow of traffic on the Concession Highway. The Province will use commercially reasonable efforts to cause the Phase 1 Section Contractor to consult and coordinate its activities with 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 Phase 1 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 **DELETED**, 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 or the Phase 1 Section Contract or any exercise of rights (whether proper or improper) or default by the Phase 1 Section Contractor under the Phase 1 Section Contract. 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 Phase 1 Section effected by the Phase 1 Section Contractor.
- 8.15.3 In the event of any disagreement or dispute between the Concessionaire and the Phase 1 Section Contractor with respect to the coordination of their respective activities under this Agreement and the Phase 1 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.
- 8.15.4 The Concessionaire may carry out regular audits of the quality management systems of the Phase 1 Section Contractor during the design and construction of the Phase 1 Section Contract at such intervals as the Concessionaire determines appropriate, and may carry out other monitoring or spot checks of the design and construction of the Phase 1 Section Works.
- 8.15.5 If any auditing, monitoring or spot checks by the Concessionaire reveals deficiencies in the design or construction or other works of the Phase 1 Section Contractor or any

breach by the Phase 1 Section Contractor of its obligations under the Phase 1 Section Contract:

- 8.15.5.1 the Concessionaire will inform the Province forthwith in writing stating in reasonable details the deficiencies or breach and suggestions for remedying such deficiencies or breach; and
 - 8.15.5.2 the Concessionaire may carry out increased levels of audits, monitoring or spot checks, whether in number, duration or detail, of the design and construction of the Phase 1 Section Works referred to in Section 8.15.4 until such time as it is reasonably satisfied that neither of the circumstances described in this Section 8.15.5 continues to exist.
- 8.15.6 The Province will make reasonable efforts to ensure that the deficiencies or breach notified by the Concessionaire under Section 8.15.5.1 are corrected promptly. However, the Province is not obliged to accept any of the Concessionaire's suggestions referred to in Section 8.15.5.1 that relates to design of the Phase 1 Section Works and that requires materials, standards or specifications exceeding those applicable to Comparable Controlled Access Highways or comparable structures.

8.16 Concession Highway Encumbrances

- 8.16.1 The Concessionaire will perform the Operations such that:
- 8.16.1.1 the Concessionaire complies with and 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 Operations performed by or on behalf of the Concessionaire are performed 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 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 Site or the Adjacent Areas or any part thereof. If the Project Facilities, the Site or the Adjacent Areas or any part thereof becomes subject to any Encumbrance which has not been consented to by the Province or BCTFA (as applicable), 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 15 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 Orders

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

8.16A.1.1 the Concessionaire complies with and performs all obligations under all Orders 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 Orders as such; and

8.16A.1.2 all Operations performed by or on behalf of the Concessionaire are performed in a manner which does not breach any of the provisions of the Orders.

8.16A.2 The Concessionaire will obtain all New Orders necessary for carrying out the Operations, for which it does not require assistance from the Province in obtaining, and all renewals, extensions, modifications, substitutions or replacements of or for existing Orders, for which it does not require assistance from the Province in obtaining, as may be required from time to time in connection with the Operations. Where the Concessionaire reasonably requires the assistance of the Province or BCTFA in obtaining such New Orders or renewals, extensions, modifications, substitutions or replacements of existing Orders, each of the Province and BCTFA, at the cost of the Concessionaire, will provide such assistance as is reasonably requested by the Concessionaire and which it is reasonably able to provide. The Concessionaire, notwithstanding any such assistance provided by the Province or BCTFA, will be responsible for and will indemnify and hold the Province and BCTFA harmless in respect of all costs of obtaining, renewing, extending and complying with any New Orders necessary for carrying out the Operations or existing Orders whether obtained, renewed or extended in the name of the Concessionaire (or any of its 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 contractors or subcontractors of any tier) and the Province or BCTFA.

8.17 Liens

8.17.1 The Concessionaire will notify the Province and BCTFA of all liens affecting the Project Facilities, the Site and the Adjacent Areas 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 cause all liens affecting the Project Facilities, the Site and the Adjacent Areas or any part thereof arising out of the conduct of the Operations by the Concessionaire or any of its contractors or subcontractors of any tier to be vacated and, if registered, to be removed within 15 days (or such longer period as may reasonably be required in the circumstances provided the Concessionaire is proceeding with all due diligence to vacate or remove the same) following the date on which the Concessionaire becomes aware of such lien. 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 contractors and subcontractors of any tier 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 or in respect of the Project Facilities, the Site and the Adjacent Areas and will provide evidence of such compliance to the Province upon request.

8.18 Environmental Matters

- 8.18.1 The Concessionaire on the one hand and each of the Province and BCTFA on the other hand represent and warrant to the other that it is not, and in the case of the Concessionaire, none of its Partners or their Shareholders or other Affiliates is, currently subject to any charge, 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 on the one hand and the Province and BCTFA on the other hand acknowledge that the other has relied on this representation and warranty in entering into this Agreement.
- 8.18.2 Without prejudice to Section 8.18.12 and except as provided in Section 8.18.1 or evidenced by the Disclosed Data, 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 Site or the Adjacent Areas, and that, prior to the execution of this Agreement, the Concessionaire has been afforded an opportunity to perform and has performed such investigations of the Project Facilities, the Site and the Adjacent Areas as it considers appropriate and is satisfied with respect to all such investigations and the environmental condition of the Project Facilities, the Site and the Adjacent Areas to the extent that such condition could be ascertained by the Concessionaire through the exercise of reasonable due diligence. The Concessionaire waives the requirement, if any, for the Province or BCTFA to provide a site profile for the Project Facilities, the Site or the Adjacent Areas 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 Operations the Concessionaire will not use or permit to be used the Project Facilities, 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.

- 8.18.4 Subject to the obligations of the Province or BCTFA or as otherwise provided for under Sections 8.18.11, 8.18.12 and 8.18.15, the Concessionaire will deal with all Hazardous Substances on the Project Facilities, the Site and the Adjacent Areas in accordance with all Environmental Laws 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 in respect of the Project Facilities, the Site and the Adjacent Areas and the conduct of the Operations.
- 8.18.5 Without prejudice to Section 8.18.4, in the course of carrying out the Operations 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 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.
- 8.18.6 The Concessionaire on the one hand and the Ministry and BCTFA on the other hand will promptly provide the other 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 its possession at any time whether before or after the Commencement Date, except that the obligations of the Province and BCTFA to provide such materials are subject to restrictions contained in the Freedom of Information and Protection of Privacy Act and any requirements to maintain confidentiality in respect of such materials. 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 and the same would be required under Environmental Laws to be remediated, the Province or BCTFA may require the Concessionaire at its cost 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 Operations, which includes any additional investigations recommended by the environmental consultant. The Concessionaire will, at the request of the Province or BCTFA from time to time, where there are reasonable grounds for making such request, and in any event 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 complied 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 but without personal liability, having made reasonable inquiry) no adverse environmental occurrence has taken place on or at or affecting the Project Facilities, the Site or the Adjacent Areas or any part thereof (or, if any such non-compliance or occurrence has taken place, providing full and complete particulars thereof and of the Concessionaire's response thereto 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 (collectively, the "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; 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 or 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 25.1.1 all Environmental Documents, all of which may be reviewed and inspected by the Province and BCTFA and their respective authorized representatives at any time.
- 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. 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 contractors or subcontractors of any tier to any Governmental Authority.
- 8.18.10 The Concessionaire will forthwith, and in any event within 24 hours of becoming aware of same (in the case of a matter referred to in Section 8.18.10.1) and within 48 hours of becoming aware of 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

of which it is aware that could contaminate the Project Facilities, the Site or the Adjacent Areas or any other lands in their vicinity or subject the Concessionaire, the Province or BCTFA 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 Operations or the Project Facilities, the Site or 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 Operations 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 upon becoming aware of any Release of any Hazardous Substance at or from the Project Facilities, the Site or the Adjacent Areas notify the relevant Governmental Authorities 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 On the Termination Date, or at any time if requested by BCTFA or the Province or by any other Governmental Authority pursuant to Environmental Laws, the Concessionaire will promptly at its own cost and in accordance with Environmental Laws 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 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, except to the extent that the same is Existing Contamination. Notwithstanding any other provision of this Agreement, the Province shall be responsible for effecting, at its own cost, all remediation of Existing Contamination, provided that it may issue instructions to the Concessionaire pursuant to Section 8.18.12. 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 its reputation or the Concession Highway or public safety is placed in any jeopardy by the requirement for any such remedial work, 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. 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. If any Laws and Regulations or Legal Requirements or any such instruction issued by the Province's Representative require the Concessionaire to perform remediation work as a result of Existing Contamination which would not otherwise be required to be performed by the Concessionaire under any provision of this Agreement other than this Section 8.18 [Environmental Matters], then such remediation work, to the extent arising from the Existing Contamination, will be deemed to be a Province Change and the provisions of Part 2 of Schedule 13 [Province Changes] will apply accordingly.
- 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, 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 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, provided that for greater certainty, the Province will be responsible for the costs of remediating any Existing Contamination which is Released by or on behalf of the Concessionaire in carrying out the Operations in accordance with this Agreement.
- 8.18.14 The Concessionaire's and the Province'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 provision(s) of this Agreement.
- 8.18.15 Notwithstanding any other provision of this Agreement, with the exception only of Hazardous Substances (other than Existing Contamination) brought onto, used at or Released at or from the Project Facilities, the Site or the Adjacent Areas during the Contract Period by the Concessionaire or any person for whom the Concessionaire is in law or under the terms of this Agreement responsible, the Concessionaire shall not be responsible for, or have any liability with respect to the costs or otherwise of, remediating any Hazardous Substances or the Release of any Hazardous Substances (including any Existing Contamination or the Release of any Existing Contamination).

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 [Not Used];

9.1.1.2 [Not Used];

9.1.1.3 [Not Used];

9.1.1.4 “Notice of Project” means the notice of project described in the OHS Regulation;

9.1.1.5 “Prime Contractor” means a “prime contractor” as defined and described in the Workers Compensation Act and the OHS Regulation, respectively;

9.1.1.6 “Qualified Coordinator” means a person qualified within the contemplation of the Workers Compensation Act and the OHS Regulation to discharge the responsibilities of a “qualified coordinator” as described in the Workers Compensation Act and the OHS Regulation;

9.1.1.7 “Safety Program” means an occupational health and safety program as described in Section 9.4 [Health and Safety Program] of this Agreement; and

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

9.1.2 [Not Used]

9.2 Site Safety and Security

9.2.1 The Concessionaire will:

9.2.1.1 [Not Used];

9.2.1.2 at all times throughout the Contract Period have full regard for the safety of all persons (including Users of the Concession Highway) on the Project Facilities, the Site and the Adjacent Areas (whether lawfully or not) and will keep the Project Facilities, 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, in respect of the Project Facilities, the Site and the Adjacent Areas at all times throughout the Contract Period, take such measures as are reasonably required, including fencing where appropriate, to prevent the trespass and access onto the Project Facilities, the Site and the Adjacent Areas, respectively, of any persons not entitled to be there or of any creatures including wildlife and livestock.

9.3 Occupational Health and Safety

9.3.1 By entering into this Agreement, the Concessionaire agrees that it is the Prime Contractor for:

9.3.1.1 [Not Used];

9.3.1.2 the Project Facilities, the Site and the Adjacent Areas at all times throughout the Contract Period.

9.3.2 By not later than 30 days after the Commencement Date in the case of the matters referred to in Sections 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 OHS Regulation; 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 OHS Regulation.

9.4 Health and Safety Program

9.4.1 Notwithstanding any limitation in the OHS Regulation regarding the number of workers in any work force, the Concessionaire will prepare and maintain at all times throughout the Contract Period in respect of the Project Facilities, the Site and the Adjacent Areas, a formal health and safety program 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 OHS Regulation) and is satisfactory to the Province;

9.4.1.2 satisfies the requirements of section 3.3 of Part 3 of the OHS Regulation;

9.4.1.3 is designed to prevent injuries and occupational diseases within the contemplation of the Workers Compensation Act and the OHS Regulation; 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 OHS Regulation.

9.5 General

9.5.1 [Not Used]

- 9.5.2 The Concessionaire will at all times throughout the Contract Period in respect of the Project Facilities, the Site and the Adjacent Areas:
- 9.5.2.1 post the name of the Qualified Coordinator, and a site drawing showing the boundaries of the Project Facilities, the Site and the Adjacent Areas, with project layout, first aid locations, emergency transportation provisions and the evacuation marshalling points relating to the Project Facilities, the Site and the Adjacent Areas;
 - 9.5.2.2 implement and maintain the Safety Program;
 - 9.5.2.3 ensure a copy of the Safety Program, the written construction procedures designed to protect health and safety of workers at the Project Facilities, the Site and the Adjacent Areas, and the OHS Regulation are readily available at convenient locations within the Project Facilities, the Site and the Adjacent Areas;
 - 9.5.2.4 deliver and post any and all Notices of Project as may be required by the Workers Compensation Act and the OHS Regulation;
 - 9.5.2.5 when conditions or activities at any location or locations in the Project Facilities, the Site and the Adjacent Areas 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 Project Facilities, the Site and the Adjacent Areas and that the Qualified Coordinator alerts all workers to all reasonably foreseeable hazards to which they are likely to be exposed;
 - 9.5.2.6 immediately notify all employers, workers, suppliers and subcontractors and any other persons throughout the Project Facilities, the Site and the Adjacent Areas 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;
 - 9.5.2.7 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 Project Facilities, the Site and the Adjacent Areas;
 - 9.5.2.8 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 Operations is permitted to enter upon or otherwise allowed access (other than as a User) to any part or parts of the Project Facilities, the Site and the Adjacent Areas in respect of which there is for the time being any part of the Operations 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
- 9.5.2.9 be and fulfil or cause one of its Affiliates to be and fulfil all functions and duties of the Prime Contractor in compliance with all Laws and Regulations including the Workers Compensation Act and the OHS Regulation.
- 9.5.3 The Concessionaire will at all times in respect of the Project Facilities, the Site and the Adjacent Areas throughout the Contract Period:
- 9.5.3.1 ensure that the Qualified Coordinator is qualified under the Workers Compensation Act and the OHS Regulation, including by having a combination of training, education and experience;
- 9.5.3.2 observe and comply with, and ensure that the performance of the Operations and the Works (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 OHS Regulation;
- 9.5.3.3 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 OHS Regulation, are punctually paid as they become due;
- 9.5.3.4 be qualified to fulfil all functions and duties of the Prime Contractor as required under all Laws and Regulations including the Workers Compensation Act and the OHS Regulation;
- 9.5.3.5 establish and maintain a joint health and safety committee and ensure that that committee fulfils its functions under the Workers Compensation Act and the OHS Regulation;
- 9.5.3.6 ensure that the activities of employers, workers and other persons relating to occupational health and safety are coordinated;
- 9.5.3.7 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 OHS Regulation;
- 9.5.3.8 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
- 9.5.3.9 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:

- 9.5.3.9.1 notices which the Concessionaire is required to provide to the Workers' Compensation Board;
 - 9.5.3.9.2 summaries of remedial actions taken to reduce occupational health and safety hazards within the Project Facilities, the Site and the Adjacent Areas;
 - 9.5.3.9.3 directives and inspection reports issued by or through the Workers' Compensation Board in connection with the Project Facilities, the Site and the Adjacent Areas, the Project, the Works or the performance of the Operations;
 - 9.5.3.9.4 reports and investigations on incidents and accidents which are required by the Workers' Compensation Board or any other government agency under any Laws and Regulations relating to health and safety, including the Workers Compensation Act and the OHS Regulation, to be investigated;
 - 9.5.3.9.5 records, including minutes, of safety meetings; and
 - 9.5.3.9.6 evidence that instruction and health and safety orientation and training for workers within the Project Facilities, the Site and the Adjacent Areas is being conducted in accordance with any Laws and Regulations relating to health and safety, including the Workers Compensation Act and the OHS Regulation.
- 9.5.4 If the Workers' Compensation Board of British Columbia refuses to recognize or accept the Concessionaire, including by making a determination to that effect, at any time as the Prime Contractor, but recognizes or accepts, including by making a determination to that effect, the Phase 1 Section Contractor or the Contractor, Operator or any of the Concessionaire's other contractors or subcontractors of any tier, as the Prime Contractor, then the Concessionaire will not be considered to be in breach of this Agreement solely by reason of such refusal or determination by the Workers' Compensation Board, provided that and only to the extent that,
- 9.5.4.1 the Concessionaire has not failed to observe, abide by or comply with any term of this Section 9 [Health and Safety] or any other provision of this Agreement;
 - 9.5.4.2 such refusal to recognize or accept, or other determination, of the Workers' Compensation Board was for a reason other than a failure by any person, including for greater certainty, by the Concessionaire, to discharge the duties as a Prime Contractor under the Workers Compensation Act or the OHS Regulation;
 - 9.5.4.3 the Concessionaire has not entered into a contract with any person, including the Phase 1 Section Contractor, the Operator or the Contractor or

any of the Concessionaire's other contractors or subcontractors of any tier, under which that person has agreed to be the Prime Contractor in connection with the Project or any part of the Project Facilities, the Site and the Adjacent Areas and, for greater certainty, nothing in this subsection prevents the Concessionaire from entering into such arrangements as are appropriate to fulfill its obligations as the Prime Contractor;

9.5.4.4 the Concessionaire indemnifies and holds the Province and BCTFA, and each of them, harmless in connection with any and all Losses or Claims, arising in connection with any acceptance, recognition or determination contemplated in Section 9.5.4, any failure contemplated under Section 9.5.4.1 and Section 9.5.4.2, or any contract contemplated under Section 9.5.4.3 (including for greater certainty, any assessments, levies, penalties, fees or fines assessed or charged against the Province or BCTFA based on the number of employees employed in relation to the Project, to the Phase 1 Section Works, or otherwise); and

9.5.4.5 the Concessionaire will make, do, execute and cause to be made, done and executed all further and other acts, deeds, instruments, agreements and assurances as the Province or BCTFA may require for the performance of the Prime Contractor obligations at all time and from time to time, throughout the Contract Period.

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 OHS Regulation, including being registered, in good standing and current in respect of all assessments, levies, penalties, fees and fines thereunder.

9.5A Coordination and Site Overlap with Phase 1 Section Contractor

The Parties acknowledge that in order for the Concessionaire to comply with its obligations under this Section 9 [Health and Safety], the Concessionaire has on or before the Commencement Date entered into a written agreement with Emil Anderson Construction (EAC) Inc., as one of the Phase 1 Section Contractors, and the Province (the "EAC Agreement"), on terms satisfactory to the Province in its sole discretion wherein the Concessionaire has been appointed the Prime Contractor for the Project Facilities, the Site and the Adjacent Areas notwithstanding that the Phase 1 Section Works have not been completed. The Concessionaire shall be solely responsible for, and shall assume all of, the costs and risks required to implement the EAC Agreement. The Concessionaire shall at all times comply with all terms of the EAC Agreement.

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 in connection with works and activities that may be undertaken and performed at any location or

locations on the Project Facilities, the Site and the Adjacent Areas, 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. Where such action is taken by the Province, the Concessionaire will be relieved of its obligations under Section 9.3 [Occupational Health and Safety], Section 9.4 [Health and Safety Program] and Section 9.5 [General] in respect of the assumption of the role of Prime Contractor as set out in those provisions, and the consequent duties imposed upon the Prime Contractor thereunder.

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 this Section 9.6.2 by the Concessionaire and its contractors and subcontractors of any tier, 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 fulfil 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 OHS Regulation, 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, including to 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 or the Adjacent Areas of, or any other interference with or affecting the Project Facilities, the Site or the Adjacent Areas or the vicinity of them or the Operations 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 or the Adjacent Areas of, or any other interference with or affecting the Project Facilities, the Site or the Adjacent Areas or the vicinity of them or the Operations 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 and BCTFA under Section 8 [Land] to permit the Concessionaire to have access to the Site and the Adjacent Areas, nor a breach of any other obligation or representation or warranty of the Province or BCTFA under this Agreement.
- 10.1.2 [Not Used]
- 10.1.3 The management of any Protest Action and/or Trespassers will be the responsibility of the Concessionaire. If any part of the Project Facilities, the Site or the Adjacent Areas 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 a material adverse effect on the conduct of the Operations that the Concessionaire is unable to mitigate. Following such request, the Province will notify the Concessionaire whether the Province is lawfully able to provide any assistance in relation to the removal of the 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. Where the Concessionaire is given assistance by the Province in accordance with this Section 10.1.4, then 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.

10.1.5 If at any time:

10.1.5.1 a Protest Action occurs which prevents the Concessionaire from proceeding with the Works or any material element of the Works in accordance with the Works Schedule or otherwise prevents the Concessionaire from carrying on any material element of the Operations; and

10.1.5.2 [Not Used];

10.1.5.3 the Concessionaire is unable to mitigate the effect of such prevention of the Concessionaire's ability to proceed with the Works in accordance with the Works Schedule or otherwise of the Concessionaire's performance of the Operations without incurring costs in addition to those it would otherwise have incurred in performing its obligations under this Agreement,

and provided that the Protest Action does not relate to and is not attributable to: (i) any failure of the Concessionaire to perform the Operations in accordance with the requirements of this Agreement, or (ii) any other act or omission of the Concessionaire or any of its agents, contractors or subcontractors of any tier or employees of any of them (other than the performance of the Operations in the normal course in accordance with the requirements of this Agreement), **DELETED**. For greater certainty, the provisions of this Section do not limit the obligation of the Concessionaire to implement and comply with any instructions given by the Province pursuant to Section 12.6.6 in the circumstances described in that Section.

10.1.6 If an event described in Section 10.1.5 has occurred and continues for a period of more than **DELETED**.

10.2 Concessionaire to Bear Loss

10.2.1 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:

10.2.1.1 the Concessionaire, its agents, contractors or subcontractors of any tier or employees of any of them; or

10.2.1.2 the Province to the extent that such Loss arises:

(a) from any interference, obstruction or other hindrance to the Project including the presence of such Protester and/or Trespasser on the Project Facilities, the Site or the Adjacent Areas; or

(b) from any damage caused to the Project Facilities;

and where such Loss arises:

(c) as a result of any measures taken by or on behalf of or at the request or direction of the Concessionaire; and/or

(d) as a result of the failure by the Concessionaire to take or cause to be taken measures which should have been taken,

which is caused by any Protester and/or Trespasser, including any damage to property, any personal injury or death, and any loss of income **DELETED**.

10.2.2 For greater certainty, nothing in Section 10.2.1 will affect:

10.2.2.1 any right of the Province to make or recover any Claim against any Protester or Trespasser for public nuisance or for damage suffered by the Province, its agents, contractors or subcontractors of any tier or any employees of any of them; or

10.2.2.2 any right of the Concessionaire to make or recover any Claim against any Protester or Trespasser for damage suffered by the Concessionaire, its agents, contractors or subcontractors of any tier or any employees of any of them.

10.3 No Payments to Protesters

The Concessionaire will not give directly or indirectly to any Protester or Trespasser any 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

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

Where the Design and Construction Output Specifications and all other applicable Technical Requirements refer to the quality control, assurance requirements and acceptance of the work involving “the Ministry” or “Ministry Representative” as generally applied to conventional design / bid / build construction contracts, these references will be modified to be consistent with the terms and conditions in this Agreement in respect of quality control, assurance, audit and acceptance of the work by “the Province” or “the Province’s Representative”.

11.2 Design and Certification Procedure

11.2.1 Within 30 days following the Commencement Date the Concessionaire will submit, for review by the Province's Representative in accordance with the Review Procedure, a proposed Design Management Plan which includes the components and information (including with respect to submissions of drawings and other Design Data and design reviews, meetings, audits and progress reports) required by, and otherwise complies with the requirements for such plan set forth in, the Design and Construction Output Specifications. The Concessionaire will implement and comply with the Design Management Plan to which there is no objection by the Province’s Representative in accordance with the Review Procedure in connection with all Design Data prepared or adopted in connection with the Works and any other works carried out as part of the Operations.

11.2.2 The Concessionaire will ensure that:

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

11.2.2.2 without prejudice to Section 11.2.2.1, where in accordance with paragraph 4 of Section A of Part 3 of Schedule 5 [Design and Certification Procedure] Design Data is prepared by a Professional Engineer employed by the Contractor, the Contractor ensures that such Design Data is prepared in accordance with the Design and Construction Output Specifications and the Concessionaire’s Design and Construction Requirements (subject to Section 11.4 [Concessionaire Changes] and Part 2 of Schedule 13 [Province Changes]) and complies with the Design Management Plan and the Design and Certification Procedure;

- 11.2.2.3 the Contractor undertakes all management, coordination and supervision necessary to properly perform the construction works necessary to complete, commission and test the Works; and
- 11.2.2.4 the Concessionaire undertakes all supervision, inspection and monitoring necessary to ensure that the design, construction, completion, commissioning and testing of the Works are properly performed.
- 11.2.3 The Concessionaire will ensure that all certification procedures referred to in the Design Management Plan and 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.
- 11.2.4 The Concessionaire will ensure that all review and checking procedures referred to in the Design Management Plan and the Design and Certification Procedure are complied with by the appropriate persons referred to therein, including the Checking Team, 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.
- 11.2.5 Without prejudice to Section 51.3 [Concessionaire Responsibility], any failure by any person referred to in the Design Management Plan and the Design and Certification Procedure, including the Design Team, the Designer, the Checking Team, the Audit Team, the Contractor and any independent team or engineer within the Designer, to fulfil the obligations required of them under the Design Management Plan and the Design and Certification Procedure will be a breach of the Concessionaire's obligations under this Agreement.
- 11.2.6 Design Data which is the subject of a Certificate that has been submitted to the Province's Representative in accordance with the Design Management Plan and 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 All Design Data and relevant Certificates in respect of the Works will be submitted for review in accordance with the provisions of the Review Procedure and all other checking and design review requirements under this Agreement will be satisfied in respect thereof. Relevant Certificates will include Design Certificates, Road Safety Audit Certificates and Alternative Proposal Certificates as appropriate under the Design and Certification Procedure.
- 11.3.2 The Concessionaire will not commence or permit the commencement of the construction of any part of the Works (including any Temporary Works) unless and until all Design Data and relevant Certificates required in respect of such part of the Works have been submitted for review in accordance with the Design and Certification Procedure and the Review Procedure.

- 11.3.3 Commencement by the Concessionaire of construction of any part of the Works otherwise in accordance with all other requirements of this Agreement after submission of but prior to completion of the review process under the Review Procedure in respect of the Design Data and relevant Certificates in respect of such part of the Works or the satisfaction of any other checking and design review requirements under this Agreement in respect thereof will not constitute a default on the part of the Concessionaire hereunder, provided that any such action will be taken at the sole risk of the Concessionaire and the Concessionaire will in any event remain responsible for complying with the outcome of such review process once it is completed and for the satisfaction of any such other checking and design review requirements and will carry out at its sole cost and expense any and all reconstruction, alterations, modifications or other remedial work to construction already completed necessary to comply with such act and satisfy such requirements.

11.4 Concessionaire Changes

- 11.4.1 If the Concessionaire proposes to vary or amend the design, quality or scope of the Works, including making additions, deletions, substitutions and/or variations in or to the Concessionaire's Design and Construction Requirements and/or making alterations in design which require a variation in or to the Concessionaire's Design and Construction Requirements, 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 or any such objection has been resolved (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, unless it is consented to by the Province's Representative as provided in Section 11.4.3, in any way qualify or relieve the Concessionaire of its primary responsibility to comply with, satisfy and perform the Design and 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 Total 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 Concessionaire's Design and Construction Requirements does not comply with and satisfy the Design and 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 Concessionaire's Design and Construction Requirements so that they comply with and satisfy the Design and Construction Output Specifications.
- 11.4.3 For greater certainty and notwithstanding any other provision of this Agreement (including Section 11.3.3 and 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 Design and 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.

- 11.4.4 If a departure from Design Data that has already been submitted and not objected to (or in respect of which any objection was resolved) pursuant to the Design and Certification Procedure and Review Procedure is required solely as a result of geological site conditions which were not known to and could not reasonably have been foreseen by the Concessionaire at the time the Design Data was submitted and not objected to, the review period for revised Design Data submitted in connection with the Concessionaire Change proposed by the Concessionaire with respect to such departure will be 10 Working Days.

11.5 Breaches

- 11.5.1 If the Concessionaire becomes aware (including by way of notice from the Province's Representative) of a breach 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 seven 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, an application for a Concessionaire Change.

- 11.5.2 The Province's Representative will deal with a submission pursuant to Section 11.5.1 above 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 (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 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 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 and upon reasonable prior notice to any site or workshop where materials are being manufactured for the Works for the purposes of general inspection auditing and of attending any test or investigation being carried out in respect of the Works;

11.7.2 the Province's Representative will have the right to attend regular site and other similar progress meetings (site meetings to be held not less frequently than every two weeks to review the status of all relevant matters, including hours of work and the timing of when various discrete components of the Works are to be carried out, progress of design work, planned tests and inspections, compliance with the Works Schedule, etc.) and the Concessionaire will give the Province's Representative timely notice of all 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 Operation to which the drawings, numbered appendices, specifications and schedules relate.

11.8 [Not Used]

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 and any contractors, consultants or other persons authorized by the Province or BCTFA will have unrestricted access at all reasonable times during normal working hours to view the Works at the Site and the Adjacent Areas on reasonable prior notice appropriate to the circumstances, provided that no notice will be required for the Province's Representative, staff and visitors to use any office and other facilities provided at the site for the Province's use; 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 and any contractors, consultants or other persons authorized by the Province or BCTFA will also have unrestricted access at all times to the Project Facilities, the Site and the Adjacent Areas:

11.9.1.1 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 that the Concessionaire has failed to comply with any of the requirements of this Agreement pertaining to the performance of the Works, 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 of the Concessionaire and the performance of the Works until such time as the Concessionaire shall have demonstrated to the satisfaction of the Province that it is capable of performing and will perform all of its obligations under this Agreement. The Concessionaire will compensate the Province for costs incurred by the Province as a result of such increased level of monitoring (including the relevant administrative expenses of the Province, including an appropriate sum in respect of general staff costs and overheads) 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.

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 activities 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 remove any relevant 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.

11.9.4 The Province's Representative will have the right at any time prior to the issue of a Final Completion Certificate, to request the Concessionaire to open up and inspect any part or parts of the Works where the Province's Representative (following consultation with the Concessionaire) reasonably believes that such part or parts of the Works 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 with a view to avoiding or, if unavoidable, minimizing any delay caused to the conduct of the remaining Works.

11.9.5 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 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 costs 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.

11.9.6 [Not Used]

11.9.7 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.

11.10 CP Rail Works

The Concessionaire will be responsible for liaising with CP Rail from time to time as necessary to identify the CP Rail Works and the specifications therefor and to establish mutually agreed schedules (the "CP Rail Works Schedules") for carrying out the CP Rail Works. Where the Concessionaire reasonably requires the Province's assistance in complying with its obligations under the CP Rail Agreement, the Province, at the cost of the Concessionaire, will provide such assistance as is reasonably requested by the Concessionaire and which the Province is

reasonably able to provide. The Concessionaire, notwithstanding any such assistance provided by the Province or BCTFA, will be responsible for and will indemnify and hold the Province and BCTFA harmless in respect of all costs of complying with its obligations under the Existing CP Rail Agreements and the CP Rail Agreement. The Concessionaire will provide the Province with copies of the CP Rail Works Schedules as settled and agreed between the Concessionaire and CP Rail from time to time, together with written confirmation of CP Rail's agreement thereto. For greater certainty, the Concessionaire will ensure that all CP Rail Works are completed in accordance with the applicable provisions of the Design and Construction Output Specifications, the Concessionaire's Design and Construction Requirements and all other Technical Requirements. The Concessionaire acknowledges that, in accordance with the terms of the CP Rail Agreement, certain CP Rail Works are required to or may be carried out by CP Rail's employees or contractors rather than by the Concessionaire or its contractors or subcontractors. For greater certainty, the Concessionaire will be responsible for all costs incurred in connection with the CP Rail Works, including any reimbursement or compensation payable to CP Rail in respect of CP Rail Works carried out by its employees and contractors as aforesaid.

12. SCHEDULE

12.1 Project Schedule

The Project Schedule sets out the schedule in accordance with which the Concessionaire is to carry out the design and construction of the Works.

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 Works does not materially conform with the Project Schedule then, within a reasonable time not to exceed 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 or the reasons why it does not agree that there is material non-conformity; and

12.2.1.2 if the Concessionaire agrees that there is material non-conformity (or following Dispute Resolution which has established that there is material non-conformity), 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 Design and Construction Output Specifications and the Concessionaire's Design and Construction Requirements;

12.2.1.2.2 provide for the Works to be commenced and pursued diligently to Final 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 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 Works 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 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 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 Works does not materially conform with the Works Schedule then, prior to making any such amendment or within 15 days of being so required by the Province's Representative or (if earlier) becoming aware of such material 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 or that it disagrees that there is material non-conformity; and

12.3.2.2 unless it disagrees that there is material non-conformity, 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.
- 12.3.5 The Concessionaire shall provide an updated Works Schedule on a monthly basis, reflecting progress to date, comparison to previous Works Schedule, and a forecast to Completion.

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 Design and Construction Output Specifications and the Concessionaire's Design and 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 Works to be commenced and pursued diligently to Final Completion in accordance with Section 12.5 [Achievement of Completion].

12.5 Achievement of Completion

- 12.5.1 The Concessionaire will commence the Works promptly following the Commencement Date and pursue the Works diligently with a view to 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 each of the construction milestone events identified in the Project Schedule is achieved at or before the time specified therefor in the Project Schedule;
 - 12.5.1.2 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
 - 12.5.1.3 completion of the Works to such standard as would require the issue of the Final Completion Certificate occurs as soon as practicable after the Substantial Completion Date and in any event on or before the Scheduled Final 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 are completed to such standard as would require the issue of the Final Completion Certificate by no later than the Final 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 it foresees an event occurring which will or might reasonably be expected to cause material delay to or to materially impede completion of the Works or any element of the Works by the date set out in the Project Schedule for such completion or by any applicable date set forth in Section 12.5.1 or, if the same is not foreseen by the Concessionaire, as soon as it becomes aware of such event but in any case within seven days of such event becoming apparent to the Concessionaire. Thereafter, but in any event not later than 10 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 including the extent to which achievement of the Substantial Completion Date or the Final Completion Date referred to in Section 12.5.1 or of the Substantial Completion Longstop Date is likely to be affected by the delay or impediment; and
 - 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 inspections and meetings; and

- 12.6.2.3 promptly take all steps necessary and consistent with Good Industry Practice to minimize the delay to completion of the Works.
- 12.6.3 If the Concessionaire has failed to comply with the requirements as to the giving of notice 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 the period of any delay in the giving of such notice will not at any time be taken into account if 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 Where the Concessionaire may have a claim for additional payment if completion of any part of the Works is delayed or impeded as a result of:
- 12.6.5.1 an event of Eligible Force Majeure resulting in uninsured rectification works referred to in Section 37.4.4, the provisions of Section 37.4.4 will apply;
 - 12.6.5.2 a Province Change, the provisions of Part 2 of Schedule 13 [Province Changes] will apply; or
 - 12.6.5.3 a Compensation Event, the provisions of Part 5 of Schedule 13 [Compensation Events] will apply.

For greater certainty, the Concessionaire will have no claim against the Province for any additional payment as a result of any delay or impediment which is not an event referred to in Sections 12.6.5.1, 12.6.5.2 or 12.6.5.3 above, and any such claim will in any event be subject to the provisions of Section 12.6.3.

- 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, the Scheduled Substantial Completion Date, Substantial Completion Longstop Date, Scheduled Final Completion Date and Final Completion Longstop Date will, as applicable depending on the part or parts of the Works affected by the delay or impediment, 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 possible to do so, will implement and comply with any instructions given by the Province's Representative to accelerate construction or take other 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 (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 (but not in respect of any Revenue Loss directly resulting from compliance with such instructions) **DELETED**.

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 any date referred to in Section 12.6.6 as a result of an event referred to in that Section, then subject to:

12.6.7.1 the Concessionaire complying with the requirements of Section 12.6.1 in respect of any such notice as therein mentioned;

12.6.7.2 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 to completion of the Works; and

12.6.7.3 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 relevant part of the Works (the "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 matter 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 of each of the Scheduled Substantial Completion Date, the Substantial Completion Longstop Date and the Scheduled Final Completion Date, as applicable.

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 Operations 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 is greater than it would otherwise have been;

12.6.8.2 whether (and if so to what extent) any events for which the Concessionaire is responsible pursuant to this Agreement or other failures to conduct the Operations in accordance with this Agreement have contributed to the period of the delay; and

- 12.6.8.3 (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:
- 12.6.9.1 the period (if any) which reflects the impact of the event on the timing of the completion of the Works being greater than it would otherwise have been;
- 12.6.9.2 the period which reflects the contribution to the period of delay resulting from any events for which the Concessionaire is responsible or other failures to conduct the Operations in accordance with this Agreement; and/or (as the case may be)
- 12.6.9.3 the period by which the period of delay would have been reduced by such mitigation referred to in Section 12.6.8.3,
- 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 agree that they have, pursuant to the Independent Certifier Contract, appointed the Independent Certifier for the purposes of this Agreement.

13.1A.2 Role of Independent Certifier

- (a) The general role, obligations and functions of the Independent Certifier are described in Part 9 of Schedule 5 [Form of Independent Certifier Contract].
- (b) The Province and the Concessionaire are entitled to attend and participate in all meetings attended by the Independent Certifier.

13.1A.3 Changes in Terms of Appointment

- (a) Neither the Province nor the Concessionaire will without the other's prior approval (not to be unreasonably withheld or delayed):
- (i) waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Independent Certifier; or

- (ii) vary the terms of the Independent Certifier Contract or the services performed or to be performed by the Independent Certifier.
- (b) 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 shall perform services that relate to matters in connection with the Federal Cost Contribution Agreement and 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 and the Concessionaire 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

- (a) 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.

- (b) In the event the Province and the Concessionaire fail to agree upon either the identity and terms of a replacement Independent Certifier within seven days of the original Independent Certifier's appointment being terminated, then a replacement Independent Certifier will be chosen as follows:
- (i) each of the Province and the Concessionaire will within seven 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;
 - (ii) 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
 - (iii) 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.

13.1A.8 Independence and Impartiality

The Independent Certifier will act fully independently and impartially and to the highest professional standards in fulfilling its duties and functions.

13.1 Substantial Completion Certificate

- 13.1.1 The Concessionaire will issue to the Independent Certifier and the Province's Representative a notice at least 15 Working Days but no more than 30 Working Days prior to the date upon which the Concessionaire expects the Works will be Substantially Completed, informing them of such anticipated date. 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 five 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.
- 13.1.2 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, as soon as reasonably practicable and not more than 10 Working Days after receipt of such notice, an inspection of the Works.

- 13.1.3 The Province's Representative and the Concessionaire will cause the Independent Certifier, as soon as reasonably practicable and not more than 20 Working Days after commencement of such inspection, to either:
- 13.1.3.1 issue a Substantial Completion Certificate to the Province and the Concessionaire; or
 - 13.1.3.2 notify the Concessionaire and the Province's Representative of its decision not to issue a Substantial Completion Certificate and state the reasons for such decision.
- 13.1.4 The Independent Certifier will refuse to issue a Substantial Completion Certificate only if:
- 13.1.4.1 the Works (including any Off-Site Facilities comprised therein or relating thereto) have not been Substantially Completed in accordance with the Design and Construction Output Specifications and the Concessionaire's Design and Construction Requirements;
 - 13.1.4.2 there has been non-compliance in any material respect with the Design and Certification Procedure or any of the Technical Requirements or non-compliance with any Laws and Regulations or Legal Requirements which in either case has not been rectified;
 - 13.1.4.3 evidence of compliance with Section 20.1 [Insurance Cover] has not been provided to the Province; or
 - 13.1.4.4 any other conditions or requirements under this Agreement (including any conditions or requirements set forth in the definition of "Substantial Completion" in Section 1 of Schedule 1 [Definitions and Interpretation]) to the achievement of Substantial Completion have not been satisfied or complied with in respect of the Works.
- 13.1.5 In the event of service of a notice by the Independent Certifier under Section 13.1.3.2, the Concessionaire will issue to the Independent Certifier and the Province's Representative a notice not less than five Working Days but no 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 Substantial Completion Certificate notifying them accordingly. Upon the Concessionaire notifying the Independent Certifier and the Province's Representative that such further works or other measures necessary or appropriate as aforesaid have been completed, 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 such further works or measures and the provisions of Sections 13.1.3 and 13.1.4 and this Section 13.1.5 will thereafter apply to such notice *mutatis mutandis*.

13.2 Final Completion Certificate

- 13.2.1 Notwithstanding the issue of a Substantial Completion Certificate, the Concessionaire will promptly Finally Complete all outstanding Works as soon as practicable and in any

event within 200 days (or such longer period as may be determined by the Province's Representative, acting reasonably) following the issue of the Substantial Completion Certificate.

- 13.2.2 The Concessionaire will issue to the Independent Certifier and the Province's Representative a notice notifying them at least 15 Working Days but no more than 30 Working Days prior to the date upon which the Concessionaire expects the Works to be Finally Completed. If the Concessionaire has at any time reason to believe that the said date expected for Final Completion as aforesaid will be delayed by more than five 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 Final Completion as aforesaid.
- 13.2.3 Upon the Concessionaire notifying the Independent Certifier and the Province's Representative that Final Completion as aforesaid has occurred and subject to the delivery to the Independent Certifier and the Province's Representative of a Concessionaire's Final 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.
- 13.2.4 The Province's Representative and the Concessionaire will cause the Independent Certifier, within 20 Working Days of the commencement of such inspection, to either:
 - 13.2.4.1 issue a Final Completion Certificate to the Province and the Concessionaire; or
 - 13.2.4.2 notify the Concessionaire and the Province's Representative of its decision not to issue a Final Completion Certificate and state the reasons for such decision.
- 13.2.5 The Independent Certifier will refuse to issue a Final Completion Certificate only if:
 - 13.2.5.1 the Works (including any Off-Site Facilities comprised therein or relating thereto) have not been Finally Completed in accordance with the Design and Construction Output Specifications and the Concessionaire's Design and Construction Requirements;
 - 13.2.5.2 there has been non-compliance in any material respect with the Design and Certification Procedure or any of the Technical Requirements or non-compliance with any Laws and Regulations or Legal Requirements which in either case has not been rectified; or
 - 13.2.5.3 any other conditions or requirements under this Agreement (including any conditions or requirements set forth in the definition of "Final Completion" in Section 1 of Schedule 1 [Definitions and Interpretation]) to the achievement of Final Completion have not been satisfied or complied with in respect of the Works.

- 13.2.6 In the event of service of a notice by the Independent Certifier under Section 13.2.4.2, the Concessionaire will issue to the Independent Certifier and the Province's Representative a notice not less than five Working Days but no 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 Final Completion Certificate notifying them accordingly. Upon the Concessionaire notifying the Independent Certifier and the Province's Representative that such further works or other measures necessary or appropriate as aforesaid have been completed, 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 such further works or measures and the provisions of Sections 13.2.4 and 13.2.5 and this Section 13.2.6 will thereafter apply to such notice *mutatis mutandis*.

13.2A Opinion of Province'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 relevant Substantial Completion Certificate or Final Completion Certificate (as the case may be) pursuant to Section 13.1.3 or 13.2.4 (as the case may be) with respect to the part of the Works referred to in such notice, provide the Independent Certifier and the Concessionaire with the Province's Representative's submissions as to whether the conditions for issuance of the relevant Substantial Completion Certificate or Final Completion Certificate have been satisfied and, if applicable, any reasons as to why the Province's Representative considers that the relevant Substantial Completion Certificate or Final Completion Certificate should not be issued, and the Independent Certifier will consider such submissions in determining whether to issue the relevant Substantial Completion Certificate or Final Completion Certificate.
- 13.2A.2 The Concessionaire's Representative, the Province's Representative and/or any contractors or consultants retained by either of them may participate in any inspection carried out by the Independent Certifier pursuant to Section 13.1 [Substantial Completion Certificate] or Section 13.2 [Final Completion Certificate].

13.2B Saving

The issue of the Substantial Completion Certificate or Final Completion Certificate will be without prejudice to and will not in any way limit:

- 13.2B.1 the obligation of the Concessionaire to design and construct the Works and to operate, maintain and rehabilitate the Project Facilities, the Site and the Adjacent Areas subject to and in accordance with this Agreement;
- 13.2B.2 any warranties given by the Concessionaire under this Agreement; and
- 13.2B.3 Section 13.3.1.3.

13.3 [Not Used]

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 Final Completion Certificate in accordance with the terms of Section 13.1 [Substantial Completion Certificate] or Section 13.2 [Final 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, including Schedule 16 [Disputes Resolution Procedure], if the Independent Certifier has issued a Substantial Completion Certificate or Final Completion Certificate and the Province's Representative has referred a Dispute in respect thereof for resolution under the Dispute Resolution Procedure pursuant to Section 13.4.1, then, other than as provided in Section 13.4.3, the Substantial Completion Certificate or Final Completion Certificate, as the case may be, will be deemed not to have been issued unless it is determined in accordance with the Disputes Resolution Procedure that it was properly issued by the Independent Certifier in accordance with the provisions of Section 13.1 [Substantial Completion Certificate] or Section 13.2 [Final Completion Certificate], as applicable.
- 13.4.3 If the Independent Certifier has issued a Substantial Completion Certificate and the Province's Representative has initiated a Dispute in accordance with Section 13.4.1, for the purposes of Section 32.1 [Total Performance Payment] and the provisions of Schedule 10 [Payments], the Substantial Completion Certificate shall be deemed to have been issued. In the event that it is subsequently determined that the Substantial Completion Certificate was not properly issued, the Province's costs incurred in resolving the Dispute and in connection with the rectification of any deficiencies resulting in the issue of the Substantial Completion Certificate (including, without limitation, any overpayment of ESP Performance Payments) will be due and owing to the Province and may be deducted from the next forthcoming Monthly ESP Performance Payment(s).

14. OPERATION, MAINTENANCE AND REHABILITATION

14.1 Operation, Maintenance and Rehabilitation

- 14.1.1 Except to the extent that it is prohibited from so doing by reason of a breach by the Province and BCTFA of their obligations under Section 8.1 [Access for Concessionaire], 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&R Requirements) and in such a manner as to comply with and ensure satisfaction of the O,M&R Output Specifications and all other applicable Technical Requirements.
- 14.1.1A Notwithstanding Section 14.1.1 but without prejudice to Section 14.1.2, it is acknowledged that the Concessionaire will be responsible for performing the operation, maintenance and rehabilitation activities required to be performed on the Phase 1 Section prior to the completion of the Phase 1 Section Works only to the extent such activities are not otherwise required to be performed by the Phase 1 Section Contractor under the terms of the Phase 1 Section Contract.

14.1.2 Prior to the completion of the Phase 1 Section Works, the Concessionaire will consult and coordinate its activities with the Phase 1 Section Contractor and will carry out its activities pursuant to this Agreement (including with respect to the Works) so as not to prevent or unnecessarily hinder the Phase 1 Section Contractor from keeping the Phase 1 Section open for public use and performing its obligations under the Phase 1 Section Contract and so that, to the greatest extent possible, the activities of the Phase 1 Section Contractor under the Phase 1 Section Contract and the activities of the Concessionaire under this Agreement may be conducted in a coordinated and efficient manner. The Province will use commercially reasonable efforts to cause the Phase 1 Section Contractor to consult and coordinate its activities with 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 the 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 Phase 1 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, 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 Phase 1 Section Contract or any exercise of rights (whether proper or improper) or default by the Phase 1 Section Contractor thereunder. In the event of any disagreement or dispute between the Concessionaire and the Phase 1 Section Contractor with respect to the coordination of their respective activities under this Agreement and the Phase 1 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 the Disputes Resolution Procedure.

14.2 O,M&R 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&R Requirements (as previously varied in accordance with this Section 14.2 [O,M&R 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]) or if such objection is resolved, then the O,M&R Requirements as so varied will, subject to Section 14.2.2, be the O,M&R 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 or if such objection is resolved. A revision to or substitution for the O,M&R 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&R 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 Total Performance Payment will be made as a consequence of implementation of a revision to or substitution for the O,M&R 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&R Requirements does not comply with and satisfy the O,M&R 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&R Requirements so that they comply with and satisfy the O,M&R 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&R Output Specifications and the O,M&R 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:
- 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;
 - 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 trial 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 trial will be conducted in accordance with the provisions of Section 14.9 [Trials]; or
 - 14.4.1.2.4 without prejudice to Sections 14.4.1.2.1 and 14.4.1.2.2, to construct, operate, manage, maintain, repair, rehabilitate or reconstruct any existing or new vehicle inspection and weigh

stations on the Concession Highway and access lanes or roads allowing trucks and other vehicles to travel from the Concession Highway to such existing and new stations and to return to the Concession Highway, provided that the Province or BCTFA (as the case may be) in exercising such right will use reasonable efforts to minimize physical disruption to the operation of the Concession Highway or physical damage to the Concession Highway;

- 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 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 during 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 under existing Laws and Regulations, 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; and
 - 14.4.1.4 the Phase 1 Section Contractor and its agents or contractors 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 prior to the completion of the Phase 1 Section Works to perform its obligations and exercise its rights under the Phase 1 Section Contract.
- 14.4.2 Subject to Section 8.1 [Access for Concessionaire], the Concessionaire will ensure that all Relevant Authorities (including Utility Suppliers) have 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 Requirement and to exercise any right or power 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 Requirement 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], the Concessionaire will also ensure that the Province, BCTFA and any other Relevant Authorities are permitted 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 Accesses and Connecting Roads for which the Province is the highway authority at all reasonable times throughout the Contract Period but only 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 Accesses and Connecting Roads and will not cause any physical damage to the Accesses and Connecting Roads. In the case of Accesses and 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.

- 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.
- 14.4.5 The Province will use commercially reasonable efforts to ensure that contractors, consultants or other persons authorized solely by the Province to have access to the Project Facilities, the Site or the Adjacent Areas will not interfere with, disrupt or delay the carrying out of the Works or the performance of the Operations. For greater certainty, the Province's obligation under this Section 14.4.5 does not apply to persons who are jointly authorized by the Province and the Concessionaire to have access to the Project Facilities, the Site or the Adjacent Areas.

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 Part 1 of Schedule 17 [General Principles] and Part 2 of Schedule 17 [Operations, Emergencies and Traffic Management], and the Parties 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 a Party 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 Proposal; and
- 14.6.3 a Concessionaire's Change Certificate being deemed a reference to an Alternative Proposal Certificate.

14.7 Unstable Slope Mitigation Program

- 14.7.1 The Concessionaire will comply with the provisions of this Section 14.7 [Unstable Slope Mitigation Program] and with all other requirements contained in the O,M&R Output Specifications, the O,M&R Requirements and the other Technical Requirements, including all requirements with respect to monitoring activities, hazard assessment, maintenance of records, submission of reports and giving of notifications, in respect of slope mitigation and related matters.
- 14.7.2 Within 60 days following the Commencement Date the Concessionaire will submit to the Province's Representative, in accordance with the Review Procedure, a proposed five-year Unstable Slope Mitigation Program for slope mitigation work with respect to the Project Facilities, the Site and the Adjacent Areas and other lands in the vicinity thereof which complies with the requirements for such program set out in the O,M&R Output Specifications and the O,M&R Requirements. Not less than 60 days prior to the commencement of the second and each subsequent Contract Year, the Concessionaire will submit to the Province's Representative, in accordance with the Review Procedure, an update and extension of the Unstable Slope Mitigation Program proposed for the five-year period from the commencement of that Contract Year.
- 14.7.3 The Unstable Slope Mitigation Program will include a description of and schedule for activities to mitigate instability of slopes, including, but not limited to, scaling, trimming, selective blasting, excavating, regrading, installing ground support, anchoring, debris removal, erosion control or other activities to enhance stability to be carried out by the Concessionaire over the five-year period to which it applies together with cost estimates for carrying out such work, all in reasonable detail, with, for the period of two years following the completion of the work, separate cost estimates for both the portion of the Highway Improvement that the Concessionaire has Disturbed or will Disturb, and the balance of the Concession Highway, and all other information required to be included therein pursuant to the O,M&R Output Specifications and the O,M&R Requirements.
- 14.7.4 The Province's Representative may object to the initial Unstable Slope Mitigation Program or any proposed update and extension thereof only on the grounds that:
 - 14.7.4.1 it does not comply with Good Industry Practice and the applicable requirements set out in the O,M&R Output Specifications, the O,M&R Requirements and the other Technical Requirements;

- 14.7.4.2 any cost estimate provided therein is not a reasonable estimate of the cost of carrying out the relevant work;
 - 14.7.4.3 the scope of work provided for therein provides for work in excess of what rock slope stabilization work would be undertaken by the Province acting prudently in similar circumstances on similar highways or is not consistent with the Province's rock slope stabilization policy and program in effect from time to time;
 - 14.7.4.4 the scheduling of work provided for therein is not reasonable having regard for all the circumstances or is not consistent with the Province's rock slope stabilization policy and program in effect from time to time;
 - 14.7.4.5 it does not reflect an appropriate and reasonable scheduling and prioritization of work having regard to available hazard assessment information; or
 - 14.7.4.6 it does not comply with the requirements set out in Section 14.7.3.
- 14.7.5 The Concessionaire will comply with and carry out all unstable slope mitigation work (including with respect to lands in the vicinity of, but not comprised within, the Site and the Adjacent Areas) provided for in the Unstable Slope Mitigation Program as submitted, updated and extended from time to time without objection by the Province's Representative in accordance with the Review Procedure (including, for greater certainty, any work required to comply with any objection made by the Province on the ground set out in Section 14.7.4.3 which has been resolved by the Parties); provided that the Concessionaire will be relieved of its obligation to carry out any such work on lands not within the Site or the Adjacent Areas if and for so long as the Concessionaire, having used commercially reasonable efforts to do so, is unable to obtain from the owner of those lands the rights of entry or access to the lands that are necessary to carry out such work. The Concessionaire will immediately notify the Province's Representative if at any time the Concessionaire is denied entry or access to any lands not within the Site or the Adjacent Areas for purposes of carrying out any work required pursuant to the Unstable Slope Mitigation Program, and will cooperate fully with the Province in any attempt by the Province to obtain the necessary entry or access to such lands. The Province may carry out periodic scheduled and unscheduled audits of the Concessionaire's compliance with the Unstable Slope Mitigation Program.
- 14.7.6 Within 30 Working Days after the end of every second month, starting with the second full month following the Commencement Date, the Concessionaire will provide the Province with a certificate addressed to the Province and in form satisfactory to the Province's Representative (an "Unstable Slope Mitigation Work Compliance Certificate") signed and sealed by a duly qualified Professional Engineer describing in reasonable detail the unstable slope mitigation work carried out by the Concessionaire during that period and the costs incurred by the Concessionaire in carrying out that work, and certifying that such work has been carried out in accordance with and satisfies the requirements of the Unstable Slope Mitigation Program for that period and has been carried out in compliance with all applicable Technical Requirements. The Province will be responsible for all physical remediation work costs (and, for greater certainty, this includes engineering costs (including engineering costs relating to

design and supervision) incurred by the Concessionaire in implementing the Unstable Slope Mitigation Program but does not include any engineering costs associated with the development of the Unstable Slope Mitigation Program) actually incurred by the Concessionaire in complying with and carrying out all unstable slope mitigation work provided for in the Unstable Slope Mitigation Program (except for unstable slope mitigation work on slopes that have been Disturbed by the Concessionaire for the purpose of any construction work or other work carried out in performing the Operations that occur during the period of two years following the completion of the work), but only to the extent such incurred costs are equal to or less than the cost estimates contained in the Unstable Slope Mitigation Program for the balance of the Concession Highway. The Province will reimburse the Concessionaire for such costs within 20 Working Days of receipt by the Province of each Unstable Slope Mitigation Work Compliance Certificate. The Concessionaire shall be responsible for all costs for unstable slope mitigation work on those slopes that have been Disturbed by the Concessionaire for the purpose of any construction work or other work carried out in performing the Operations that occur during the period of two years following the completion of the work.

14.8 Landslides

14.8.1 Subject to Sections 14.8.2, 14.8.3 and 14.8.4, the Concessionaire, at its expense, will be responsible for the removal of debris and all other clean up work in respect of, and for repairing any damage caused by, Landslides affecting the Project Facilities, the Site or the Adjacent Areas in accordance with and to the standards provided for in the O,M&R Output Specifications and the O,M&R Requirements.

14.8.2 For the purposes of this Section 14.8.2 and Section 14.8.3, the term “Landslide Repair Costs” means the costs (excluding in any event costs related to traffic management) of removing rocks, soil and debris and other clean up work and repairing, to the extent required to restore the Concession Highway to normal operating conditions in accordance with and to the standards provided for in the O,M&R Output Specifications and the O,M&R Requirements, damage to the Project Facilities, the Site and/or the Adjacent Areas caused by a Landslide (other than an Excluded Landslide as defined in Section 14.8.2A). The Province will by payment to the Concessionaire contribute towards the Landslide Repair Costs in connection with any one or more Landslides caused by or attributable to a single Event in accordance with the following Table:

Landslide Repair Costs	Concessionaire Share	Province Share
Applicable to the first \$25,000 (index linked)	100%	0%
Applicable to the next \$25,000 (index linked)	50%	50%
Applicable to the next \$25,000 (index linked)	25%	75%
Applicable to amounts over \$75,000 (index linked)	0%	100%

provided that the Province will have no obligation to contribute towards Landslide Repair Costs that exceed a reasonable estimate of the cost of carrying out the relevant work taking into account the Concessionaire’s general duty to mitigate such costs pursuant to Section 1.9 [General Duty to Mitigate] or that directly or indirectly result from or are attributable to any of the matters referred to in Section 14.8.5, and such Landslide Repair Costs will not be taken into account in determining the Qualifying

Landslide Repair Costs incurred by the Concessionaire in any Contract Year for purposes of Section 14.8.3. For greater certainty, the Concessionaire will be solely responsible for all costs of removing rocks, soil and debris and other clean up work and repairing damage caused by an Excluded Landslide.

14.8.2A For the purposes of this Section 14.8 [Landslides], the term “Excluded Landslide” means, subject to Section 14.8.2B, a Landslide:

14.8.2A.1 that originates along portions of the Project Facilities, the Site or the Adjacent Areas which have been Disturbed by the Concessionaire for the purpose of any construction work or other work including the construction of the Works carried out in performing the Operations at any time during the Contract Period;

14.8.2A.2 that occurs during the period of two years following substantial completion of such work and in the case of the construction of the Works, during the period of two years following issuance of the Substantial Completion Certificate; and

14.8.2A.3 for which the Disturbance is a reasonable factor in the causation of the Landslide.

14.8.2B If, during the time that the Concessionaire is carrying out any of the work referred to in Section 14.8.2A or during the two-year period referred to in Section 14.8.2A, the Province directs that work be undertaken by an independent third party (other than any contractor or subcontractor of any tier of the Concessionaire carrying out any of the work referred to in Section 14.8.2A), including any work which is undertaken by Emil Anderson Construction (EAC) Inc. under its Phase 1 Section Contract notwithstanding that the Concessionaire has entered into the EAC Agreement as set out in Section 9.5A, on any portion of the Project Facilities, the Site or the Adjacent Areas which have been Disturbed by the Concessionaire, then to the extent that any Landslide which occurs within the period of two years referred to in Section 14.8.2A is reasonably caused by the work undertaken by the independent third party such Landslide or portion thereof shall not be an Excluded Landslide.

14.8.2C Any dispute in relation to whether or not a Landslide is an Excluded Landslide for the purposes of this Section 14.8 shall be referred to the Disputes Resolution Procedure.

14.8.3 For purposes of this Section 14.8.3 the term “Qualifying Landslide Repair Costs” means Landslide Repair Costs in excess of \$25,000 (index linked) incurred by the Concessionaire in connection with any one or more Landslides caused by or attributable to a single Event. Without limiting the Province’s contribution obligations set out in the table in Section 14.8.2, if the Concessionaire incurs aggregate Qualifying Landslide Repair Costs in any Contract Year of \$75,000 (index linked), then the Province will bear all Landslide Repair Costs in connection with any subsequent Landslides occurring during that Contract Year.

14.8.4 Where:

14.8.4.1 the Province is obliged to contribute towards Landslide Repair Costs in connection with any one or more Landslides caused by or attributable to a

single Event pursuant to Section 14.8.2 and the total Landslide Repair Costs in connection with such Landslide(s) are reasonably estimated to exceed \$150,000 (index linked); or

- 14.8.4.2 the Province is obliged to bear all of the Landslide Repair Costs in connection with any Landslide pursuant to Section 14.8.3,

the Province may in its absolute and unfettered discretion determine who will carry out the rock, soil and debris removal, clean up and repair 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 as aforesaid 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, provided that no such Province Change will entitle the Concessionaire to compensation or relief in respect of any Revenue Loss relating to or resulting from any Landslide(s) to which this Section 14.8.4 applies). For greater certainty, the Concessionaire will not, by reason only of the Province exercising its discretion in accordance with this Section 14.8.4, be relieved of its obligation to pay its portion (if any) of Landslide Repair Costs, as determined by reference to the table in Section 14.8.2 and by reference to Section 14.8.3.

- 14.8.5 Provided that the Concessionaire has complied with all of its obligations under Section 14.7 [Unstable Slope Mitigation Program], and subject and without prejudice to the limitations on liability provided for in the Transportation Investment Act, the Province will indemnify and save harmless the Concessionaire against all Losses resulting from third party Claims for personal injury or death or loss of or damage to property caused by Landslides onto the Concession Highway; provided that the indemnity under this Section will not extend or apply to any Losses directly or indirectly resulting from or attributable to any of the following matters:

14.8.5.1 Excluded Landslides;

14.8.5.2 [Not Used];

14.8.5.3 negligence of the Concessionaire or any of its agents, contractors or subcontractors of any tier or employees of any of them in closing the Concession Highway or implementing the initial response to open the Concession Highway following any Landslide;

14.8.5.4 any other failure of the Concessionaire to design, construct, operate, maintain, repair and rehabilitate the Project Facilities, the Site and the Adjacent Areas in accordance with its obligations under this Agreement including, in accordance with the Unstable Slope Mitigation Program; or

14.8.5.5 any other act or omission of the Concessionaire or any of its agents, contractors or subcontractors of any tier or employees of any of them or the conduct of the Operations or any activity in connection therewith.

14.8A Snow Avalanches

- 14.8A.1 The Concessionaire will comply with all requirements contained in the O,M&R Output Specifications, the O,M&R Output Requirements and the other Technical Requirements, including the Snow Avalanche Program and all requirements with respect to monitoring activities, hazard assessment, maintenance of records, submission of reports and giving of notifications, in respect of avalanche control and related matters.
- 14.8A.2 The Concessionaire, at its expense, will be responsible for the removal of snow, ice, debris and all other clean up work in respect of, and subject to Sections 14.8A.3, 14.8A.4 and 14.8A.5, for repairing any damage caused by, Snow Avalanches affecting the Project Facilities, the Site or the Adjacent Areas in accordance with and to the standards provided for in the O,M&R Output Specifications and the O,M&R Requirements, including, without limitation, the Snow Avalanche Program. The Concessionaire will at all times during the Contract Period be solely responsible for all costs of removing snow, ice, debris and other clean up work for the entire Concession Highway.
- 14.8A.3 For the purposes of this Section 14.8A.3 and Section 14.8A.4 the term “Snow Avalanche Repair Costs” means the costs of repairing damage caused by a Snow Avalanche to the Project Facilities, the Site and/or the Adjacent Areas to the extent required to restore the Concession Highway to normal operating conditions in accordance with and to the standards provided for in the O,M&R Output Specifications and the O,M&R Requirements, but will not include any costs related to traffic management and the costs of removing snow, ice and debris and other clean up work. The Province will by payment to the Concessionaire contribute towards the Snow Avalanche Repair Costs in connection with any one or more Snow Avalanches caused by or attributable to a single Snow Avalanche in accordance with the following Table:

Snow Avalanche Repair Costs	Concessionaire Share	Province Share
Applicable to the first \$25,000 (index linked)	100%	0%
Applicable to the next \$25,000 (index linked)	50%	50%
Applicable to the next \$25,000 (index linked)	25%	75%
Applicable to amounts over \$75,000 (index linked)	0%	100%

provided that the Province will have no obligation to contribute towards Snow Avalanche Repair Costs that exceed a reasonable estimate of the cost of carrying out the relevant work taking into account the Concessionaire’s general duty to mitigate such costs pursuant to Section 1.9 [General Duty to Mitigate] or that directly or indirectly result from or are attributable to any of the matters referred to in Section 14.8A.6, and such Snow Avalanche Repair Costs will not be taken into account in determining the Qualifying Snow Avalanche Repair Costs incurred by the Concessionaire in any Contract Year for purposes of Section 14.8A.4.

- 14.8A.4 For purposes of this Section 14.8A.4 the term “Qualifying Snow Avalanche Repair Costs” means Snow Avalanche Repair Costs in excess of \$25,000 (index linked) incurred by the Concessionaire in connection with any one or more Snow Avalanches caused by or attributable to a single Snow Avalanche. Without limiting the Province’s

contribution obligations set out in the table in Section 14.8A.3, if the Concessionaire incurs aggregate Qualifying Snow Avalanche Repair Costs in any Contract Year of \$75,000 (index linked), then the Province will bear all Snow Avalanche Repair Costs in connection with any subsequent Snow Avalanches occurring during that Contract Year.

14.8A.5 Where:

14.8A.5.1 the Province is obliged to contribute towards Snow Avalanche Repair Costs in connection with any one or more Snow Avalanches caused by or attributable to a single Snow Avalanche pursuant to Section 14.8A.3 and the total Snow Avalanche Repair Costs in connection with such Snow Avalanche(s) are reasonably estimated to exceed \$150,000 (index linked); or

14.8A.5.2 the Province is obliged to bear all of the Snow Avalanche Repair Costs in connection with any Snow Avalanche pursuant to Section 14.8A.4,

the Province may in its absolute and unfettered discretion determine who will carry out the repair 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 as aforesaid 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, provided that no such Province Change will entitle the Concessionaire to compensation or relief in respect of any Revenue Loss relating to or resulting from any Snow Avalanche(s) to which this Section 14.8A.5 applies). For greater certainty, the Concessionaire will not, by reason only of the Province exercising its discretion in accordance with this Section 14.8A.5, be relieved of its obligation to pay its portion (if any) of Snow Avalanche Repair Costs, as determined by reference to the table in Section 14.8A.3 and by reference to Section 14.8A.4.

14.8A.6 Provided that the Concessionaire has complied with all of its obligations under the Snow Avalanche Program, and subject and without prejudice to the limitations on liability provided for in the Transportation Investment Act, the Province will indemnify and save harmless the Concessionaire against all Losses resulting from third party Claims for personal injury or death or loss of or damage to property caused by Snow Avalanches onto the Concession Highway; provided that the indemnity under this Section will not extend or apply to any Losses directly or indirectly resulting from or attributable to any of the following matters:

14.8A.6.1 any work performed or omitted to be performed by the Concessionaire in execution of the Snow Avalanche Program or the performance of the Operations;

14.8A.6.2 negligence of the Concessionaire or any of its agents, contractors or subcontractors of any tier or employees of any of them in closing the Concession Highway or implementing the initial response to open the Concession Highway following any Snow Avalanche;

14.8A.6.3 any other failure of the Concessionaire to design, construct, operate, maintain, repair and rehabilitate the Project Facilities, the Site and the Adjacent Areas in accordance with its obligations under this Agreement; or

14.8A.6.4 any other act or omission of the Concessionaire or any of its agents, contractors or subcontractors of any tier or employees of any of them or the conduct of the Operations or any activity in connection therewith.

14.9 Trials

Any study, test or trial 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, any Lane Closures or any other adverse effect on traffic flows on the relevant part of the Concession Highway and no such study, test or trial will, without the consent of the Concessionaire (which consent may not be withheld where the Province undertakes responsibility for the rectification thereof, and otherwise may not be unreasonably withheld or delayed), substantially affect the physical integrity of the Project Facilities.

14.10 Five-Year Management Plan

The Concessionaire will submit, for review by the Province's Representative in accordance with the Review Procedure, a proposed Five-Year Management Plan and annual updates thereof in compliance with the requirements set forth in Part 3 of Schedule 15 [Five-Year Management Plan]. The Concessionaire will carry out the relevant part or parts of the Operations to which the Five-Year Management Plan relates in a manner that complies with and meets the requirements set forth in the Five-Year Management Plan as submitted and updated from time to time without objection by the Province's Representative (or following resolution of such objection) in accordance with the Review Procedure.

14.11 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 Operations. 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 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 Sections 8.15.1, 15.1.5 and 15.2 [Liaison], general management of traffic on the Concession Highway will be the responsibility of the Concessionaire, except with

respect to the Phase 1 Section prior to the completion of the Phase 1 Section Works, for which the Phase 1 Section Contractor will be responsible. The Concessionaire will manage traffic on the Concession Highway both for the Original Service Period and the Enhanced Service Period (including with respect to notice, timing, predictability and duration of Lane 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 and all other applicable Technical Requirements.

- 15.1.2 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 15.1.2) or any part thereof. If there is no objection to such proposed revision in accordance with the Review Procedure (or following resolution of such objection), then the Traffic Management Requirements as so revised will, subject to Section 15.1.3, be the Traffic Management Requirements for the purposes of this Agreement, subject to any further revision in accordance with this Section 15.1.2 to which there is no objection in accordance with the Review Procedure (or following resolution of such objection). A revision to the Traffic Management Requirements pursuant to this Section 15.1.2 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. For greater certainty, no additional payment to the Concessionaire or adjustment to the Total Performance Payment will be made as a consequence of implementation of a revision to the Traffic Management Requirements pursuant to this Section 15.1.2 or Section 15.1.3.
- 15.1.3 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 15.1.2) a revision to the Traffic Management Requirements so that they comply with and satisfy the Traffic Management Output Specifications.
- 15.1.4 For greater certainty, the Concessionaire's obligations under this Section will not extend to the scheduling of Lane Closures or related management of traffic on the Phase 1 Section during the carrying out of the Phase 1 Section Works by the Phase 1 Section Contractor.
- 15.1.5 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 construction of the Works and the conduct of the Operations 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 construction of the Works or the carrying out of the Operations, all in accordance with the Liaison Procedures.

15.2.2 The Concessionaire shall cooperate fully with Utility Suppliers, Governmental Authorities, Relevant Authorities and any contractors or subcontractors of the Province and BCTFA working on the Project Facilities and coordinate the construction of the Works and the Operations accordingly.

15.2A Traffic Management Plan

15.2A.1 Within 60 days following the Commencement Date and in any event not less than 15 Working Days prior to commencement of any construction activity with respect to the Works the Concessionaire will submit to the Province's Representative, in accordance with the Review Procedure, a proposed Traffic Management Plan (including all related sub-plans as described in the Traffic Management Output Specifications (Original Service Period)) which has been accepted and sealed by the Traffic Engineer and which is consistent and complies with the requirements for such Plan and all other requirements set forth in the Traffic Management Output Specifications (Original Service Period) and with the Traffic Management Requirements, the Traffic Quality Management Plan and all other Technical Requirements and relevant provisions of this Agreement. Notwithstanding Section 11.3.3 or any other provision of this Agreement, the Concessionaire will not commence any construction activities that affect traffic flow on the Concession Highway until there has been no objection to the Concessionaire's proposed Traffic Management Plan in accordance with the Review Procedure or such objection has been resolved.

15.2A.2 The Concessionaire will submit any proposed modifications to the Traffic Management Plan for review in accordance with the Review Procedure:

15.2A.2.1 where the Concessionaire is of the opinion, reasonably held, that circumstances require immediate modifications to the Traffic Management

Plan, not less than 3 Working Days prior to the date upon which the Concessionaire proposes to implement such modifications; and

15.2A.2.2 where Section 15.2A.2.1 does not apply, not less than 14 days prior to the date upon which the Concessionaire proposes to implement such modifications,

provided always that no such modifications will in any case be implemented until there has been no objection thereto in accordance with the Review Procedure or such objection has been resolved.

15.2A.3 Notwithstanding the provisions of paragraph 1.1 of Part 2 of Schedule 8 [Review Procedure]:

15.2A.3.1 the period for review of the Concessionaire's proposed Traffic Management Plan submitted pursuant to Section 15.2A.1 under the Review Procedure will be 20 Working Days;

15.2A.3.2 the period for review of any proposed modifications to the Traffic Management Plan submitted by the Concessionaire pursuant to Section 15.2A.2.1 will be three Working Days; and

15.2A.3.3 the period for review of any proposed modifications to the Traffic Management Plan submitted by the Concessionaire pursuant to Section 15.2A.2.2 will be 14 days.

15.2A.4 The Province's Representative may make comments in respect of the proposed Traffic Management Plan submitted by the Concessionaire pursuant to Section 15.2A.1 or in respect of any proposed modification to the Traffic Management Plan submitted by the Concessionaire pursuant to Section 15.2A.2 in accordance with paragraph 3.2 of Part 2 of Schedule 8 [Review Procedure].

15.2A.5 Without limiting the provisions of or any of the Concessionaire's obligations under Section 15.1 [Traffic Management and Police Services], the Concessionaire will manage traffic on the Concession Highway at all times during the Contract Period in accordance with the Traffic Management Plan to which there has been no objection under the Review Procedure (or once such objection has been resolved). Neither the review of the Concessionaire's proposed Traffic Management Plan or any proposed modifications thereto nor the making of any comments or failure to make any comments in respect thereof pursuant to the Review Procedure will in any way qualify or relieve the Concessionaire of its primary responsibility to comply with, satisfy and perform the Traffic Management Output Specifications and the Traffic Management Requirements and to comply with the Traffic Quality Management Plan at all times during the Contract Period.

15.2B Schedules of Lane Closures

15.2B.1 The Concessionaire will submit to the Province's Representative, in accordance with the Review Procedure, a proposed Weekly Schedule of Lane Closures in respect of the Concession Highway for each week during the period from the Commencement Date to the Final Completion Date. The Weekly Schedule of Lane Closures for the

first three weeks during such period will be submitted within seven days following the Commencement Date and each subsequent Weekly Schedule of Lane Closures will be submitted not less than ten days prior to the commencement of the week to which it relates. Each such Weekly Schedule of Lane Closures will comply with the Traffic Management Output Specifications and (where applicable) the Traffic Management Requirements and give details of the proposed start and end dates for and scheduled duration of each period of Lane Closure and of the works to be carried out that require the Lane Closure. For the period prior to the completion of the Phase 1 Section Works, each such Weekly Schedule of Lane Closures applicable to such period shall take into account any anticipated Lane Closures by the Phase 1 Section Contractor and, to the greatest extent possible, the Concessionaire will consult and coordinate with the Phase 1 Section Contractor to minimize the disruption to the flow of traffic on the Concession Highway.

- 15.2B.1A The Concessionaire will, not less than 60 days prior to the Final Completion Date and not less than 60 days prior to the commencement of each Quarter following the Final Completion Date for the duration of the Contract Period, submit to the Province's Representative, in accordance with the Review Procedure, a proposed Quarterly Schedule of Lane Closures for the balance of the Quarter in which the Final Completion Date occurs, in the case of the first such submission, and for the next ensuing Quarter in the case of each subsequent submission will comply with the Traffic Management Output Specifications and (where applicable) the Traffic Management Requirements and give details of the proposed start and end dates for and scheduled duration of each period of Lane Closure and of the works to be carried out that require the Lane Closure.
- 15.2B.2 Not later than 30 days prior to the commencement of any Quarter, the Concessionaire may submit to the Province's Representative in accordance with the Review Procedure a revision of the Quarterly Schedule of Lane Closures for that Quarter showing proposed revisions to the periods of Lane Closure in respect of such Quarter. If there is no objection to any such revision in accordance with the Review Procedure (or once such objection has been resolved), then it will replace the Quarterly Schedule of Lane Closures in respect of such Quarter.
- 15.2B.3 The Province's Representative may make comments in respect of any Schedule of Lane Closures submitted by the Concessionaire pursuant to Section 15.2B.1 or Section 15.2B.1A or in respect of a proposed revision to a Schedule of Lane Closures submitted by the Concessionaire pursuant to Section 15.2B.2 in accordance with paragraph 3.5 of Part 2 of Schedule 8 [Review Procedure]. In the event that the Province's Representative objects to any requested period of Lane Closure, the Province's Representative will notify the Concessionaire thereof with reasons and will indicate, in the case of an objection pursuant to paragraph 3.5.5 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 Lane Closures

- 15.3.1 The Concessionaire will not effect any Lane Closures except:
- 15.3.1.1 in accordance with a Schedule of Lane Closures to which no objection has been made under the Review Procedure (or once such objection has been resolved);
 - 15.3.1.2 in accordance with the procedures set out in Section 15.3.3; or
 - 15.3.1.3 in an emergency, in accordance with Section 15.3.4.
- 15.3.2 Notwithstanding that there has been no objection to a period of Lane Closure 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 any of 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:
- 15.3.2.1 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
 - 15.3.2.2 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.
- 15.3.3 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 start and end dates and times for and scheduled 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].
- 15.3.4 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, provided that the Concessionaire will as soon as reasonably practicable advise the Province's Representative of such Lane Closures and the reasons therefor and will take all reasonable steps to mitigate the necessity for and minimize the duration of such Lane Closures.
- 15.3.5 The Concessionaire will be responsible for identifying and signing any temporary detour routes required as a result of any Lane Closures in accordance with Good Industry Practice and the provisions of the Technical Requirements applicable to traffic management.
- 15.3.6 If an emergency occurs on any Accesses and Connecting Roads, 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 case conflict with any lane closures or stoppages or other arrangements implemented to deal with the emergency on such Accesses and Connecting Roads.

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 operate public information services in respect of the Concession Highway, including a telephone service to 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 to receive any complaints in respect of the Concession Highway, in accordance with the Technical Requirements.

15.5 Province's Maintenance

- 15.5.1 Without prejudice to Section 15.3.6 and subject to Section 15.5.3, the Province will use commercially reasonable efforts to coordinate the maintenance programs for the Accesses and Connecting Roads, other than the Side Roads, for which the Province is the highway authority with any Scheduled Closures, so as to minimize to the extent reasonably feasible any disruption to the construction of the Works and the operation of the Concession Highway. The Concessionaire will be responsible for coordinating Lane Closures on the Concession Highway with the maintenance programs for the Accesses and 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 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 Accesses and Connecting Roads, other than the Side Roads, for which the Province is from time to time the highway authority having regard to the character of such Accesses and 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, repair and/or rehabilitation of any Accesses and Connecting Roads or other highway for which the Province is the highway authority (other than the Concession Highway) 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 Accesses and Connecting Roads 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 reasonable efforts to coordinate its activities in connection with the construction of the Works and 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 Accesses and Connecting Roads or other highway; 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 coordination 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 decision of the Province with respect to any such matter will not be subject to the Disputes Resolution Procedure.

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 Accesses and 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 Accesses and 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 Accesses and 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

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 Any increase in the monthly fee charged in accordance with Section 16.5.2 that is greater than the increase in CPI from the same month in the previous year will be reimbursed to the Concessionaire by the Province in accordance with Section 32.2 [Annual Reconciliation].

17. DEFECTS

17.1 Latent Defects and Phase 1 Section Defects

For the purposes of this Agreement:

- 17.1.1 the term “Latent Defect” means any defect in the Concession Highway existing as at the Commencement Date or, in the case of the Phase 1 Section Works, as at the date of joint inspection referred to in Section 17.2 [Joint Inspection of Phase 1 Section Works], which the Concessionaire is not aware of as at that date and which could not reasonably have been discovered, ascertained or anticipated by a competent person acting in accordance with Good Industry Practice during an inspection and examination of the Concession Highway or from an analysis of all relevant information available to the Concessionaire prior to the Commencement Date (including the Disclosed Data);
- 17.1.2 the term “Phase 1 Section Defect” means any of the following defects identified at any time during the Contract Period:
- 17.1.2.1 any defect directly resulting from the failure of the Phase 1 Section Contractor to complete the works provided for in the Phase 1 Section Contract in accordance with the specifications set forth in the Phase 1 Section Contract as disclosed in the Disclosed Data; or
- 17.1.2.2 any deformation or displacement of the fill placed as part of the Phase 1 Section Contract shown on Drawing R2-211-104 as disclosed in the Disclosed Data between the longitudinal limits of the embankment material placed in the Phase 2 Section by the Phase 1 Section Contractor and used for general earth embankment purposes, only, and not as embankment material for supporting structures nor as embankment material at bridge ends within the limits specified in standard specification 201.40 as disclosed in the Disclosed Data, provided that the Concessionaire has at all times acted in accordance with Schedule 5 [Design and Construction Requirements] and with Good Industry Practice; and
- 17.1.3 the onus of proving that any particular defect is a Latent Defect will rest solely upon the Concessionaire.

17.2 Joint Inspection of Phase 1 Section Works

A joint inspection of the Phase 1 Section Works will be carried out by the Province’s Representative and the Concessionaire’s Representative within 45 days following the later of the completion of the Phase 1 Section Works and the Commencement Date and, within 15 days following the completion of such inspection, a list will be produced and initialled by both of those parties identifying in reasonable detail any Phase 1 Section Defects and describing the remedial or other works required to rectify the same. Any Dispute between the Province’s Representative and the Concessionaire’s Representative as to the existence or nature of any Phase 1 Section Defect or the remedial or other works required to rectify the same will be referred for determination to the Disputes Resolution Procedure. The list produced as aforesaid will be conclusive and binding on the Province and the Concessionaire as to the existence and nature of any Phase 1 Section Defects identified at the time of inspection for the purposes of the Province’s obligations set out in Section 17.4.2.

17.3 Reporting of Defects

Without prejudice to any other reporting requirement under this Agreement, in the event that a defect in any part of the Concession Highway (including a Latent Defect and, following the joint inspection referred to in Section 17.2 [Joint Inspection of Phase 1 Section Works], a Phase 1 Section Defect) becomes apparent, the Concessionaire will promptly and in any event within 10 days of becoming aware of the same give notice to the Province's Representative identifying the defect in reasonable detail.

17.4 Remedial Action

17.4.1 Any Latent Defect in: (a) the Phase 1 Section except on any portion of the Phase 1 Section on which the Concessionaire has undertaken construction of any of the Works; (b) the portion of the Phase 2 Section, if any, on which the Concessionaire has not undertaken construction of any of the Works; (c) the Phase 3 Section except on any portion of the Phase 3 Section on which the Concessionaire has undertaken construction of any of the Works; or (d) the Side Roads, will be rectified at the cost of the Province either by the Province or, at the election of the Province, by the Concessionaire (such election to be notified to the Concessionaire as a Province Change) as soon as reasonably practicable after the Concessionaire notifies the Province of the Latent Defect.

17.4.2 The Province, at its cost, will rectify or cause the Phase 1 Section Contractor to rectify any Phase 1 Section Defect as soon as reasonably practicable following the production of the Defect List referred to in Section 17.2 [Joint Inspection of Phase 1 Section Works] or as soon as reasonably practicable following such later time as any Phase 1 Section Defect becomes known to the Province, provided that in the case of a Phase 1 Section Defect referred to in Section 17.1.2.2 the Province has no obligation to rectify such Phase 1 Section Defect unless it directly results in:

17.4.2.1 a delay or disruption of, or interference with, the completion of the Works;

17.4.2.2 an adverse impact on the performance of the Operations; or

17.4.2.3 an inability by the Concessionaire to meet the O,M&R Output Specifications.

17.4.3 The Concessionaire will carry out any remedial or other works required as a result of any defect in the Concession Highway except:

17.4.3.1 any Latent Defect for which the Province is responsible pursuant to Section 17.4.1; and

17.4.3.2 a Phase 1 Section Defect.

17.4.4 For greater certainty, where the Province is obliged pursuant to Section 17.4.1 or Section 17.4.2 to rectify or cause to be rectified any 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 as aforesaid 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 (including any 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, provided that no such Province Change will entitle the Concessionaire to any duplication of compensation or relief in respect of any Revenue Loss relating to or resulting from any defect to which this Section 17.4.4 applies).

- 17.4.5 The Province at its option may defer the rectification of any Latent Defect or Phase 1 Section Defect referred to in Section 17.4.1 or 17.4.2 above, **DELETED**.

17.5 Costs of Defects

Without prejudice to Section 17.6 [Enforcement of Rights against Third Party Contractors]:

- 17.5.1 all costs of and associated with any defect in the Concession Highway (other than as excluded pursuant to Sections 17.4.3.1 and 17.4.3.2) and any remedial or other works in respect thereof will be borne by the Concessionaire; and
- 17.5.2 for greater certainty, neither the Province nor BCTFA will have any liability to the Concessionaire or any of its contractors or subcontractors of any tier (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, agents, contractors or subcontractors of any tier or employees of any of them) in respect of any Loss or Claim arising out of or in connection with the existence of any such defect in the Concession Highway or any remedial or other works required as a result of any such defect.

17.6 Enforcement of Rights against Third Party Contractors

- 17.6.1 If the Concessionaire suffers any Loss as a result of any defect other than a Phase 1 Section Defect in the Concession Highway and wishes the Province or BCTFA to exercise any warranty or other rights against any Third Party Contractor (other than the Phase 1 Section Contractor) which the Province or BCTFA may have in respect of any such Defective Work giving rise to such defect, then the Concessionaire may serve a notice on the Province or BCTFA (as the case may be) asking it to exercise any right it may have to make a claim against the relevant Third Party Contractor (a "Contractor Claim Notice").
- 17.6.2 A Contractor Claim Notice will:
- 17.6.2.1 describe the claim against the relevant Third Party Contractor in respect of which it is given in a level of detail sufficient to enable the Province or BCTFA (as the case may be) to understand the basis for such claim;
- 17.6.2.2 set out the Concessionaire's detailed estimate of the value of such claim; and

- 17.6.2.3 contain an undertaking by the Concessionaire (in a form satisfactory to the Province or BCTFA (as the case may be)) to meet all costs and/or liabilities incurred by the Province or BCTFA (as the case may be) in pursuing such claim.
- 17.6.3 Neither the Province nor BCTFA will be under any obligation to exercise any right in respect of Defective Work against a Third Party Contractor if the Province or BCTFA (as the case may be) considers, and either it is agreed by the Concessionaire or determined pursuant to the Disputes Resolution Procedure, that there is no reasonable prospect of making a successful and financially worthwhile claim in relation to such right. In any case the Province or BCTFA (as the case may be), instead of itself exercising any right in respect of Defective Work against a Third Party Contractor pursuant to a Contractor Claim Notice, may at its option assign such right to the Concessionaire.
- 17.6.4 If the Province or BCTFA pursues and is successful in a claim against a Third Party Contractor in respect of Defective Work pursuant to a Contractor Claim Notice, it will pay to the Concessionaire the amount (net of any costs of recovery) which it recovers from the Third Party Contractor in respect of the Defective Work following the final conclusion of the relevant proceedings against the Third Party Contractor and the expiry of the time for any appeal.
- 17.6.5 Nothing in this Section 17.6 [Enforcement of Rights against Third Party Contractors] derogates from or relieves the Concessionaire of any of its obligations under this Agreement.

17.7 Traffic Management and Public Safety

For greater certainty, the Concessionaire will be responsible for all traffic management and other procedures and arrangements for the safety of the public using the Concession Highway for which it is otherwise responsible under the terms of this Agreement irrespective of any defect in the Concession Highway including any Latent Defect or Phase 1 Section Defect.

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 Maintenance Works) specified as part of, and will consult with the Province's archaeologists as required by, the Technical Requirements.

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 or the Adjacent Areas 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 Operations, 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 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. If there is a delay in or increase in the cost of the execution of the Works or the conduct of the Operations as a consequence of compliance with Section 18.2.2 or with any instructions given by the Province pursuant to this Section 18.2.3 which exceeds that which the Concessionaire otherwise would have experienced or incurred in order to comply with the provisions of this Agreement other than this Section 18.2 [Items of Geological, Historical or Archaeological Interest or Value] (any Dispute as to which will be referred to the Disputes Resolution Procedure for determination), then the Province's Representative will as soon as reasonably practicable request a Province Change pursuant to Part 2 of Schedule 13 [Province Changes]. Save as agreed or determined pursuant to Part 2 of Schedule 13 [Province Changes], no compensation for increases in costs, Revenue Losses or extension of time will be allowed as a consequence of compliance with Section 18.2.2 or with any instructions given by the Province pursuant to this Section 18.2.3.

19. END OF TERM

19.1 End of Term Requirements

The Concessionaire, at its expense, will ensure that upon the Expiry Date 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 40 months nor more than 43 months prior to the expected Expiry Date, 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 Part 4 of Schedule 7 [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 Part 4 of Schedule 7 [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&R Output Specifications and the O,M&R 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:

19.3.4.1 in the case of an objection in respect of the Renewal Works, whether or not the objection is justified and whether any alternative proposals by the

Province's Representative are more appropriate to ensure that the Project Facilities, including the pavement of the Concession Highway and all relevant Structures, will satisfy the End of Term Requirements on the Expiry Date (on the basis referred to in Section 19.3.2);

- 19.3.4.2 in the case of an objection in respect of the Renewal Schedule, what schedule would be reasonable for the implementation of the Renewal Works; and
 - 19.3.4.3 in the case of an objection in respect of the Renewal Amount, what amount would represent the reasonable cost of carrying out the Renewal Works or any specific identified and discrete element of the Renewal Works for which a specific itemized sum has been provided pursuant to Section 19.3.1.3 (as the case may be), on the assumption that such Renewal Works will be carried out in accordance with all applicable Technical Requirements and Good Industry Practice and in accordance with the Renewal Schedule (as agreed or determined in the absence of agreement).
- 19.3.5 Upon agreement or determination in accordance with the Disputes Resolution Procedure of the Renewal Works and the Renewal Schedule, the Concessionaire will carry out the Renewal Works in accordance with the Renewal Schedule. 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 16 months nor more than 19 months prior to the expected Expiry Date, 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 7 [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 Expiry Date, 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 Section 19.5.1, 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.

19.5.4.1 in the case of an objection in respect of any revisions or additions to the Renewal Works, whether or not the objection is justified and whether any alternative proposals by the Province's Representative are more appropriate to ensure that each element of the Project Facilities will satisfy

the End of Term Requirements on the Expiry Date (on the basis referred to in Section 19.3.2):

- 19.5.4.2 in the case of an objection in respect of any revisions to the Renewal Schedule, what schedule would be reasonable for the implementation of the Renewal Works (as revised or added to in accordance with the provisions of this Section 19.5 [Revised Renewal Program]); and
 - 19.5.4.3 in the case of an objection in respect of any change in the Renewal Amount, what amount would represent the reasonable cost of carrying out the Renewal Works (as revised or added to in accordance with the provisions of this Section 19.5 [Revised Renewal Program]).
- 19.5.5 Upon agreement or determination in accordance with the Disputes Resolution Procedure of any revision or addition to the Renewal Works 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 Expiry Date, 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 joint inspection will be conducted for the purposes of confirming whether all Renewal Works are Finally Complete and whether the Project Facilities comply with the End of Term Requirements. Such inspection will comply with the requirements set out in Part 4 of Schedule 7 [End of Term Requirements] as applicable to each element of the Project Facilities. The Concessionaire and the Province's Representative will cooperate 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:
 - 19.6.3.1 the Concessionaire has failed to Finally Complete all of the Renewal Works in compliance with the requirements of this Agreement; or
 - 19.6.3.2 as at the Expiry Date the Project Facilities for any other 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 Renewal Works have not been Finally Completed or 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 Finally Completing such Renewal Works and/or of ensuring that the Project Facilities comply in all respects with the End of Term Requirements (the "Remediation Amount").
- 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 the Province's Representative's estimate of the Remediation Amount and all other estimates contained in such notice).
- 19.6.5A If the Province's Representative has issued an End of Term Certificate, then within 60 days after the issue of the End of Term Certificate the Province will pay to the Concessionaire the End of Term Payment calculated in accordance with Part 7 of Schedule 10 [End of Term Payment] without deduction for any Remediation Amount.
- 19.6.5B If the Province's Representative has issued a notice to the Concessionaire under Section 19.6.2.2 and the Concessionaire has failed to issue a notice in accordance with Section 19.6.5, the estimated Remediation Amount specified in the notice given by the Province's Representative under Section 19.6.2.2 will be deemed to have been agreed to by the Concessionaire in accordance with Section 19.6.5 and will be the Remediation Amount for the purposes of calculating any End of Term Payment to be made to the Concessionaire pursuant to Part 7 of Schedule 10 [End of Term Payment] and, except where the Remediation Amount exceeds the Gross End of Term Payment, the Province will pay to the Concessionaire the End of Term Payment so calculated within 30 days from the last day on which the Concessionaire could have given notice under Section 19.6.5. To the extent the Remediation Amount set out in the Province's Representative's notice given in accordance with Section 19.6.2.2 and deemed to have been agreed to by the Concessionaire in accordance with Section 19.6.5 exceeds the Gross End of Term Payment, then without prejudice to any right or remedy of the Province, the Concessionaire, subject to Section 19.7.9C, will pay to the Province an amount equal to the amount by which the Remediation Amount exceeds the Gross End of Term Payment within 30 days from the last day on which the Concessionaire could have given notice under Section 19.6.5.
- 19.6.5C If the Province's Representative has issued a notice to the Concessionaire pursuant to Section 19.6.2.2 and the Province's Representative's estimate of the Remediation Amount specified in such notice is less than the Gross End of Term Payment and the Concessionaire gives notice to the Province's Representative in accordance with Section 19.6.5 objecting to the Province's Representative's estimate of the Remediation Amount, the Province will within 60 days of issue of the Province's Representative's notice pursuant to Section 19.6.2.2 pay to the Concessionaire the amount by which the Gross End of Term Payment exceeds the Province's Representative's estimate of the Remediation Amount as set out in the Province's

Representative's notice. Unless the issue is otherwise resolved by agreement between the Concessionaire and the Province's Representative, a determination as to whether the Concessionaire is entitled to any additional End of Term Payment will be made in accordance with the Disputes Resolution Procedure pursuant to Section 19.6.6, and any such additional amount determined to be payable by the Province to the Concessionaire will be paid within 14 days following such determination.

19.6.5D If the Province's Representative has issued a notice to the Concessionaire pursuant to Section 19.6.2.2 and the Province's Representative's estimate of the Remediation Amount specified in such notice exceeds the Gross End of Term Payment and the Concessionaire gives notice to the Province's Representative in accordance with Section 19.6.5 objecting to the Province's Representative's estimate of the Remediation Amount, the Province will not be required to pay any amount to the Concessionaire on account of the End of Term Payment, nor will the Concessionaire be required to pay any amount to the Province, until the matters referred to in the notice given by the Concessionaire in accordance with Section 19.6.5 have been agreed or determined in accordance with the Disputes Resolution Procedure. If it is agreed or determined in accordance with the Disputes Resolution Procedure that the Remediation Amount is less than the Gross End of Term Payment, any resulting End of Term Payment will be paid by the Province to the Concessionaire within 14 days following such agreement or determination. If it is agreed or determined in accordance with the Disputes Resolution Procedure that the Remediation Amount exceeds the Gross End of Term Payment, then without prejudice to any other right or remedy of the Province, the Concessionaire, subject to Section 19.7.9, will pay to the Province an amount equal to the difference between the Remediation Amount and the Gross End of Term Payment within 14 days following such agreement or determination.

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 Finally Completed in 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 Remediation Amount.

19.6.7 [Not Used]

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 60 days following the Commencement Date. Any interest accrued on any money standing to the credit of the Retention

Account will be for the benefit of the Province. All sums standing to the credit of the Retention Account from time to time, excluding 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, (i) from the Scheduled Final Completion Date until the Final Completion Date, the Province may withhold the Completion Retention as security for the Concessionaire's obligation to Finally Complete the Works on or before the Final Completion Date, and (ii) from the Commencement Date until the Termination Date, the Province may withhold the Asset Condition Retention as security for the obligations of the Concessionaire to maintain all elements of the Project Facilities in accordance with the O,M&R Output Specifications and the O,M&R Requirements during the Contract Period. The Monthly Retention may be withheld from any payment that would otherwise be due in any month to the Concessionaire under this Agreement during the Contract Period in respect of any instalment of the Total Performance Payment. 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 Total 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 Total Performance Payment in addition to the Monthly Retention that is otherwise to be withheld from such subsequent payments of the Total 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 Total 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 to any consequential amendments to the provisions and procedures contemplated by this Section 19.7 [Retention Account]), the Monthly Retention applying during a Contract Year will be the aggregate of the Completion Retention and the Asset Condition Retention, as determined in accordance with Part 3A of Schedule 10 [Payment Retentions].
- 19.7.4 The Province will pay the Completion Retention and the Asset Condition Retentions to the Concessionaire in accordance with the provisions of Part 3A of Schedule 10 [Payment Retentions].
- 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 in respect of Completion Retentions (less any accrued interest and 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 Completion 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 monies standing to the credit of the Retention Account not already paid out in accordance with Part 3A of Schedule 10

[Payment Retentions] (less any accrued interest and bank charges and less any deductions required by any Laws and Regulations to be made from such account) to the Concessionaire.

19.7.7 If the Province's Representative gives a notice in accordance with Section 19.6.2.2 and the Concessionaire gives notice to the Province's Representative in accordance with Section 19.6.5 objecting to any matter set out in the Province's Representative's notice, and if the estimated Remediation Amount stated in the Province's Representative's notice exceeds the Gross End of Term Payment, then pending the agreement or determination in accordance with the Disputes Resolution Procedure of all matters raised in the notice given by the Concessionaire in accordance with Section 19.6.5, 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 an amount equal to the amount by which the estimated Remediation Amount stated by the Province's Representative in the notice given in accordance with Section 19.6.2.2 exceeds the Gross End of Term Payment,

and the balance (if any) of any monies 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 within 30 days of receipt by the Province of the Concessionaire's notice under Section 19.6.5.

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 Concessionaire in accordance with Section 19.6.5.

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 amount by which the Remediation Amount exceeds the Gross End of Term Payment 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, and any remaining monies 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. If the Province receives any amount out of the Retention Account pursuant to this Section 19.7.9, then the amount payable by the Concessionaire to the Province pursuant to Section 19.6.5D will be reduced by an amount equal to the amount received by the Province out of the Retention Account pursuant to this Section 19.7.9.

- 19.7.9A If the Province's Representative gives a notice in accordance with Section 19.6.2.2 and the Concessionaire gives notice to the Province's Representative in accordance with Section 19.6.5 objecting to any matter set out in the Province's Representative's notice, and if the estimated Remediation Amount stated in the Province's Representative's notice does not exceed the Gross End of Term Payment, then the monies standing to the credit of the Retention Account that have not otherwise been paid out pursuant to Part 3A of Schedule 10 [Payment Retentions] (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 within 30 days of receipt by the Province of the Concessionaire's notice under Section 19.6.5
- 19.7.9B If the Province's Representative gives a notice in accordance with Section 19.6.2.2 and the Concessionaire does not give notice to the Province's Representative in accordance with Section 19.6.5 objecting to any matter set out in the Province's Representative's notice, and if the estimated Remediation Amount stated in the Province's Representative's notice and deemed to have been agreed to by the Concessionaire in accordance with Section 19.6.5 does not exceed the Gross End of Term Payment, then the Province will pay the monies 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 within 30 days from the last day on which the Concessionaire could have given notice under Section 19.6.5.
- 19.7.9C If the Province's Representative gives a notice in accordance with Section 19.6.2.2 and the Concessionaire does not give notice to the Province's Representative in accordance with Section 19.6.5 objecting to any matter set out in the Province's Representative's notice, and if the estimated Remediation Amount stated in the Province's Representative's notice and deemed to have been agreed to by the Concessionaire in accordance with Section 19.6.5 exceeds the Gross End of Term Payment, then within 30 days of the last day on which the Concessionaire could have given notice under Section 19.6.5 the Province will pay out of the Retention Account to itself an amount equal to the amount by which the Remediation Amount stated in the Province's Representative's notice exceeds the Gross End of Term Payment 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, and any remaining monies 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. If the Province receives any amount out of the Retention Account pursuant to this Section 19.7.9C, then the amount payable by the Concessionaire to the Province pursuant to Section 19.6.5B will be reduced by an amount equal to the amount received by the Province out of the Retention Account pursuant to this Section 19.7.9C.
- 19.7.10 If the amount standing to the credit of the Retention Account (including accrued interest but less any bank charges and less any deductions required by any Laws and Regulations to be made from such account) is less than the amount payable by the Concessionaire to the Province pursuant to Section 19.6.5B or Section 19.6.5D, as

applicable, then the payment of any sum to the Province in accordance with Section 19.7.9 or Section 19.7.9C in or towards satisfaction of the amount payable by the Concessionaire to the Province pursuant to Section 19.6.5B or Section 19.6.5D, as applicable, 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 amount payable by the Concessionaire to the Province pursuant to Section 19.6.5B or Section 19.6.5D, as applicable, 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] as they relate to Completion Retentions 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). The Concessionaire shall not be entitled to post any such letter of credit, guarantee or other form of security in respect of Asset Condition Retentions.

19.7.13 [Not Used]

19.7.14 [Not Used]

19.7.15 [Not Used]

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 Section 2 of Part 1 of Schedule 11 [Insurance Requirements] are taken out prior to the commencement of any Works and are thereafter maintained in force until

the later of the Final 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 Section 2 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 Section 1 of Part 1 of Schedule 11 [Insurance Requirements];
- 20.1.1.3 the Concessionaire will ensure that the insurances identified in Section 3 of Part 1 of Schedule 11 [Insurance Requirements] are taken out on the date of this Agreement and are thereafter maintained in force throughout the Contract Period; and
- 20.1.1.4 the Concessionaire will ensure that the insurances identified in Section 4 of Part 1 of Schedule 11 [Insurance Requirements] are taken out:
 - 20.1.1.4.1 in respect of those portions of the Concession Highway other than the portions upon which the Works are to be constructed on the date of this Agreement and are thereafter maintained in force throughout the Contract Period; and
 - 20.1.1.4.2 in respect of that portion of the Concession Highway upon which the Works are to be constructed from the date of this Agreement until commencement of construction of the Works and on 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/or the Operations in accordance with any Laws and Regulations or Legal Requirements.
- 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 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 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 contractors or subcontractors (including, in the case of the Concessionaire, the Designer, the Contractor and the Operator) that would entitle any insurer to refuse to pay any claim under any insurance policy in which that Party is an insured, a co-insured, additional insured or additional named insured person.

20.2 Policies and Copies

The Concessionaire will furnish evidence of all required insurance coverages in accordance with Section 1 of Part 1 of Schedule 11 [Insurance Requirements] and any other insurance taken out and maintained by the Concessionaire in respect of the Project Facilities, the Site, the Adjacent Areas and/or the Operations, 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.

Except for professional liability insurance, 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 Sections 2.2(c), 2.6, 3.2(c), 3.6 and 4.2 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 all policies of insurance 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 Section 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

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 Section 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.

20.6.2 Without prejudice to Section 20.6.1, the Concessionaire will notify the Province's Representative within five 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 giving rise to the claim.

20.6A Restoration and Reinstatement

20.6A.1 Subject to Sections 14.8 [Landslides] and 14.8A [Snow Avalanches], Section 20.8 [Uninsurable Risks] and Section 37.4 [Consequences of Eligible Force Majeure], if any part of 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 such damage or destruction ("Reinstatement Works") promptly and in any event as soon as practicable in the circumstances.

20.6A.2 If any Reinstatement Works are reasonably estimated to cost more than \$1,000,000 (index linked) or in any other case where the Province, having regard to the nature of the damage or destruction, notifies the Concessionaire that a Reinstatement Plan is required, the Concessionaire will, as soon as practicable and in any event within 20 Working Days after the occurrence of the damage or destruction, submit to the Province's Representative pursuant to the Review Procedure a plan (a "Reinstatement Plan") prepared by the Concessionaire for carrying out the Reinstatement Works setting out, *inter alia*:

20.6A.2.1 a description of the Reinstatement Works required to restore, replace and reinstate the damage or destruction (in accordance, where applicable, with any Province Change issued in respect thereof);

20.6A.2.2 the Concessionaire's proposed schedule for the execution of the Reinstatement Works;

20.6A.2.3 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 applicable public procurement policies and requirements, will be a competitive procedure designated by and conducted under the supervision of the Province);

20.6A.2.4 if the damage or destruction occurs prior to the Final Completion Date, the Concessionaire's proposal for any amended Project Schedule and/or Works Schedule necessary to accommodate the proposed schedule for the execution of the Reinstatement Works (which proposal will be dealt with in accordance with the provisions of Section 12.2 [Variations to Project Schedule] and Section 12.3 [Preparation of Works Schedule], as applicable); and

20.6A.2.5 the Concessionaire's proposal for any related amendment to the Traffic Management Requirements, the Traffic Management Plan or the Schedule of Lane Closures to accommodate Lane Closures required in connection with the execution of the Reinstatement Works (which proposal will be dealt with in accordance with the provisions of Section 15.1.2 and Section 15.2B [Schedules of Lane Closures], as applicable),

and the Reinstatement Works will not be commenced until there has been no objection to the Reinstatement Plan in accordance with the Review Procedure.

20.6A.3 Subject to Section 37.4.4, 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 Operations under this Agreement.

20.6A.4 If requested by the Province, 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 Collateral Agreements with the Province, BCTFA and the Concessionaire in substantially the same form as the Collateral Agreement entered into by the Contractor.

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 and 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:

20.7.1.1.1 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;

20.7.1.1.2 to the Province as loss payee (and the Province will pay the same to the relevant third party or employee concerned); or

20.7.1.1.3 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, all risks property 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 to the Insurance Trustee pursuant to the provisions of Part 2 of Schedule 11 [Insurance Trust Agreement] except where the Concessionaire has already completed the Reinstatement Works in respect of the damage or destruction that gave rise to the proceeds (or, in the case of any pollution liability to a third party, discharged such liability) and except where the insurance proceeds payable in respect of any single claim made under the relevant insurance policy is equal to or less than \$2,500,000 (index linked), in either of which cases the proceeds may be paid directly to the Concessionaire or to any collateral agent or trustee for the Senior Funders to the extent required by the Senior Funding Agreements; provided that where the proceeds of any such insurance policy (other than any business interruption or loss of profits insurance policy proceeds payable to the Concessionaire) are paid to the Concessionaire in respect of any single claim equal to or less than \$2,500,000 (index linked), the Concessionaire will ensure that such proceeds are applied to the Reinstatement Works in respect of the damage or destruction that gave rise to the proceeds and not for any other purpose; and provided further that where the proceeds of such policies of insurance are paid in whole or in part to the Insurance Trustee pursuant to this Section 20.7.1.2 (such proceeds received by the Insurance Trustee being

referred to as the “Insurance Proceeds”), then either Section 20.7.1.2.1 or 20.7.1.2.2 will apply:

20.7.1.2.1 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:

20.7.1.2.1.1 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;

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

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

pay to the relevant third party an amount equal to the lesser of such Insurance Proceeds and the amount of such invoice, provided that the Insurance Trustee has also received written confirmation from the Province’s Representative that it has no objection to the amount of such invoice or the Reinstatement Works in respect of which it is issued. Upon completion of the relevant Reinstatement Works and the issue of a Reinstatement Certificate pursuant to Section 20.7.3, the Insurance Trustee will pay the balance (if any) of any such Insurance Proceeds to the Concessionaire or to any collateral agent or trustee for the Senior Funders to the extent required by the Senior Funding Agreements within 20 Working Days of receipt of request for the same from the Concessionaire or such collateral agent or trustee, and 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;

20.7.1.2.2 if the Concessionaire itself, in accordance with the provisions of the relevant Reinstatement Plan, carries out the Rectification 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:

20.7.1.2.2.1 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

20.7.1.2.2.2 receipt of the Insurance Proceeds by the Insurance Trustee in respect of the relevant Reinstatement Works,

pay to the Concessionaire 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 written confirmation from the Province's Representative that it has no objection to the amount of the Insurance Proceeds claimed by the Concessionaire for the Reinstatement Works carried out by the Concessionaire in respect of which the relevant Insurance Proceeds are claimed. Upon completion of the Reinstatement Works and the issue of a Reinstatement Certificate pursuant to Section 20.7.3, the Insurance Trustee will within 20 Working Days of receipt of a request from the Concessionaire for the same pay the balance (if any) of such Insurance Proceeds to the Concessionaire or to any collateral agent or trustee for the Senior Funders to the extent required by the Senior Funding Agreements, and 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;

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

20.7.2

20.7.2.1 Where the Province's Representative does not provide the written confirmation required by Section 20.7.1.2.1 or Section 20.7.1.2.2, the Province's Representative will provide its reasons for objecting to the claim to the Concessionaire within the period within which but for the absence of such written confirmation the Province would be required to make payment pursuant to those Sections.

- 20.7.2.2 The Province's Representative may object to the amount claimed or the Reinstatement Works in respect of which the claim is made if:
- 20.7.2.2.1 the cost of the said Reinstatement Works completed is less than the amount claimed;
 - 20.7.2.2.2 any of the grounds referred to in Sections 20.7.3.3.1 to 20.7.3.3.3, inclusive, exist with respect to the said Reinstatement Works; or
 - 20.7.2.2.3 the Insurance Proceeds remaining in the hands of the Province following payment of the amount claimed would be insufficient to cover the reasonably estimated remaining cost to complete the Reinstatement Works.

Any dispute under this Section 20.7.2.2 may be referred by either the Province or the Concessionaire to the Disputes Resolution Procedure for determination in accordance with Section 20.7.4.

20.7.3

- 20.7.3.1 In respect of Reinstatement Works for which a Reinstatement Plan is required pursuant to Section 20.6A.2, 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 Reinstatement Works will be Finally Completed and ready for inspection by the Province's Representative. Upon the Concessionaire notifying the Province's Representative that Final Completion has occurred and subject to the delivery to the Province's Representative of a Concessionaire's Final Completion Certificate (Reinstatement 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 Reinstatement Works, the Province's Representative will commence an inspection of such Reinstatement Works within 10 Working Days of receipt of such notice.
- 20.7.3.2 The Province's Representative will within 20 Working Days of the commencement of such inspection either:
- 20.7.3.2.1 issue a Reinstatement Certificate; or
 - 20.7.3.2.2 notify the Concessionaire of its decision not to issue a Reinstatement Certificate and state the reasons for such decision.
- 20.7.3.3 The Province's Representative may refuse to issue a Reinstatement Certificate if:
- 20.7.3.3.1 such Reinstatement Works have not been Finally Completed in accordance with the Design and Construction Output Specifications and the Technical Requirements;

- 20.7.3.3.2 there has been non-compliance in any material respect with the Design and Certification Procedure or any of the Technical Requirements or non-compliance with any Laws and Regulations or Legal Requirements in connection with the execution of the Reinstatement Works, which in either case has not been rectified; or
 - 20.7.3.3.3 there is any other default in the execution of the Reinstatement Works in accordance with the requirements of this Agreement (including the requirements set forth in Section 20.6A [Restoration and Reinstatement] and in the relevant Reinstatement Plan).
- 20.7.3.4 If the Province's Representative gives a notice under Section 20.7.3.2.2, then the Concessionaire will issue to the Province's Representative a notice not less than five 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 Reinstatement 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 20.7.3.2 and 20.7.3.3 and this Section 20.7.3.4 will thereafter apply to such notice, *mutatis mutandis*.
- 20.7.3.5 The issue of any Reinstatement Certificate is without prejudice to and does not in any way limit:
- 20.7.3.5.1 the obligation of the Concessionaire to design, construct, operate, maintain and rehabilitate the Project Facilities subject to and in accordance with this Agreement;
 - 20.7.3.5.2 any warranties given by the Concessionaire under this Agreement; and
 - 20.7.3.5.3 the provisions of Section 13 [Inspection and Completion].
- 20.7.4 Any Dispute as to whether a Reinstatement Certificate or a written confirmation pursuant to this Section 20.7 [Application of Proceeds] is required to be issued in accordance with the terms of this Section 20.7 may be referred by either Party to the Disputes Resolution Procedure and the provisions of Section 13.4 [Disputed Certificate] will apply *mutatis mutandis* as if the said Reinstatement Certificate or written confirmation (as the case may be) were specifically mentioned therein.
- 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 Section 20.7.1.

- 20.7.6 The Province agrees that, subject to compliance by the Concessionaire with its obligations under Section 20.6A [Restoration and Reinstatement] and this Section 20.7 [Application of Proceeds], and provided that the Concessionaire carries out and completes the Reinstatement Works in accordance with the requirements of this Agreement and the Reinstatement Plan, it will not exercise any right which it might otherwise have to terminate this Agreement by virtue of the event which gave rise to a claim for insurance proceeds in respect of the relevant damage or destruction.

20.8 Uninsurable Risks

- 20.8.1 The Province may notify the Concessionaire and the Concessionaire will forthwith notify the Province if a risk or component of a risk (other than a 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 in accordance with the Disputes Resolution Procedure. In addition, the Concessionaire may notify the Province if a risk insured against under its business interruption insurance or under earthquake insurance that is maintained by the Concessionaire becomes or is expected to become Uninsurable and such risk being 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 risk is or is about to become Uninsurable and that:

20.8.1.1 the risk being Uninsurable is not or will not be caused by the actions or omissions of the Concessionaire or any Contracting Affiliate, contractor or subcontractor of any tier; and

20.8.1.2 prudent directors of project companies in the transportation sector or in the same or substantially similar business to that of the Concessionaire 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), 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 applicable law,

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).

20.8.2 If the requirements of Section 20.8.1 are satisfied but the Parties cannot agree 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, business interruption or earthquake 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; and

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, then this Agreement will continue but with the remaining Total Performance Payments being adjusted, from the date upon which the risk becomes Uninsurable, to deduct an amount equal to the amount that the Concessionaire was liable to pay in accordance with this Agreement (or, in the case of business interruption or earthquake 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 Total 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 20.8.2.2.1 and deposits with the Province an amount equal, in the reasonable opinion of the Province, to the insurance proceeds that would have been paid to the Province 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 Province 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 39.8 [Conduct of Claims Subject to Province's Indemnities] will apply as if such payments were an indemnity claim to which that Section applies.
- 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 (6) 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 or earthquake 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 Sections 20.8.1 to 20.8.5 (inclusive) will no longer apply to the risk; and
 - 20.8.6.2 the Total 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 20.8.2.2 (provided that where the risk ceases to be an Uninsurable Risk for part of a year only, the increase in the Total 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 39.5 [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 but not limited to non-disclosure or under-insurance) or any other policy of insurance (including business interruption or loss of profits insurance) which the Concessionaire has taken out and maintained.

20.11 [Not Used]

20.12 [Not Used]

20.13 Benchmarking of Insurance

20.13.1 For purposes of this Section 20.13 [Benchmarking of Insurance]:

- 20.13.1.1 "Actual Premium Cost" means the amount payable for any 12-month period during the Contract Period as the annual actual premium costs by the Concessionaire, excluding any brokerage fees or commissions, to obtain, maintain or replace the O,M&R Insurance Coverages and **DELETED** as the case may be;
- 20.13.1.2 "Adjusted Actual Premium Cost" means the amount payable for any 12-month period during the Contract Period as the annual actual premium costs by the Concessionaire, excluding any brokerage fees or commissions, to obtain, maintain or replace the O,M&R Insurance Coverages and Business Interruption Insurance Coverages, as the case may be, after factoring in year-end premium adjustments made to reflect the Operations actually performed during the applicable 12-month period;

- 20.13.1.3 “Insurance Adjustment Date” means the first anniversary of the Commencement Date and thereafter, the date which is one year after the previous Insurance Adjustment Date;
- 20.13.1.4 “O,M&R Insurance Coverages” means the insurance coverages and limits which the Concessionaire is required to maintain or cause to be maintained under Sections 20.1.1.3 and 20.1.1.4 as the same may be amended pursuant to Section 3.1(f) of Part 1 of Schedule 11 [Insurance Requirements];
- 20.13.1.5 **DELETED**.
- 20.13.2 The Concessionaire will deliver to the Province by not later than 30 days before each Insurance Adjustment Date,
- 20.13.2.1 written verification issued by the Concessionaire’s insurer(s) of the Actual Premium Cost, including premium calculations and other supporting documentation to the reasonable satisfaction of the Province, as at the renewal or replacement date of the O,M&R Insurance Coverages and **DELETED**, for the next succeeding Contract Year; and
- 20.13.2.2 the Adjusted Actual Premium Cost incurred by the Concessionaire during the course of the preceding Contract Year, for greater certainty the amounts comprising the Actual Premium Cost and the Adjusted Premium Cost will be provided in the aggregate and broken down with the amounts for each component insurance comprising the O,M&R Insurance Coverages and **DELETED** separately identified.
- 20.13.3 On request of the Province, and in any event, by not later than 30 days before each Insurance Adjustment Date, the Concessionaire will, and will cause the Concessionaire’s insurer(s) to, fully inform the Province in writing, including by providing supporting documentation (such documentation to include particulars as to the claims matters referenced in this Section, and the Actual Premium Cost and the Adjusted Actual Premium Cost for the intervening Contract Year since the previous Insurance Adjustment Date) to the reasonable satisfaction of the Province, as to whether or not any component of the Actual Premium Cost or the Adjusted Actual Premium Cost is due solely or in part to claims matters relating to the Concessionaire, and if so, its estimate as to any portion of the Actual Premium Cost or the Adjusted Actual Premium Cost changes that reflects claims matters relating to the Concessionaire.
- 20.13.4 At either the Province’s or Concessionaire’s election in writing within 14 days of receiving the information described in Section 20.13.3, the Province will, within 30 days thereafter, retain a person (who will be subject to the Concessionaire’s reasonable approval) unrelated to either the Province or the Concessionaire (“Independent Third Party”) to prepare in a manner impartial to the Province and to the Concessionaire, and to deliver contemporaneously to the Province and to the Concessionaire the report described in Section 20.13.6 (the “Insurance Report”), within 45 days or such other reasonable period of time after the Insurance Adjustment Date, but in any event by no later than 75 days after the Insurance Adjustment Date, unless such time period is further extended to reflect the additional time period, if any,

required to resolve any dispute under Section 20.13.5, and in that event by no later than such extended time period.

- 20.13.5 In the event the Concessionaire fails, acting reasonably, to approve a person proposed by the Province to act as the Independent Third Party, the reasons for such failure, including any substitute person proposed by either or both of the Province and the Concessionaire, will be submitted to a single arbitrator for final and binding resolution pursuant to the *Commercial Arbitration Act* (British Columbia), and the time limitations for retaining an Independent Third Party and for delivering the Insurance Report by the Independent Third Party and the calculations by the Province pursuant to Section 20.13.8, will each be extended by the number of days equal to the period of time required to obtain a decision on the matter from the arbitrator.
- 20.13.6 The Insurance Report to be delivered by the Independent Third Party will
- 20.13.6.1 examine the reasons as to why the Concessionaire's Actual Premium Costs and Adjusted Actual Premium Costs have changed since the previous Insurance Adjustment Date (or since the Commencement Date in the case of the first Insurance Adjustment Date), including an estimate as to the portion, if any, of the Actual Premium Cost or the Adjusted Actual Premium Cost changes that reflects claims matters relating to the Concessionaire; and
- 20.13.6.2 review and consider relevant market factors, including industry standard premium costs for insurance coverages equivalent to the O,M&R Insurance Coverages and **DELETED** over the one-year period since the previous Insurance Adjustment Date.
- 20.13.7 The Province and the Concessionaire will share equally the fees and costs of the Independent Third Party, and the Concessionaire hereby irrevocably authorizes and directs the Province to pay the Concessionaire's portion of such fees and costs, on behalf of the Concessionaire, to the Independent Third Party out of the amounts payable from time to time by the Province to the Concessionaire.
- 20.13.8 By not later than 90 days, or if such time period is extended to reflect the additional time period, if any, required to resolve any dispute under Section 20.13.5, then by not later than such extended time period, after each Insurance Adjustment Date, the Province will complete the calculations required to make the determinations and arrive at the payment adjustments set out in sections 20.13.9 through to and including 20.13.11, and will deliver a copy of the calculations to the Concessionaire.
- 20.13.9 If on review of the information delivered under section 20.13.2 and section 20.13.3 the Province determines that there is a decrease or an increase in the amount of the Actual Premium Cost delivered pursuant to section 20.13.2 over the amount of the Actual Premium Cost applicable as at the immediately preceding Insurance Adjustment Date (or, for the first Insurance Adjustment Date, the Actual Premium Cost applicable as at Commencement Date), and the decrease or increase, as the case may be, exceeds **DELETED** (the **DELETED** Threshold Amount") then in respect of any adjustment applicable to the first Insurance Adjustment Date, the process set out in section 20.13.10 will be followed, and in respect of any adjustment applicable to any

subsequent Insurance Adjustment Date, the process set out in Section 20.13.11 will be followed.

20.13.10 In the event of:

20.13.10.1 an increase in the Actual Premium Cost under Section 20.13.9 applicable to the first Insurance Adjustment Date, the Province will increase the Total Performance Payment payable for the Contract Year commencing on the Insurance Adjustment Date by an amount that is equal to 80% of that portion of the net increase in the Actual Premium Cost (excluding the portion, if any, of the Actual Premium Cost that reflects claims matters relating to the Concessionaire) that exceeds the **DELETED** Threshold Amount,

20.13.10.2 a decrease in the Actual Premium Cost under Section 20.13.9 applicable to the first Insurance Adjustment Date, the Province will reduce the Total Performance Payment payable for the Contract Year commencing on the Insurance Adjustment Date by an amount that is equal to 80% of that portion of the net decrease in the Actual Premium Cost (excluding the portion, if any, of the Actual Premium Cost that reflects claims matters relating to the Concessionaire) that exceeds the **DELETED** Threshold Amount.

20.13.11 In the event of an increase or a decrease in the Actual Premium Cost exceeding the **DELETED** Threshold Amount under Section 20.13.9 applicable to an Insurance Adjustment Date other than the first Insurance Adjustment Date, the Province will adjust the Total Performance Payment payable for the Contract Year commencing on the applicable Insurance Adjustment Date by an amount that is equal to the aggregate of:

20.13.11.1 80% of that portion of the net increase or decrease in the Actual Premium Cost (excluding the portion, if any, of the Actual Premium Cost that reflects claims matters relating to the Concessionaire) that exceeds the **DELETED** Threshold Amount; and

20.13.11.2 each of the sums, positive or negative, by which the Total Performance Payment was adjusted on each of the preceding Insurance Adjustment Dates.

20.13.12 For the purposes of the calculations made under Section 20.13.10 and Section 20.13.11, the Province will use the information provided by the Concessionaire's insurers pursuant to Section 20.13.3 (unless an Insurance Report has been prepared, in which case the Province will use the information provided in the Insurance Report) to determine the portion, if any, of the Actual Premium Cost changes that reflects claims matters relating to the Concessionaire.

20.13.13 If the Concessionaire disagrees with any of the calculations delivered by the Province under Section 20.13.6, the Concessionaire will notify the Province within 30 days of receipt of the calculations and if the Province and the Concessionaire have not resolved the disagreement within 30 days of receipt of the notification of disagreement,

the matter will be considered a Dispute and resolved by submission to the Disputes Resolution Procedure for determination under this Agreement.

- 20.13.14 Any adjustment to the Total Performance Payment, whether determined by the Province and agreed to by the Concessionaire or determined pursuant to the Disputes Resolution Procedure, will have effect from the relevant Insurance Adjustment Date referenced in Section 20.13.3.
- 20.13.15 Any increase to or reduction in the Total Performance Payment to be made pursuant to this Section 20.13 will be, in the case of an increase payable by the Province, and in the case of a reduction deducted by the Province, on the payment date, determined in accordance with Section 33.5.1, immediately following the last day of the month within which the adjustment is determined by the Province and agreed to by the Concessionaire or determined pursuant to the Disputes Resolution Procedure.
- 20.13.16 From time to time during the Contract Period, the Province may, but will not be obliged to, pursue and implement, subject to the Concessionaire's reasonable consent, alternate risk financing measures for the Project if the Province considers in its reasonable discretion that such alternate measures would result in coverage substantially similar to the insurance coverages described in Part 1 of Schedule 11 [Insurance Requirements] being obtained in a more cost efficient manner.
- 20.13.17 Sample calculations of the benchmarking processes described in this Section 20.13 are set out in Appendix 1 to Part 1 of Schedule 11 [Insurance Requirements]. The numbers used in the sample calculations set out in Appendix 1 to Part 1 of Schedule 11 [Insurance Requirements] are for illustrative purposes only.

21. [NOT USED]

PART III
RELATIONSHIP AND MONITORING

22. REPRESENTATIVES

22.1 Province's Representative

- 22.1.1 The Province has appointed the Province's Representative to act as its agent in relation to the Operations, including in relation to the design, construction, completion, commissioning and testing of the Works and all other aspects of the Operations. 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.
- 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 identified by a notice from the Province to the Concessionaire in advance of any particular act of the Province's Representative and subject to Section 22.1.5, the Concessionaire is entitled to treat any act of the Province's Representative which is authorized by this Agreement 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, but without extension of any time period applicable to the Province's Representative 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 identified by a notice from the Concessionaire to the Province in advance of any particular act of the Concessionaire's Representative 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 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 will remain on Site 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. 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 Operations are identified in Part 3 of Schedule 8 [Key Individuals and Senior Individuals]. The Concessionaire will cause such persons (or suitable replacement individuals with equivalent qualifications and experience appointed in accordance with Section 22.4.2) to remain involved in the Operations 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 and Senior 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.

22.5 Senior Individuals

22.5.1 The Concessionaire represents to the Province that the senior individuals for the Operations are identified in Part 3 of Schedule 8 [Key Individuals and Senior Individuals].

22.5.2 The Concessionaire will provide the Province with advance notice of any such senior individual being changed, together with details of the qualifications and experience of the proposed replacement for information purposes only.

23. QUALITY MANAGEMENT

23.1 Quality Management System 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 Operations 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].

The portion of the Concessionaire's Quality Management System (as described in the Concessionaire's Quality Manual), which relates to 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 within 365 days from the Commencement Date 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 remainder of the Concessionaire's Quality Management System does not require certification by any accredited ISO 9000:2000 certification agency but must be compliant with the ISO 9001:2000 Standard. The Concessionaire will update its 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 is and at all times remains 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 Operations and meeting the requirements set out in Appendix 1 to Schedule 6 [Quality Management];

23.1.3.2 a Design Quality Management Plan for undertaking the design activities covered by the Design-Build Contract and meeting the requirements set out in Appendix 2 to Schedule 6 [Quality Management];

23.1.3.3 a Construction Quality Management Plan for undertaking the construction activities covered by the Design-Build Contract and meeting the requirements set out in Appendix 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 Appendix 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 Appendix 5 to Schedule 6 [Quality Management];

23.1.3.6 an Environmental Quality Management Plan meeting the requirements set out in Appendix 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 material and substantial aspect of the Operations (excluding in particular 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 The Concessionaire will not commence or permit the commencement of any aspect of the Operations before those parts the Quality Documentation that concern such aspect of the Operations 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 or such objection has been resolved.
- 23.1.6 The Concessionaire will comply with the Quality Management System detailed in the Quality Manual and will require that:
 - 23.1.6.1 the Designer complies with the Design Quality Management Plan in connection with its design activities;
 - 23.1.6.2 the Contractor complies with the Design Quality Management Plan, 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).

For greater certainty, any failure by the Designer, the Contractor, the Operator or any other person contracting with the Concessionaire, the Designer, the Contractor or the Operator to comply with the Quality Documentation applicable to the activities of such person will constitute a default by the Concessionaire in the performance of its obligations under this Agreement.

- 23.1.7 Where any aspect of the Operations 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 may 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 (or such objection has been resolved).
- 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 (or such objection has been resolved).
- 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 unresolved 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 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 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 trial, such calibration, sample, test or trial 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 trials will be carried out by laboratories that are duly accredited for the carrying out of such calibrations, samples, tests and trials 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: CAS 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

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 trial 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) and his job specification and responsibilities 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 quality management;
- 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 Audits and 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 the Quality Audit Plans referred to therein, and the reports 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 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 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 in any material respect; or

23.6.3.2 any auditing, monitoring or spot checks of the Quality Management System reveal material deficiencies in the Quality Management System or the implementation thereof,

the Province's Representative may carry out increased levels of external Quality Audits (whether in number, duration or detail) of all or any aspect of the 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, then without limiting any other rights and remedies of the Province the Concessionaire will compensate the Province for all costs incurred relating thereto (including the relevant administrative expenses of the Province, including an appropriate sum in respect of general staff costs and overheads); provided that if the Concessionaire disputes that the circumstances described in Section 23.6.3.1 or 23.6.3.2 existed to warrant the increased levels of audits, the Concessionaire may refer the matter to the Disputes Resolution Procedure and the Province shall bear the costs of the increased levels of audits and the cost of any Dispute unless the Concessionaire otherwise agrees or the Disputes Resolution Procedure confirms that such circumstances existed.

24. REPORTS AND INFORMATION

24.1 Required Reports

The Concessionaire will submit to the Province's Representative all reports provided for or specified in or required under the provisions of this Agreement and the Technical Requirements including all reports specified or referred to in Part 2 of Schedule 15 [Reports], 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

The form of such Reports, unless otherwise specified herein, 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 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 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 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 whose work (or any part of it) is work undertaken for the purposes of this Agreement.
- 24.6.2 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

- 25.1.1 The Concessionaire will maintain and update those records relating to the Project, the Project Facilities, the Site and the Adjacent Areas and the Operations 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 and the Adjacent Areas and the Operations at a location within British Columbia and will inform the Province of the particulars of that location.
- 25.1.2 The Province will be entitled at its own cost within 180 days after the Commencement Date or, in the case of records pertaining to the Phase 1 Section, within 180 days after the completion of the Phase 1 Section Works, to deliver up to the Concessionaire all or

any of the existing records (or copies thereof) of the Province or BCTFA in respect of the Project Facilities, the Site and the Adjacent Areas or any part thereof. In such event, the Province will at the same time it delivers such records to the Concessionaire deliver a written description of the state of such records (the "Province Records Description"). The Concessionaire will be deemed to have agreed with the Province Records Description unless within 20 Working Days of receipt thereof by the Concessionaire, the Concessionaire notifies the Province's Representative of any discrepancies between the Province Records Description and the actual state of the records delivered to the Concessionaire pursuant to this Section 25.1.2. The Parties will within 15 Working Days of receipt by the Province's Representative of any notice served by the Concessionaire in accordance with this Section 25.1.2 use reasonable efforts to agree on any necessary amendments to the Province Records Description, and failing such agreement within such period either Party may refer any Dispute to the Disputes Resolution Procedure.

25.1.3 The Concessionaire will retain the records referred to in Section 25.1.2 in safe storage at its own cost and such records will be treated for all purposes (including for greater certainty the remaining provisions of this Section 25 [Records]) as though they were part of the records referred to in Section 25.1.1, provided that the Concessionaire will not be required to retain such records in any other state than that described in the Province Records Description.

25.2 Audit and Inspection

Subject to Section 25.1.3, all records relating to the Project, the Project Facilities, the Site and the Adjacent Areas and the Operations 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. Without limiting the foregoing or any other provisions of this Agreement, the Minister may require the accounts and other records of the Concessionaire with respect to the Project, the Project Facilities, the Site and the Adjacent Areas and the Operations 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 and the Adjacent Areas and the Operations 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, Legal

Requirements, policies and 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 and the Adjacent Areas and the Operations or any part thereof. The Concessionaire will, where necessary or as reasonably 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 and the Adjacent Areas or the Operations 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 and the Adjacent Areas or the Operations 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 and the Adjacent Areas and the Operations, 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 seven 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 seven 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 its own 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 and the Adjacent Areas and the Operations, including the records referred to in Section 25.1 [Required Records], which were in existence at the Termination 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 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 Termination 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 a termination for convenience pursuant to Section 42.5 [Termination for Convenience or Relevant Change in Law (Province Enactment)]; 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, 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, 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 Schedule 10

[Payments] and of any other breach of its obligations under this Agreement as soon as practicable and in any case within seven 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 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, then the Province's Representative may serve a notice on the Concessionaire (a "Default Notice") requiring the Concessionaire (at its own cost and expense) to remedy such failure (and any damage resulting from such failure) within a reasonable period of not less than 30 days (the "Remedial Period") and, for greater certainty, a failure to perform will include a failure to remedy as required by this Section 26.1.2. 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 15 Working Days of receipt of such Default Notice. In the event of any breach by the Concessionaire as described in Section 26.5.2.1, irrespective of the Province having exercised its right to take action under Section 26.5 [Province's Remedial Rights], 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 grounds of that breach and will not be required to stipulate any Remedial Period.

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 Schedule 10 [Payments] relating to Nonconformity Reports and the Parties' respective rights and obligations relating thereto, and the provisions of Schedule 10 [Payments] 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 3 month period exceeds 30% of the Maximum Total Performance Payment for such rolling 3 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".

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 obligations under this Agreement and such failure is not capable of remedy; 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,

then the Province's Representative may give notice (herein called a "Default Warning Notice") to the Concessionaire setting out in general 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".

26.4 Increased Monitoring

If:

- 26.4.1 the total of all Availability/Performance Deductions in any month exceeds 10% of the Maximum Total Performance Payment for that month; or
- 26.4.2 the Concessionaire receives a Warning Notice; 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 costs incurred by the Province as a result of such increased level of monitoring (including the relevant administrative expenses of the Province, including an appropriate sum in respect of general staff costs and overheads).

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 (including, in the case of a failure by the Concessionaire to pursue completion of the Works diligently in accordance with Section 12.5 [Achievement of Completion], carrying out all works required to complete the Works in accordance with Section 12.5 [Achievement of Completion]), 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; or
 - 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,

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 this 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 (in the case of any action taken pursuant to Section 26.5.1) 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 [Increased Monitoring] 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 26.5.2 and/or any requirement of the Province thereunder **DELETED** 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 costs incurred by the Province in taking the steps or engaging others to take the steps referred to in Section 26.5.1 or Section 26.5.2 (including the relevant administrative expenses of the Province, including an appropriate sum in respect of general staff costs and overheads).
- 26.5.5 Where the Province carries out or causes a third party to carry out any capital works on the Concession Highway as part of the steps referred to in Section 26.5.2, other than as a result of a failure of the Concessionaire to perform any obligation under this Agreement, the Province will carry out or cause such capital works to be carried out to such standard as the Province in its reasonable judgment determines to be appropriate having regard to the relevant circumstances and the facts known to the Province at the time the capital works are carried out.

26.5.6 To the extent that the Parties agree or it is determined under the Disputes Resolution Procedure that the Province was not reasonable in exercising its rights under Section 26.5.5 (any such determination to be made on the basis of the facts known to the Province at the time it took or caused such action to be taken) then any actions taken or caused to be taken by or on behalf of the Province pursuant to Section 26.5.5 **DELETED** will apply.

26.6 Removal of Personnel

Without limiting any of the Concessionaire's obligations under Section 9 [Health and Safety], the Province's Representative may require the Concessionaire to remove forthwith from the Project Facilities, the Site and the Adjacent Areas any person who, in the opinion of the Province's Representative, acting reasonably, engages in misconduct or is incompetent or negligent in the proper performance of any duties, or whose presence on the Project Facilities, the Site or the Adjacent Areas is otherwise considered by the Province's Representative to be undesirable, and such person will not be again allowed upon the Project Facilities, the Site or the Adjacent Areas without the prior consent of the Province's Representative.

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, acting reasonably, 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 whether under a Utility Agreement or otherwise 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 any bridges or other Structures comprised in the Project Facilities 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 Project Facilities, the Site and the Adjacent Areas (including Utilities within any excavation) are to remain in service and be protected and preserved by the Concessionaire during and after the performance of the Works and any other works carried out in the course of the Operations.

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 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.
- 28.1.5 Without limiting any other provision of this Agreement, the Concessionaire will be responsible for and will 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 Operations to the extent required to comply with its obligations to perform the Operations 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 amounts so paid.

28.2 Utility Works

- 28.2.1 The Concessionaire is responsible for securing all temporary and permanent Utilities required in connection with or as part of the Works and any other works carried out in the course of the Operations, and for all Utility Works to be carried out in connection with or as part of the Works and such other works. 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 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;
- 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 consents or approvals 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, municipality, private owner or other Interested Party; and

- 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.

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 commercially 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 Operations within a reasonable time and on reasonable terms, then the Concessionaire may request the assistance of the Province (at the expense of the Concessionaire) 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.

28.3 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 is included in the Disclosed Data. 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 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 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) 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 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 Operations:

- 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 Operations; 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 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.

29. DELEGATION OF OBLIGATIONS, RIGHTS, POWERS AND FUNCTIONS

29.1 Delegated Obligations

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 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:

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 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 in 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.

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 commercially reasonable efforts to do so, is rendered unable to observe, abide by, comply with or otherwise perform a term of this Agreement solely by reason of such revocation, modification or suspension by the Minister then:

29.6.2.1 such revocation, modification or suspension will constitute a Relevant Change in Law; and

29.6.2.2 the Concessionaire will not be considered to be in breach of this Agreement for failing to observe, abide by, comply with or otherwise perform such term of this Agreement where such failure results solely from such revocation, modification or suspension by the Minister.

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.

29.7 Revocation and Termination on Termination 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 for 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 Termination Date (but without prejudice to any liability, whether incurred prior to or after the Termination 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 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 Project Facilities, the Site and the Adjacent Areas 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 of the Concession Highway or others) in a prompt, courteous and efficient manner 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 only, and without limiting the Concessionaire's duties, obligations and liabilities under the Transportation Investment Act, 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, which Claims or Losses for the purposes of this Section 30.2.1 shall exclude Consequential Losses:

30.2.1.1 made against 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; or

30.2.1.2 incurred, suffered or sustained by the Province, BCTFA or the Concessionaire in respect of the Project Facilities, the Site or the Adjacent Areas,

which is caused by the acts or omissions of any User of the Concession Highway or other person in either case, on or about the Project Facilities, the Site or the Adjacent Areas.

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 User or other 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 User or other 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.

30.3 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 any User of the Concessionaire Highway or any other person on or about the Project Facilities, the Site or the Adjacent Areas 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 the 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 \$20,000 (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 and the Adjacent Areas and the conduct of the Operations.

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 and other proper 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 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 of 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. Except as set forth in the second sentence of Section 30.6.1, the Province will have no liability or obligation to the Concessionaire with respect to any Extraordinary Traffic on the Concession Highway.
- 30.6.3 The provisions of Section 30.3.1 will apply in respect of any Claim or Loss arising directly or indirectly as a result of any Extraordinary Traffic on the Concession Highway.

30.7 Shared Facilities

The Concessionaire will be responsible at its own expense for the operation, maintenance and rehabilitation of any facilities forming part of the Project Facilities the use of which is shared with any other person, and will comply with all requirements set forth in the Technical Requirements with respect to any such shared facilities. The Concessionaire may enter into such cost sharing agreements as it deems appropriate with any other person sharing the use of any such shared facilities, provided that no such agreement binds or adversely affects the Province or BCTFA.

PART IV **PAYMENTS**

31. MEASUREMENT OF TRAFFIC AND DETERMINATION OF AVAILABILITY

The provisions of Part 8 of Schedule 10 [Monitoring and Measurement] will apply with respect to the measurement of traffic and the determination of Availability on the Concession Highway.

32. CALCULATION OF PAYMENTS

32.1 Total Performance Payment

32.1.1 In consideration for the carrying out of the Operations, the Province will pay the Concessionaire an amount in respect of each Contract Year equal to the Total Performance Payment for that Contract Year. For greater certainty, the Total Performance Payment to the Concessionaire under this Agreement (save in respect of the Pre-Completion Performance Payments which are contributions towards Eligible Costs incurred by the Concessionaire in respect of capital works relating to the Works) is related to and based upon performance by the Concessionaire of its obligations under this Agreement and, except as may otherwise be expressly provided herein, is not specific to the measurement of any materials or quantities.

32.1.2 The following payments made on account of the Total Performance Payment will be adjusted in accordance with Section 32.2 [Annual Reconciliation]:

32.1.2.1 for any Contract Year falling within the Original Service Period, the Monthly OSP Availability & Safety Payment and the Pre-Completion Performance Payment for that Contract Year; and

32.1.2.2 for any Contract Year falling within the Enhanced Service Period, the Monthly ESP Performance Payment and any Pre-Completion Performance Payment for that Contract Year.

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 (the "Annual Reconciliation Notice") setting forth the following information in respect of that Contract Year:

32.2.1.1 the actual Total Performance Payment;

32.2.1.2 the total of: (i) each Monthly OSP Availability & Safety Payment and each semi-annual Pre-Completion Performance Payment for any Contract Year falling within the Original Service Period paid to the Concessionaire; or (ii) each Monthly ESP Performance Payment and any semi-annual Pre-Completion Performance Payment for any Contract Year falling within the Enhanced Service Period paid to the Concessionaire;

32.2.1.3 either: (i) the amount payable by the Province to the Concessionaire in respect of the Total Performance Payment for such Contract Year, being

- the amount by which the amount in Section 32.2.1.1 exceeds the amount in Section 32.2.1.2, or (ii) the amount payable by the Concessionaire to the Province in respect of the Total Performance Payment for such Contract Year, being the amount by which the amount in Section 32.2.1.2 exceeds the amount in Section 32.2.1.1;
- 32.2.1.4 the total of any Completion Retentions and Asset Condition Retentions made during the Contract Year providing details of when such Completion Retentions or Asset Condition Retentions were made and repaid to the Concessionaire and the balance of such Completion Retentions and Asset Condition Retentions outstanding at the Contract Year end;
 - 32.2.1.5 any PST included in the amount payable pursuant to Section 32.2.1.3 or, where the amount is payable to the Province, the amount of any PST overpaid by the Province included in the payment (in either event identifying the relevant taxable property or service and the value thereof);
 - 32.2.1.6 any increase in the Provider System monthly fee to be reimbursed to the Concessionaire by the Province pursuant to Section 16.5.3;
 - 32.2.1.7 any other adjustments to reflect previous over-payments and/or under-payments (each adjustment stated separately);
 - 32.2.1.8 any other amount due and payable from the Concessionaire to the Province or from the Province to the Concessionaire under this Agreement;
 - 32.2.1.9 any interest payable in respect of any amounts owed; and
 - 32.2.1.10 the net amount owing by the Province to the Concessionaire or by the Concessionaire to the Province.
- 32.2.2 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 Total Performance Payment (in accordance with the calculations of each element of the Total Performance Payment specified in Schedule 10 [Payments]);
 - 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.
- 32.2.3 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 PST overpaid by the Province).

- 32.2.4 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 PST included in the amount owing by the Province and the relevant taxable property or service and the value thereof).

33. INVOICING AND PAYMENT

33.1 Monthly Invoices for Monthly OSP Availability & Safety Payment and Monthly ESP Performance Payment

- 33.1.1 The Monthly OSP Availability & Safety Payment and Monthly ESP Performance Payment components of the Total 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 an invoice (the "Monthly Invoice") setting out the Monthly OSP Availability & Safety Payment or the Monthly ESP Performance Payment, as the case may be, payable in respect of such month in accordance with Schedule 10 [Payments]. The Monthly Invoice will show:

33.1.2.1 the Monthly OSP Availability & Safety Payment or the Monthly ESP Performance Payment payable for the relevant month;

33.1.2.2 [Not Used];

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; and

33.1.2.7 the net amount owing by the Province to the Concessionaire or by the Concessionaire to the Province.

- 33.1.3 The Monthly Invoice will be accompanied by work papers clearly setting forth the derivation of the figures set out in the Monthly Invoice. The work papers will illustrate, *inter alia*, the calculation of:

33.1.3.1 the Monthly OSP Availability & Safety Payment and the Monthly ESP Performance Payment for the relevant month (in accordance with the calculations specified in Schedule 10 [Payments]);

- 33.1.3.2 any adjustments to the Monthly 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; and
 - 33.1.3.4 if the Monthly Invoice reflects any amounts due and owing on which interest is being charged, the amount of interest.
- 33.1.4 If the Monthly Invoice shows a net amount owing by the Province to the Concessionaire, the Monthly Invoice will separately identify any PST included in the amount owing by the Province and 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 the Monthly Invoice (which debit note will separately identify any PST included in the calculation of such amount).

33.2 Semi-Annual Invoices for Pre-Completion Performance Payments

- 33.2.1 The Pre-Completion Performance Payment component of the Total Performance Payment will be payable by the Province to the Concessionaire semi-annually in arrears in accordance with this Section 33.2 [Semi-Annual Invoices for Pre-Completion Performance Payments] and Part 3AA of Schedule 10 [Pre-Completion Performance Payment], provided the following conditions are satisfied:
- 33.2.1.1 the Concessionaire is in compliance in all respects with the Concessionaire's Design and Construction Requirements and the Design and Construction Output Specifications up to the end of the Semi-Annual Period in question; and
 - 33.2.1.2 the Concessionaire is in compliance in all respects with the provisions of Sections 8.13 [Concessionaire's Environmental Obligations] and 8.18 [Environmental Matters] up to the end of the Semi-Annual Period in question.
- 33.2.2 Within 20 days following the last day of the end of each Semi-Annual Period in each Contract Year, the Concessionaire will deliver to the Province an invoice (the "Semi-Annual Invoice") setting out the Pre-Completion Performance Payment payable in respect of such Semi-Annual Period in accordance with Schedule 10 [Payments]. The report will show:
- 33.2.2.1 the Pre-Completion Performance Payment payable for the relevant Semi-Annual Period;
 - 33.2.2.2 the Eligible Costs for the relevant Semi-Annual Period;
 - 33.2.2.3 [Not Used];

- 33.2.2.4 any property or services subject to PST included in the payment for the relevant Semi-Annual Period, the value of the relevant property or service, and the PST included in the payment for the relevant Semi-Annual Period;
 - 33.2.2.5 any adjustments to reflect previous over-payments and/or under-payments (each adjustment stated separately);
 - 33.2.2.6 any other amount due and payable from the Concessionaire to the Province or from the Province to the Concessionaire under this Agreement;
 - 33.2.2.7 any interest payable in respect of any amounts owed; and
 - 33.2.2.8 the net amount owing by the Province to the Concessionaire or by the Concessionaire to the Province.
- 33.2.3 The Semi-Annual Invoice delivered pursuant to Section 33.2.2 will be accompanied by work papers clearly setting forth the derivation figures set out in the report. The work papers will illustrate, *inter alia*, the calculation of:
- 33.2.3.1 the Pre-Completion Performance Payment for the relevant Semi-Annual Period (in accordance with Part 3AA of Schedule 10 [Pre-Completion Performance Payment]);
 - 33.2.3.2 the Eligible Costs for the relevant Semi-Annual Period;
 - 33.2.3.3 any adjustments to the Semi-Annual Invoice to reflect previous over-payments or under-payments;
 - 33.2.3.4 any other amount due and payable from the Concessionaire to the Province or from the Province to the Concessionaire under this Agreement; and
 - 33.2.3.5 if the Semi-Annual Invoice reflects any amounts due and owing on which interest is being charged, the amount of interest.
- 33.2.4 If the Semi-Annual Invoice shows a net amount owing by the Province to the Concessionaire, it will separately identify any PST included in the amount owing by the Province and 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 the Semi-Annual Invoice (which debit note will separately identify any PST included in the calculation of such amount).

33.2.5 The Semi-Annual Invoice delivered pursuant to Section 33.2.2 will be accompanied by the Pre-Completion Performance Payment Certificate issued by the Independent Certifier that certifies the state of completion of the Works in accordance with the requirements of this Agreement and the Federal Cost Contribution Agreement including but not limited to:

33.2.5.1 the percentage amount of the Works completed to date and in particular the percentage completion of the milestones set out in the Pre-Completion Performance Payment Certificate; and

33.2.5.2 the Eligible Costs incurred to date,

in respect of each of those items set out in the Pre-Completion Performance Payment Certificate. Notwithstanding the amount of the Pre-Completion Performance Payment claimed in the applicable Semi-Annual Invoice by the Concessionaire, the amount payable by the Province in respect of the Pre-Completion Performance Payment in relation to such Semi-Annual Invoice shall be no more than the amount certified as being payable by the Independent Certifier in the Pre-Completion Performance Payment Certificate accompanying such Semi-Annual Invoice.

33.2.6 At least 30 Working Days but no more than 45 Working Days prior to the date for delivery by the Concessionaire to the Province of the applicable Semi-Annual Invoice in accordance with Section 33.2.2, the Concessionaire will issue a notice to the Independent Certifier with a copy to the Province's Representative requesting that the Independent Certifier attend at the Site and Adjacent Areas for the purposes of conducting the necessary investigations and inspections of the Works required to permit the Independent Certifier to issue the Pre-Completion Performance Payment Certificate which is to accompany the Semi-Annual Invoice. The Province and the Concessionaire shall cause the Independent Certifier to commence such investigations and inspections within 10 Working Days of delivery of such notice by the Concessionaire and the Concessionaire shall make available to the Independent Certifier all materials referred to in Section 33.2.3 and such other materials, including but not limited to invoices and payment records, as the Independent Certifier may require to complete and issue the Pre-Completion Performance Payment Certificate. The Concessionaire and the Province's Representative shall cause the Independent Certifier to issue the applicable Pre-Completion Performance Payment Certificate within 10 Working Days of the Independent Certifier having commenced his investigations and inspections. Without restricting the rights of the Province's Representative and any contractor, consultants or other persons authorized by the Province's Representative to have access to and view the Works, as otherwise provided in this Agreement, the Province's Representative and any contractor, consultant or other persons authorized by the Province's Representative shall be entitled to accompany the Independent Certifier in the performance of the investigations and inspections provided for in this Section 33.2.6 without restriction subject to complying with all relevant safety and security procedures and any other reasonable directions with regard to site safety that may be issued by or on behalf of the Concessionaire's representative from time to time.

33.3 [Not Used]

33.4 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 itself prepare such report or invoice and the report or invoice so prepared will be deemed to have been issued by the Concessionaire.

33.5 Due Date for Payments

33.5.1 Without prejudice to Section 33.7 [Disputed Amounts], the Province will pay to the Concessionaire the amount of a Monthly Invoice or Semi-Annual Invoice issued by the Concessionaire not later than the later of:

33.5.1.1 the last day of the month following the month or Semi-Annual Period to which the invoice relates; or

33.5.1.2 the twentieth day after the Province has received both the invoice and the Monthly Report or Semi-Annual Report in respect of such month or Semi-Annual Period.

The Province shall make any payment to be made by it in respect of a Pre-Completion Performance Payment by means of a separate transfer apart from any other sums payable to the Concessionaire at the time the payment is made if the Concessionaire requests that the Province do so in its Semi-Annual Invoice.

33.5.2 Without prejudice to Section 33.7 [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 or 33.2.4 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.

33.5.3 Without prejudice to Section 33.7 [Disputed Amounts], the Province will pay to the Concessionaire the amount of an invoice issued by the Concessionaire pursuant to Section 33.2.3 not later than the later of:

33.5.3.1 30 days after receipt of such invoice; or

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

33.5.4 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.

33.6 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.

33.7 Disputed Amounts

33.7.1 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. If it is the Concessionaire that is disputing any amount payable by it, it shall pay the amount of the debit note in question that is not in dispute and will be entitled to withhold the balance pending resolution of the Dispute. If it is the Province that is disputing any amount payable by it, it will pay the greater of (i) the amount that is not in dispute, and (ii) the amount of the periodic payments of the Senior Debt then due, and will be entitled to withhold the balance pending resolution of the Dispute.

33.7.2 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.

33.7.3 Any amount agreed or determined to be due will be paid 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 annum from the day after the date on which payment was due to (and including) the date of payment.

33.8 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 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.

33.9 Satisfaction of Obligation

If the calculation of any amounts payable by the Province under this Agreement would (but for this Section 33.9 [Satisfaction of Obligation]) require the Province 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 dollar amount of any cost, expense, liability or obligation, the Province's obligations in respect thereof will be discharged if and to the extent that payment of such amount is paid once only.

33.10 Set-Off

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, which, for greater certainty, does not include sums which are subject to an unresolved Dispute, 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: (i) this Agreement, or (ii) under 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.

33.11 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:

- 33.11.1 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
- 33.11.2 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.

33.12 Interest on Overpayment

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: (i) repay such overpayment to the Province, and (ii) pay interest thereon at a rate per annum equal to the Interest Rate plus **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.

33.13 Final Payments

For greater certainty and without limiting 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 Total Performance Payment, to make the End of Term Payment and to make any payment pursuant to Section 44 [Compensation on Termination] arise before termination of this Agreement. The parties hereby acknowledge and agree that nothing in this Section 33.13 limits or otherwise affects any law or enactment by or under which an obligation of the Province referred to in this Section 33.13 is or may be terminated, limited or otherwise affected.

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 same arises out of a breach by the Concessionaire (or any person for whom the Concessionaire is responsible) of any 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 Operations, and will take all steps necessary to ensure that the Operations are performed, 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 to the same extent as if the Concessionaire were the owner of the Project Facilities, the Site and the Adjacent Areas.

35.1.3 For greater certainty, the Concessionaire acknowledges that the *Transportation Act*, S.B.C. 2004 (c. 44) has been passed and that neither its being brought into force nor the repeal or amendment of any enactments as a result of its 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 Relevant Change in Law or Relevant Works Change in Law and take all reasonable steps to minimize any increase in costs arising from any such Relevant Change in Law or Relevant Works Change in Law; and

35.2.2 use all reasonable efforts to take advantage of any positive or beneficial effects of any Relevant Change in Law or Relevant Works Change in Law and take all reasonable steps to maximize any reduction in costs arising from any such Relevant Change in Law or Relevant Works Change in Law.

Any compensation payable to the Concessionaire or adjustment to the Total Performance Payment in respect of any Relevant Change in Law or Relevant Works 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 Total Performance Payment in respect of any Relevant Change in Law or Relevant Works Change in Law.

35.3 Adjustments for Relevant Change in Law or Relevant Works Change in Law

- 35.3.1 On the occurrence of a Relevant Change in Law or a Relevant Works Change in Law, either the Concessionaire or the Province will be entitled to seek compensation or adjustments to the Total Performance Payment to compensate for any increase or decrease (as the case may be) in the net cost to the Concessionaire of performing the Operations. Any such adjustments will be calculated in accordance with this Section 35.3 [Adjustments for Relevant Change in Law or Relevant Works Change in Law] and, as applicable, Section 35.4 [Relevant Change in Law] or Section 35.5 [Relevant Works Change in Law].
- 35.3.2 On the occurrence of a Relevant Change in Law or Relevant Works Change in Law:
- 35.3.2.1 either the Concessionaire or the Province may give notice to the other of the occurrence of the Relevant Change in Law or Relevant Works Change in Law (as the case may be);
- 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 Relevant Change in Law or Relevant Works Change in Law (as the case may be), and if they have not agreed on the occurrence or the effect of the Relevant Change in Law or Relevant Works Change in Law (as the case may be) within 14 days of such meeting, then either of them may refer the question of whether a Relevant Change in Law or Relevant Works Change in Law (as the case may be) has occurred or the effect of the Relevant Change in Law or Relevant Works Change in Law (as the case may be) for determination in accordance with the Disputes Resolution Procedure;
- 35.3.2.3 within 14 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 Relevant Change in Law or Relevant Works Change in Law (as the case may be);
- 35.3.2.3.2 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];
- 35.3.2.3.3 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] and, where applicable, the Province and BCTFA

will provide information and assistance in connection therewith as provided in Section 3.5.3;

35.3.2.3.4 the Province's Representative will not be entitled to withdraw any such request for a Province Change or Province Change Confirmation;

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 Total Performance Payment, will be calculated in accordance with Section 35.4 [Relevant Change in Law] or Section 35.5 [Relevant Works Change in Law], as applicable, subject to Section 35.2 [Mitigation].

35.4 Relevant Change in Law

35.4.1 Any compensation payable or adjustment to the Total Performance Payment in respect of a Relevant Change in Law in accordance with Section 35.3.1 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:

35.4.1.1 any net increase or decrease in the costs of the Concessionaire in performing the Operations resulting from the Relevant Change in Law;

35.4.1.2 the extent to which the Concessionaire has been, or will be, compensated as a result of any indexation of the Total Performance Payment under this Agreement; and

35.4.1.3 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).

35.4.2 The Concessionaire will not be entitled to any other payment or compensation or, except as provided otherwise in this Agreement (including pursuant to Section 12.6 [Delay]), 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 any Relevant Works Change in Law occurs, the Concessionaire will be entitled to receive compensation from the Province in an amount calculated by reference to the table set forth in Section 35.5.3 below as the Province's Share of the Allowable Capital Expenditure in respect of such Relevant Works Change in Law, taking into account the different applicable amounts of the Province's Share when the aggregate amount of such Allowable Capital Expenditures causes the Cumulative Allowable Capital Expenditure to be in more than one of the applicable provisions of such Table.

35.5.2 The Concessionaire will not be entitled to receive any other payment, compensation or relief in respect of a Relevant Works Change in Law or associated Province Change or the consequences of either. The Concessionaire acknowledges that it has accepted the risk of bearing the consequences which are not covered by, or which exceed, the Province’s Share and has had the opportunity of assessing the risk, and has satisfied itself that the Total Performance Payment is sufficient to cover all relevant contingencies, prior to executing and delivering this Agreement.

35.5.3 For the purposes of this Section 35.5 [Relevant Works Change in Law], the “Province’s Share” means an amount equal to the percentage share of the relevant Allowable Capital Expenditure that is to be borne by the Province during the Contract Period as indicated in Column 3 of the following Table:

Table

Column 1	Column 2	Column 3	Column 4
Cumulative Allowable Capital Expenditure	Concessionaire share of Allowable Capital Expenditure (as a % of the incremental Allowable Capital Expenditure)	Province’s Share (as a % of the incremental Allowable Capital Expenditure)	Maximum cumulative Concessionaire share of the Cumulative Allowable Capital Expenditure
Applicable to the first \$250,000	DELETED	DELETED	DELETED
Applicable to the next \$250,000	DELETED	DELETED	DELETED
Applicable to the next \$500,000	DELETED	DELETED	DELETED
Applicable to amounts over \$1,000,000	DELETED	DELETED	DELETED

35.6 Change in Law other than Relevant Change in Law or Relevant Works 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 Relevant Change in Law or Relevant Works 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 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] and, where applicable, the Province and BCTFA will provide information and assistance in connection therewith as provided in Section 3.5.3;
- 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; 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

- 36.1.1 Where the Province requires any Additional Works to be carried out, the provisions of Part 1 of Schedule 14 [Procedure for Additional Works] 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 "Existing Highway", "Highway Improvement", "Site", "Concession Highway" and "Project Facilities" in Section 1 of Schedule 1 [Definitions and Interpretation] will be deemed to be amended as appropriate to include references to such Additional Works.

36.2 Compensation

- 36.2.1 The Concessionaire will be entitled to compensation from the Province in respect of Additional Works carried out by the Concessionaire, calculated in accordance with Part 2 of Schedule 14 [Payment for Additional Works Services].
- 36.2.2 The provisions of Part 4 of Schedule 13 [Additional Works] will apply with respect to any Change in Capital Costs, Change in Recurrent Costs or Change in Revenues of the Concessionaire consequential upon the carrying out of any Additional Works.

36.3 Subsequent Schemes

Where the Concessionaire desires a Subsequent Scheme to be carried out, the provisions of Part 3 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 4 of Schedule 14 [Improvements] will apply.

37. 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 they are not able to perform their obligations under this Agreement.

37.1.2 The occurrence of an event of Force Majeure other than an event of Eligible Force Majeure will not affect the calculation of the Total Performance Payment or any component thereof and will not entitle the Concessionaire to any compensation or other relief except as expressly provided in Sections 10.1.5, 12.6.6 and 37.1.1. The occurrence of an event of Eligible Force Majeure will, subject to Section 37.4.4, be a **DELETED**.

37.1.3 Nothing in Section 37.1.1 will affect any entitlement of the Province to make Availability/Performance Deductions or any Availability/Performance Deduction made in accordance with the calculations of the Total 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 as a result of which any entitlement to make any Availability/Performance Deduction arises, such Availability/Performance Deduction 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 Total Performance Payment (and monthly payments in respect thereof).

37.2 Notice

Relief under Section 37.1 [Relief from Liability] will not be given unless the Party intending to claim relief has, by notice to the other Parties within 10 days of becoming aware of the event of Force Majeure, informed 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 the Party affected will take all necessary steps to mitigate the effects of the event of Force Majeure and to remedy the failure to perform, and relief under this Section 37 [Force Majeure] will not be available or will cease to be available to a Party if it fails so to take all necessary steps to mitigate the effects of the event of Force Majeure and to remedy the failure to perform as aforesaid.

37.4 Consequences of Eligible Force Majeure

Subject to Section 37.5 [Right to Terminate], if the Province and the Concessionaire agree or it is determined through the Disputes Resolution Procedure that an event of Eligible Force Majeure has caused damage to the Project Facilities (including the Works), the Site and/or the Adjacent Areas 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 damage with the intent that as soon as possible after the cessation of the event of Eligible Force Majeure rectification work 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, such uninsured rectification works and any deductibles payable under the policies of insurance referred to in this Section 37.4.4, notwithstanding any other provision of this Agreement (including paragraph (d) of the definition of "Compensation Event" in Section 1 of 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.

37.5 Right to Terminate

- 37.5.1 If the occurrence of an event of Force Majeure:
 - 37.5.1.1 in the case of an event of Eligible Force Majeure, renders or is likely to render 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;
 - 37.5.1.2 in the case of an event of Eligible Force Majeure, 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;
 - 37.5.1.3 in the case of an event of Force Majeure (that is not an event of Eligible Force Majeure), renders or is likely to render 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 12 months from the date upon which the Party affected gives notice of the occurrence of the event of Force Majeure to the other Parties; or

- 37.5.1.4 in the case of an event of Force Majeure (that is not an event of Eligible Force Majeure), 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 12 months 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, 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 and that a solution acceptable to all Parties is not reached, terminate this Agreement in accordance with Section 42.2.1.

- 37.5.2 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 Deduction that the Province would have been entitled to make but for paragraph (d) of the definition of "Excepted Closure" in Section 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, 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 the Province's receipt of the Concessionaire's notice 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 Operations in accordance with the provisions of this Agreement;

- 37.5.3.2 the Province will pay to the Concessionaire the Total 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 Operations were being fully provided 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 but no more than 60 days) from the Province to the Concessionaire stating that this Agreement is terminated.

37.6 Limit on Liability

For greater certainty, except as expressly set out in this Section 37 [Force Majeure] (other than this Section 37.6 [Limit on Liability]) neither the Province nor BCTFA nor any of their respective agents, contractors or subcontractors of any tier or employees of any of them will have any liability to the Concessionaire in relation to any Loss or Claim which the Concessionaire suffers or incurs as a result of any event of Force Majeure and, accordingly, as between the Parties any such Loss or Claim will be borne by the Concessionaire.

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 and warrants and undertakes that:

- 38.1.1 it will fully comply with and meet the Technical Requirements;
- 38.1.2 the design of the Works and of any other works the subject of a Proposal or otherwise carried out in the course of the Operations will in all respects meet the Technical Requirements and all other requirements of this Agreement;
- 38.1.3 the Works and any other works the subject of a Proposal or otherwise carried out in the course of the Operations 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;
- 38.1.4 the Concessionaire will at all times comply with the requirements of the Province's Representative as permitted under this Agreement and with all Laws and Regulations, Requirements of Interested Parties and Legal Requirements;
- 38.1.5 the Works and any other works the subject of a Proposal or otherwise carried out in the course of the Operations when constructed will comply in all respects with the Design and Construction Output Specifications, the Concessionaire's Design and 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;
- 38.1.6 the Concessionaire's Design and Construction Requirements, the O,M&R Requirements and the Traffic Management Requirements will at all times comply with and satisfy the Design and Construction Output Specifications, the O,M&R Output Specifications and the Traffic Management Output Specifications, respectively;

- 38.1.7 subject to the terms of the Design and Certification Procedure, the design of the Works and of any other works the subject of a Proposal or otherwise carried out in the course of the Operations 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;
- 38.1.8 all information, representations and other matters of fact communicated in writing to the Province or its agents, representatives or employees in connection with the Concessionaire's response to the RFQ and the RFP or in the course of the subsequent negotiations in respect of this Agreement are true, complete and accurate in all respects;
- 38.1.9 it is a general partnership, validly formed and existing under the laws of the Province of British Columbia, each of the Partners is a limited liability company, duly incorporated and validly existing under the laws of British Columbia and the Partners are the only partners of the Concessionaire;
- 38.1.10 it has full capacity, power and authority to enter into this Agreement and perform its obligations hereunder and to carry out the Operations;
- 38.1.11 the entry into and performance by it of this Agreement do not and will not:
- 38.1.11.1 conflict with its constitutional documents; or
 - 38.1.11.2 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;
- 38.1.12 there has been no material adverse change in the financial condition of the Concessionaire since its formation on September 23, 2005 or the financial condition of the Partners, since the date of their incorporation, being September 23, 2005;
- 38.1.13 the Financial Terms together with the capital terms pursuant to the Partnership Agreement are the basis on which the Concessionaire will finance the Project;
- 38.1.14 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) enforceable obligation of each of the parties thereto, 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;

38.1.15 in respect of any of the items required to be made available to the Province under Section 49.1 [Design and Other Data]:

38.1.15.1 either:

- (a) each of them is original; or
- (b) 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:
 - (i) 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 contractors or subcontractors of any tier; and
 - (ii) the Concessionaire to comply with its obligations under this Agreement (including under Section 49 [Intellectual Property]); and

38.1.15.2 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; and

38.1.16 it will comply with Section 8.6 [Acquisition of Land by Concessionaire] in respect of all land and Rights in respect of land which the Concessionaire or any of its Affiliates acquires as contemplated in that Section.

38.2 Disclaimer

38.2.1 The Province and its representatives have made available or caused to be made available, or may after the date hereof make available or cause to be made available, to the Concessionaire certain materials, documents, information and data related to the design and construction of the Works, the Project Facilities, the Site, the Adjacent Areas, 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, information 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 and the RFP (including all such materials, documents, information and data contained or referred to in the Data Room and the Resource Documents DVD), but, with respect to materials, documents, information and data made available after the date of execution of this Agreement, specifically excludes documentation including this Agreement and any agreements and documents arising therefrom which expressly provide that the Concessionaire can rely on their contents or that otherwise contain express agreements, covenants, representations or warranties of the Province.

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 Project Facilities, the Site or the Adjacent Areas 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) 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, 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.

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 made available to it up to and including the date hereof and, without prejudice to any rights it may have under Section 38.2.5, has before the execution of this Agreement satisfied itself as to the accuracy, completeness and fitness for purpose of all such Disclosed Data upon which it places reliance; and

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 Project Facilities, the Site or the Adjacent Areas 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.

38.2.5 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 additional costs are incurred by the Concessionaire in performing the Works 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 any of the geotechnical investigation datum and test results provided in borehole and test pit logs or any of the survey point datum provided as part of the Disclosed Data upon which the Concessionaire has reasonably and in accordance with Good Industry Practice relied in the design and construction of the Works recognizing that the borehole and

test pit logs record only the observations which were made at the specific locations described and at the specific times recorded and may not be representative of conditions encountered either at locations immediately adjacent thereto or, with respect to groundwater and other conditions, at any other times, 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 5 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:

- 38.2.5.1 with respect to factual errors in such geotechnical or surveying information that was 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;
- 38.2.5.2 for any delay or additional costs that result from any interpretation of or extrapolation from or assumption made on the basis of any such geotechnical or surveying information, or from any action taken or omitted on the basis of any such interpretation, extrapolation or assumption;
- 38.2.5.3 if it was not in all the relevant circumstances and having regard to any other information known to the Concessionaire at the relevant time reasonable in accordance with Good Industry Practice for the Concessionaire to rely on the information containing the factual error or to rely on such information without further investigation or site examination; or
- 38.2.5.4 if the Concessionaire in fact carried out any further investigation or site examination with respect to the subject matter of the information containing the factual error.

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.

38.3 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 39.5 [Province's Indemnities], the Concessionaire shall indemnify and save harmless the Province and BCTFA and their respective agents, contractors and subcontractors of any tier and the employees of any of them in respect of all Claims or Losses made against or incurred, suffered or sustained by the Province or BCTFA where the same are based upon or arise out of or from anything done or omitted to be done by the Concessionaire in connection with the Operations, in carrying out or failing to carry out any obligation under this Agreement required to be performed 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, in carrying out or failing to carry out any duty or obligation under the Transportation Investment Act and any breach of a representation or warranty by the Concessionaire including in respect of:

- 39.1.1 death or personal injury;
- 39.1.2 any Loss or damage to property, whether real or personal (including any property belonging to the Province or BCTFA or for which either such Party is responsible, such property being referred to herein as "Province Property");
- 39.1.3 any Loss or damage to the Works or the Project Facilities or any materials or Plant to be used in the construction of the Works or the Project Facilities;
- 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 or any other third party;
- 39.1.5 any Loss or Claim arising out of or in connection with a breach by the Concessionaire of the provisions of Section 29 [Delegation of Obligations, Rights, Powers and Functions] or as a result of any failure by the Concessionaire to properly perform any of the Delegated Obligations or any wrongful exercise by the Concessionaire of any of the Delegated Rights, Powers and Functions; and
- 39.1.6 any Loss or Claim arising out of or resulting from Contamination (including for greater certainty any Legal Requirement of any Governmental Authority in respect thereof and so that any reference herein to Contamination will be deemed to include a reference to migration and/or leaching of Contamination) which is the responsibility of the Concessionaire hereunder and which:
 - 39.1.6.1 results from the execution of the Operations;
 - 39.1.6.2 affects at any time the execution of the Works;
 - 39.1.6.3 affects at any time the Operations and/or the Project Facilities, the Site and the Adjacent Areas or any part thereof (including for greater certainty any effects of a Relevant Lawful Requirement),

except to the extent which:

- (a) the effects of that Contamination upon the Works, the Operations and/or the Project Facilities, the Site and the Adjacent Areas or the relevant part thereof; or
- (b) such Relevant Lawful Requirement,

constitutes Eligible Force Majeure; provided, however that to the extent that such Contamination constitutes or is caused by Existing Contamination (other than Contamination that occurs naturally in the environment or results from natural processes such as, for example, Contamination resulting from acid generating rock) and was not contributed to by any act or omission of the Concessionaire or any of its contractors or subcontractors of any tier or any of its or their employees after the Concessionaire had knowledge of the Existing Contamination, this indemnity will not apply to such Losses or Claims;

39.1.6.4 affects at any time any Relevant Property, provided that to the extent that such Contamination:

- (a) was caused after the Commencement Date by any acts or omissions of the Province or any of its agents, contractors or subcontractors of any tier; or
- (b) constitutes or is caused by Existing Contamination (other than Contamination that occurs naturally in the environment or results from natural processes such as, for example, Contamination resulting from acid generating rock),

the migration or leaching from the Project Facilities, the Site or the Adjacent Areas of such Existing Contamination or other effect of such Existing Contamination on the Relevant Property was not caused or contributed to by any act or omission of the Concessionaire or any of its contractors or subcontractors of any tier or any of its or their employees after the Concessionaire had knowledge of the Existing Contamination, this indemnity will not apply to such Losses or Claims; and/or

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,

including for greater certainty and without limitation any such Losses and Claims which arise directly or indirectly out of the act, neglect or omission of the Concessionaire, its Funders, Contracting Affiliates, agents, contractors or subcontractors of any tier or its or their employees.

39.2 Exceptions

The Concessionaire will not be responsible or be obliged to indemnify the Province or BCTFA under Section 39.1 [Concessionaire's Indemnities] or any other indemnity contained in this Agreement for any Claims or Losses to the extent that:

- 39.2.1 they arise as a result of the Concessionaire acting on and in accordance with the instructions of the Province or BCTFA except to the extent any such Loss or Claim arises out of or results from any negligent act or omission of the Concessionaire, its contractors or subcontractors of any tier or its or their employees;
- 39.2.2 they were caused by the negligence or wilful misconduct of the Province or BCTFA or any of their respective agents, contractors or subcontractors of any tier except to the extent any such Loss or Claim arises out of or results from any negligent act or omission of the Concessionaire, its contractors or subcontractors of any tier or its or their employees;
- 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 pursuant to this Agreement;
- 39.2.4 the Province is entitled to rely upon the protections afforded under section 8 of the Transportation Investment Act; or
- 39.2.5 the Loss or Claim arises out of or in connection with any action by a third party against the Province in tort and the Province is found liable to that third party but only to the extent that the Concessionaire is not also found liable to that third party in the same or in any related action.

39.3 Savings

- 39.3.1 The Concessionaire's liability to the Province arising under any indemnity in this Agreement is without prejudice to any other right or remedy available to the Province.
- 39.3.2 The indemnity by the Concessionaire under any provision of this Agreement is without limitation to any indemnity by the Concessionaire under any other provision of this Agreement.

39.4 Conduct of Claims Subject to Concessionaire's Indemnities

- 39.4.1 If the Province or BCTFA (in this Section 39.4 [Conduct of Claims Subject to Concessionaire's Indemnities] individually referred to as an "indemnified Party" and collectively referred to as the "indemnified Parties") receives any notice, demand, letter or other document concerning any Claim from which it appears that the indemnified Party is or may become entitled to indemnification under this Agreement, the indemnified Party will give notice to the Concessionaire as soon as reasonably practicable.
- 39.4.2 Subject to Sections 39.4.3, 39.4.4, 39.4.5 and 39.4.6, on the giving of a notice pursuant to Section 39.4.1 the Concessionaire will be entitled to and will resist the Claim in the name of the indemnified Party at its own expense and will have the conduct of any defence, dispute, compromise or appeal of the Claim (including any

arbitration proceedings in respect thereof) and of any incidental negotiations, and the indemnified Parties (subject to payment by the Concessionaire of all costs and expenses in connection therewith) will give the Concessionaire and its counsel all reasonable cooperation, access and assistance for the purposes of considering and resisting such Claim including providing or making available to the Concessionaire and its counsel documents and information and witnesses for attendance at examinations for discovery and trials, subject always to any and all applicable Laws and Regulations and solicitor and client privilege.

39.4.3 The defence and any other legal proceedings in respect of any Claim subject to Section 39.4.2 will be through legal counsel, and will be conducted in a manner, acceptable to the indemnified Party and the Concessionaire, acting reasonably. If:

39.4.3.1 the Concessionaire and an indemnified Party are or become parties to the same Claim and the representation of all parties by the same counsel would be inappropriate due to a conflict of interest; or

39.4.3.2 a conflict of interest or a perceived conflict of interest exists between the interests of an indemnified Party and the Concessionaire or some other person who may be represented by counsel retained by the Concessionaire,

then the indemnified Party will be represented by separate counsel selected by the indemnified Party and the indemnity obligations of the Concessionaire with respect to the Claim (including with respect to the cost of such separate legal representation) will continue to apply. An indemnified Party may retain separate counsel to act on its behalf in respect of the Claim in circumstances other than those described in the immediately preceding sentence, in which event the indemnity obligations of the Concessionaire with respect to the Claim will continue to apply but the fees and disbursements of such separate counsel will be paid by the indemnified Party. In any case where an indemnified Party is represented by separate counsel, the Concessionaire and its counsel will give the indemnified Party and its counsel all reasonable cooperation, access and assistance including providing or making available to the indemnified Party and its counsel documents and information and witnesses for attendance at examinations for discovery and trials, subject always to any and all applicable Laws and Regulations and solicitor and client privilege. For greater certainty, the representation of an indemnified Party by separate counsel as contemplated in this Section 39.4.3 and actions taken by such separate counsel in the course of such representation, including attendance at examinations, hearings and trials, shall not constitute a taking over of the conduct of the relevant legal proceedings by the indemnified Party for purposes of Section 39.4.6.

39.4.4 With respect to any Claim subject to Section 39.4.2:

39.4.4.1 the Concessionaire will keep the indemnified Parties fully informed and consult with the indemnified Parties about the conduct of the Claim;

39.4.4.2 to the extent that the indemnified Party is not entitled to be indemnified by the Concessionaire for all of the liability arising out of the subject matter of the Claim, no action will be taken pursuant to Section 39.4.2 that increases the amount of any payment to be made by the indemnified Party in respect

of that part of the Claim which is not covered by the indemnity from the Concessionaire; and

- 39.4.4.3 the Concessionaire will not pay or settle or make any admission of liability in respect of such Claim, whether before or after a suit, if any, is commenced, without the prior consent of the indemnified Party, such consent not to be unreasonably withheld or delayed.
- 39.4.5 The indemnified Party will be free to pay or settle any Claim on such terms as it may in its absolute and unfettered discretion think fit and without prejudice to its rights and remedies under this Agreement if:
 - 39.3.5.1 within 30 days of the notice from the indemnified Party under Section 39.4.1 the Concessionaire fails to notify the indemnified Party of its intention to dispute the Claim; or
 - 39.3.5.2 the Concessionaire fails to comply in any material respect with the provisions of Section 39.4.4.
- 39.4.6 The indemnified Party will be free at any time to give notice to the Concessionaire that it is taking over the conduct of any defence, dispute, compromise or appeal of any Claim subject to Section 39.4.2 or of any incidental negotiations. Upon receipt of such notice the Concessionaire will promptly take all steps necessary to transfer the conduct of such Claim to the indemnified Party and will provide the indemnified Party with all reasonable cooperation, access and assistance (including providing or making available to the indemnified Party and its counsel documents and information and witnesses for attendance at examinations for discovery and trials, subject always to any and all applicable Laws and Regulations and solicitor and client privilege) for the purposes of considering and resisting such Claim. If the indemnified Party gives any notice pursuant to this Section 39.4.6, then except as otherwise expressly provided by this Agreement the Concessionaire will be released from its indemnity in respect of such Claim except where such notice was given by the indemnified Party as a consequence of the failure of the Concessionaire to perform its obligations in accordance with this Section 39.4 [Conduct of Claims Subject to Concessionaire's Indemnities].

39.5 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:

- 39.5.1 any Loss or Claim to the extent resulting from any negligent act or omission of the Province or BCTFA or any of their respective agents, employees or other contractors (not being employed by the Concessionaire) (but only in so far as such negligent act or omission has not been caused or contributed to by the Concessionaire, its agents, employees or subcontractors) except in respect of:
 - 39.5.1.1 exercising a right against a Third Party Contractor as referred to in Section 17.6 [Enforcement of Rights against Third Party Contractors];

39.5.1.2 any matters referred to in Section 38.2 [Disclaimer]; and

39.5.2 any Loss or Claim arising from a breach by the Province of its obligations under this Agreement.

39.5A Exceptions

The Province will not be responsible or be obligated to indemnify the Concessionaire for any Claims or Losses referred to in Section 39.5 [Province's Indemnities] to the extent that:

39.5A.1 they were caused or contributed to by the negligence or willful misconduct of the Concessionaire, any Contracting Affiliate or any of their respective employees, agents, contractors or subcontractors of any tier; or

39.5A.2 the Concessionaire has been fully and effectively indemnified in respect of any such Claim or Loss under the insurance required to be maintained pursuant to this Agreement.

39.5B Savings

39.5B.1 The Province's liability to the Concessionaire arising under any indemnity in this Agreement is without prejudice to any other right or remedy available to the Province.

39.5B.2 The indemnity by the Province under any provision of this Agreement is without limitation to any indemnity by the Province under any other provision of this Agreement.

39.6 Limited Indemnity

Subject to 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, solely for the purpose of holding the Concessionaire harmless against any Relevant Third Party claim (but not so as to give rise to or constitute any separate or new cause of action against the Province aside from any cause of action for recovery of such losses or damages awarded by a court to such Relevant Third Party against the Concessionaire pursuant to such Relevant Third Party claim), indemnify and hold the Concessionaire harmless in respect of any Loss or Claim arising from any damage, injury or other harm suffered by such Relevant Third Party and/or Relevant Property which was caused by Existing Contamination (other than Contamination that occurs naturally in the environment or results from natural processes such as, for example, Contamination resulting from acid generating rock) which migrated or leached into or onto the Relevant Property except to the extent such migration or leaching of such Existing Contamination (and/or damage, injury or other harm suffered) was caused or contributed to by any act or omission of the Concessionaire or any of its contractors or subcontractors of any tier or any of its or their employees after the Concessionaire had knowledge of the Existing Contamination, provided that this indemnity will not apply in respect of any matter which constitutes Eligible Force Majeure.

39.7 Disclaimer

Except as expressly provided in Section 39.5 [Province's Indemnities] and Section 39.6 [Limited Indemnity], 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 Operations. This Section 39.7 [Disclaimer] will not apply in relation to:

- 39.7.1 any failure by the Province to make proper payment to the Concessionaire in accordance with the terms of this Agreement;
- 39.7.2 any negligent act or omission of the Province or BCTFA or any of their respective agents or employees giving rise to death or personal injury; and
- 39.7.3 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.

39.8 Conduct of Claims Subject to Province's Indemnities

- 39.8.1 If the Concessionaire receives any notice, demand, letter or other document concerning any Claim from which it appears that the Concessionaire is or may become entitled to indemnification under this Agreement, the Concessionaire will give notice to the Province as soon as reasonably practicable.
- 39.8.2 Subject to Sections 39.8.3, 39.8.4 and 39.8.5, on the giving of a notice pursuant to Section 39.8.1 the Province will be entitled to resist the Claim in the name of the Concessionaire at its own expense and to have the conduct of any defence, dispute, compromise or appeal of the Claim (including any arbitration proceedings in respect thereof) and of any incidental negotiations, and the Concessionaire (subject to payment by the Province of all costs and expenses in connection therewith) will give the Province and its counsel all reasonable cooperation, access and assistance for the purposes of considering and resisting such Claim including providing or making available to the Province and its counsel documents and information and witnesses for attendance at examinations for discovery and trials, subject always to any and all applicable Laws and Regulations and solicitor and client privilege.
- 39.8.3 The defence and any other legal proceedings in respect of any Claim subject to Section 39.8.2 will be through legal counsel, and will be conducted in a manner, acceptable to the Province and the Concessionaire, acting reasonably. If:
 - 39.8.3.1 the Province and/or BCTFA and the Concessionaire are or become parties to the same Claim and the representation of all parties by the same counsel would be inappropriate due to a conflict of interest; or
 - 39.8.3.2 a conflict of interest or a perceived conflict of interest exists between the interests of the Concessionaire and the Province and/or BCTFA or some other person who may be represented by counsel retained by the Province and/or BCTFA,

then the Concessionaire will be represented by separate counsel selected by the Concessionaire and the indemnity obligations of the Province with respect to the Claim (including with respect to the cost of such separate legal representation) will continue to apply. The Concessionaire may retain separate counsel to act on its behalf in respect of the Claim in circumstances other than those described in the immediately preceding sentence, in which event the indemnity obligations of the Province with respect to the Claim will continue to apply but the fees and disbursements of such separate counsel will be paid by the Concessionaire. In any case where the Concessionaire is represented by separate counsel, the Province and BCTFA and its or their counsel will give the Concessionaire and its counsel all reasonable cooperation, access and assistance including providing or making available to the Concessionaire and its counsel documents and information and witnesses for attendance at examinations for discovery and trials, subject always to any and all applicable Laws and Regulations and solicitor and client privilege.

39.8.4 With respect to any Claim subject to Section 39.8.2:

39.8.4.1 the Province will keep the Concessionaire fully informed and consult with it about the conduct of the Claim;

39.8.4.2 to the extent that the Concessionaire is not entitled to be indemnified by the Province for all of the liability arising out of the subject matter of the Claim, no action will be taken pursuant to Section 39.8.2 which increases the amount of any payment to be made by the Concessionaire in respect of that part of the Claim which is not covered by the indemnity from the Province; and

39.8.4.3 the Province will not pay or settle or make any admission of liability in respect of such Claim, whether before or after a suit, if any, is commenced, without the consent of the Concessionaire, such consent not to be unreasonably withheld or delayed.

39.8.5 The Concessionaire will be free to pay or settle the Claim on such terms as it may in its absolute and unfettered discretion think fit and without prejudice to its rights and remedies under this Agreement if:

39.8.5.1 within 30 days of the notice from the Concessionaire under Section 39.8.1 the Province fails to notify the Concessionaire of its intention to dispute the Claim; or

39.8.5.2 the Province fails to comply in any material respect with the provisions of Section 39.8.4.

39.9 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. Without limiting the generality of the foregoing, such costs, expenses or other amounts will not have been reasonably incurred in respect of Consequential Losses for which

the Province is liable to a third party pursuant to a contractual commitment entered into by the Province with such third party (a "Contractual Commitment") pursuant to which the Province is obligated to indemnify such third party under that Contractual Commitment where:

- (a) the entering into by the Province of the Contractual Commitment and the nature, scope, extent and terms of the indemnification provisions contained therein (including any liability of the Province in respect of Consequential Losses) were, at the time such Contractual Commitment was entered into, inconsistent with Past Practice, or otherwise outside the normal course of the Province's customary activities and unreasonable having regard to all relevant circumstances at the time; and
- (b) the Province did not either:
 - (i) disclose the Contractual Commitment in the Disclosed Data; or
 - (ii) consult with the Concessionaire, the Concessionaire's Representative or any Affiliate, agent or representative of the Concessionaire prior to entering into the Contractual Commitment; and
- (c) the Contractual Commitment was entered into for a reason other than the *bona fide* pursuit of completion of the Works or the performance of the Operations or furtherance of the Concessionaire's obligations in respect of the Project.

For the purposes of this Section 39.9 [Costs and Expenses]:

"Past Practice" refers to the customary practice of the Province, at the time a Contractual Commitment is entered into, with respect to the nature, scope, extent and terms of indemnification provisions (including any liability of the Province in respect of Consequential Losses) contained in contractual arrangements entered into by the Province with third parties, having regard to the nature of the Contractual Commitment and all relevant circumstances at the time any such Contractual Commitment was entered into.

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.

39.10 Further Limitation on Indemnities

If the Loss or Claim which is the subject of an indemnity in this Agreement, is incurred, suffered or sustained directly by a Party (and not through a Loss or Claim which was made, incurred, suffered or sustained by a third party) that Party shall only be entitled to recover under the indemnities contained in this Agreement for Consequential Losses (including for greater certainty those Consequential Losses contemplated in Section 39.9 [Costs and Expenses]):

- (a) to the extent that the indemnifier is entitled to receive insurance proceeds in connection with such Consequential Losses or would have been so entitled to receive insurance proceeds if it had not acted in such a way as to vitiate the relevant insurance policy; and

- (b) to the extent that such Consequential Losses are not covered by insurance proceeds as set out in paragraph (a), up to a maximum amount of \$500,000 (index linked) per Contract Year.

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, including:
- 40.1.1.1 the Concessionaire or a Partner is unable or 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 or 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 formed, incorporated or resident);
 - 40.1.1.2 without prejudice to the rights of the Senior Funders under the Direct Agreement, a receiver, manager, administrator, administrative receiver, receiver and manager, trustee, custodian or other similar official or any other like person is appointed by or on behalf of or at the instance of a creditor of the Concessionaire or a Partner with respect to the Concessionaire, the Partner or any material part of the property, assets or undertaking of the Concessionaire or the Partner, or any creditor of the Concessionaire or a Partner takes control, or takes steps to take control, of the Concessionaire, the Partner or any material part of the property, assets or undertaking of the Concessionaire or the Partner;
 - 40.1.1.3 any distress, execution, sequestration, extent or other process is levied or enforced (and not discharged within 21 Working Days) upon the whole or any material part of the assets of the Concessionaire or a Partner;
 - 40.1.1.4 any proceedings are instituted by or against the Concessionaire or a Partner seeking to adjudicate it a bankrupt or declare it insolvent or seeking administration, liquidation, winding-up, reorganization, compromise, arrangement, adjustment, protection, relief or composition of it or with respect to it or its debts or obligations, whether by voluntary or involuntary process or scheme or otherwise, 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 a Partner or with respect to any material part of the property, assets or undertaking of the Concessionaire or the Partner and, in the case of any such proceeding instituted against the Concessionaire or a Partner (but not instituted by it), either such proceeding shall remain

- unstayed for a period of 45 days or any of the actions sought in such proceeding (including the entry of an order 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 a Partner 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 or corporate actions of the Concessionaire or a Partner are taken to authorize any of the actions set forth in Section 40.1.1.1, 40.1.1.2, 40.1.1.3 or 40.1.1.4;
- 40.1.1.6 the Concessionaire or a Partner ceases to perform 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 a material adverse effect on the performance by the Concessionaire or the Partner of its obligations under this Agreement or any Project Document;
- 40.1.1.7 the Concessionaire or a Partner 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 or the Partner is incorporated or resident;
- 40.1.2 any 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 Operations 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):
- 40.1.5.1 failing to pursue Final Completion of the Works diligently in accordance with Section 12.5 [Achievement of Completion];

- 40.1.5.2 abandoning the Works; or
- 40.1.5.3 ceasing to maintain, operate and rehabilitate the Project Facilities, the Site and the Adjacent Areas or any, or any material part of any, of them in accordance with the provisions of this Agreement;
- 40.1.6 the occurrence of a Persistent Breach;
- 40.1.7 without limiting the generality of Section 40.1.6:
 - 40.1.7.1 subject to Section 45.4.2A, the Concessionaire receiving a total of three or more Warning Notices in any rolling two-year period; or
 - 40.1.7.2 the total of all Availability/Performance Deductions in any rolling six-month period exceeds 50% of the Maximum Total Performance Payment for such rolling six-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;
- 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 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 or Section 2.3.3),

and the occurrence of any of the events referred to in Section 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;
- 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 seven days after the notice of non-payment exceeds \$200,000 (index linked);

- 40.1.11 failure to achieve the Substantial Completion Date by the Substantial Completion Longstop Date or failure to achieve the Final Completion by the Final 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;
- 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 five times under Section 26.5 [Province's Remedial Rights] in each case following Default Notices given within any rolling two-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 Upon the occurrence of an Event of Default and provided such Event of Default is continuing, the Province may at its option and without prejudice to any of its other rights or remedies and to any rights of action which accrue or shall already have accrued to the Province do any or all of the following:
 - 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 without terminating this Agreement, by notice having immediate effect suspend performance by the Concessionaire of part only of the functions to be performed by it under this Agreement in respect of which the Event of Default has occurred or to which the Event of Default relates (whether in whole or in part) until such time as the Concessionaire has demonstrated to the reasonable satisfaction of the Province that it will perform and is capable of performing its obligations under this Agreement, and thereafter itself perform or engage a third party to perform such part of the functions for such period;

- 40.3.1.3 in the case of the Events of Default referred to in Sections 40.1.1 to 40.1.4 (inclusive), 40.1.6, 40.1.7, 40.1.9.1, 40.1.10 to 40.1.13 (inclusive) 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;
- 40.3.1.4 in the case of any Event of Default other than one under Section 40.1.14 and those referred to in Section 40.3.1.3, 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 40.5 [Termination in Full] shall apply; and
- 40.3.1.5 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 40.3.1.5(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 "Sub-Contractor") or by an agent or by an employee of a Sub-Contractor who is not acting independently of that Sub-Contractor, and such person intended thereby to benefit the Concessionaire, then unless the Concessionaire causes the termination of the engagement or employment of the relevant Sub-Contractor 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 Sub-Contractor who is acting independently of that Sub-Contractor, then unless such Sub-Contractor causes the termination of such employee's employment within 30 days of notification to the Concessionaire of the breach and the Sub-Contractor (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 40.3.1.5(a) to Section 40.3.1.5(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 Sub-Contractor, 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 Partial Suspension

In the case of a partial suspension of the performance by the Concessionaire under this Agreement in accordance with Section 40.3.1.2, the Concessionaire will reimburse the Province for all costs incurred by the Province in performing or engaging others to perform the functions of the Concessionaire which are suspended (including the relevant administrative expenses of the Province, including an appropriate sum in respect of general staff costs and overheads).

40.5 Termination in Full

40.5.1 Where the Concessionaire puts forward a program in accordance with Section 40.3.1.4(b) the Province will have 30 days within which to notify the Concessionaire that it does not accept such program as being reasonable, failing which the Province will be deemed to have accepted such program. Where the Province notifies the Concessionaire that it does not accept such program as being reasonable, the parties will endeavour within the following seven days to agree on any necessary amendments to the program put forward. In the absence of agreement within such seven-day period, the question of whether or not the program (as the same may have been amended by agreement) is reasonable may be referred by either Party to the Disputes Resolution Procedure.

40.5.2 If:

40.5.2.1 the breach or breaches notified in a notice of default served under Section 40.3.1.4 is or are not remedied:

- (a) before the expiry of the period referred to in Section 40.3.1.4(a) (if applicable); or
- (b) where the Concessionaire puts forward a program pursuant to Section 40.3.1.4(b) which has been accepted by the Province or determined by the Disputes Resolution Procedure as being reasonable, in accordance with such program; or

40.5.2.2 such program as is put forward by the Concessionaire pursuant to Section 40.3.1.4(b) is rejected by the Province as not being reasonable, and the Disputes Resolution Procedure does not find against that rejection,

then the Province may terminate this Agreement in its entirety by notice having immediate effect.

40.6 Compensation

Upon a termination of this Agreement pursuant to Section 40.3 [Remedies] or Section 40.5 [Termination in Full], the Concessionaire will be entitled to compensation in accordance with Section 44.2 [Compensation on Termination for Concessionaire Default].

40.7 Savings

The rights of the Province under this Section 40 [Default] are in addition and without prejudice to any other right the Province may have to claim the amount of any loss or damage suffered by the Province on account of the acts or omissions of the Concessionaire, whether pursuant to any bond or guarantee given in accordance with the requirements of this Agreement or otherwise.

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, 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 and the Direct Agreement are guaranteed as primary obligor by the Province or any ministry or department of the Province,

provided that any such person referred to in Section 41.1.3.1 or 41.1.3.2 is a person which has the legal capacity, power and authority to become a party to and perform the obligations of the Province and BCTFA under this Agreement and the Direct Agreement and such person assumes such obligations or enters into a novation of this Agreement and the Direct Agreement; or

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 \$200,000 (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 Expiry Date unless it has previously been terminated in accordance with the provisions of this Agreement.

42.2 Termination for Force Majeure

- 42.2.1 In the circumstances referred to in Section 37.5.1 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 Section 37.5.2 or Section 10.1.6, 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 Force Majeure or Relevant Change in Law].

42.3 Termination on Relevant Change in Law

- 42.3.1 Subject to Section 42.5.2A, 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 in accordance with Section 44.3 [Compensation on Termination for Force Majeure or Relevant Change in Law].

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 or Relevant Change in Law (Province Enactment)

- 42.5.1 The Province may in its absolute and unfettered discretion and for any reason whatsoever terminate this Agreement at any time on 90 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 Operations or any elements of the Operations have not been commenced, to refrain

from commencing any such Works or Operations or from allowing third parties to commence the same.

42.5.2A If a Relevant Change in Law which is enacted by the Province 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.

42.5.3 In the event of any termination pursuant to Section 42.5.1 or 42.5.2A, 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 Failure to Obtain Federal Funding

42.6.1 The Province may terminate this Agreement on March 31, 2006 by notice to the Concessionaire effective March 31, 2006 if on March 31, 2006, despite using all reasonable efforts prior to that date, the Province has not succeeded in entering into the Federal Cost Contribution Agreement.

42.6.2 In the event of any termination pursuant to Section 42.6.1, the Province will pay to the Concessionaire the amount set out in Section 44.5A [Compensation on Termination for Failure to Obtain Federal Funding] and the Concessionaire shall not be entitled to any other compensation or payment under this Agreement.

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 40.5 [Termination in Full], Section 42.2 [Termination for Force Majeure], Section 42.3 [Termination on Relevant Change in Law], Section 42.4 [Termination for Failure to Obtain Lieutenant Governor in Council Approval] or Section 42.5 [Termination for Convenience or Relevant Change in Law (Province Enactment)] or if the Concessionaire has given notice of termination under Section 41.2 [Termination Procedure], Section 42.2 [Termination for 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 Project Facilities or any part thereof either safely, without undue delay or at all, then:

43.1.1.1 the Province may by seven days notice to the Concessionaire exclude the Concessionaire from the Project Facilities, the Site and the Adjacent Areas without thereby avoiding this Agreement or releasing the Concessionaire from any of its obligations or liabilities under this Agreement and following such exclusion such obligations or liabilities shall continue 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 and/or the Adjacent Areas; and

43.1.1.2 whether or not the Province exercises the right under Section 43.1.1.1, the Province may take, or engage others to take, such steps in relation to the performance of the Operations 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 or Relevant Change in Law (Province Enactment)]) the Province may recover all 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], 40.5 [Termination in Full], 41.2 [Termination Procedure], 42.2 [Termination for 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 or Relevant Change in Law (Province Enactment)] or given pursuant to Section 42.6 [Termination for Failure to Obtain Federal Funding]) 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 or Relevant Change in Law (Province Enactment)] or given pursuant to Section 42.6 [Termination for Failure to Obtain Federal Funding]) 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 and the Adjacent Areas, 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 or the Adjacent Areas but without prejudice to any other rights the Concessionaire may have as a result of such wrongful termination.

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], 20.6 [Claims], 20.7 [Application of Proceeds] and 20.8 [Uninsurable Risks], 24 [Reports and Information], 25 [Records], 30.3 [Conduct of Claims Against Third Parties], 32 [Calculation of Payments], 33 [Invoicing and Payment], 39 [Indemnities], 42.2 [Termination for Force Majeure], 42.3 [Termination on Relevant Change in Law], 42.4 [Termination for Failure to Obtain Lieutenant Governor in Council Approval], 42.5 [Termination for Convenience or Relevant Change in Law (Province Enactment)], 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.

Without prejudice to the Province's obligations to make payment of all its obligations under Section 44 [Compensation on Termination], on the termination of this Agreement under any circumstances (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 and/or sub-licence granted to the Concessionaire under Section 8.1 [Access for Concessionaire] will automatically terminate;

43.4.2 if prior to the issue of the Final 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 the Works not already owned by the Province or BCTFA as shall have been carried out, and if the Province so elects:

43.4.2.1 the Design-Build Contract will be novated to the Province or, at the direction of the Province, to BCTFA or 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 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 or the Adjacent Areas or adjacent thereto or in the vicinity thereof will remain available to the Province and BCTFA for the purposes of completing the Works; and

43.4.2.2 the Construction Plant will remain available to the Province and BCTFA for the purposes of completing the Works, subject to payment therefor of a reasonable rental charge;

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, 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 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 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 where the Province has exercised its step-in rights under Section 43.1.1, the Province or, at the direction of the Province, BCTFA or a third party designated by the Province will have an option to purchase or 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 the commencement of the Operations 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 Termination 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
- 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 seven 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 Condition

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 in order to achieve a smooth and orderly transfer of the Operations 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 practicable remove from the Project Facilities, the Site and the Adjacent Areas 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 practicable vacate the Project Facilities, the Site and the Adjacent Areas and leave the Project Facilities, the Site and the Adjacent Areas 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 or Relevant Change in Law (Province Enactment)], 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 below, the "Province Default Termination Sum" will be an amount equal to the aggregate of:
 - (i) the Base Senior Debt Termination Amount;
 - (iA) all amounts of the Third Party Junior Debt outstanding at the Termination Date (including accrued interest, but not capitalized interest or interest on overdue interest), but excluding any breakage or other costs payable as a result of a prepayment of the Third Party Junior Debt;
 - (ii) Employee Termination Payments and any Subcontractor Breakage Costs; and
 - (iii) the amount, if any, which, when taking into account:
 - (1) any refund of Taxes paid or payable to the Concessionaire or a Partner on or before the Termination Date or payable by the

Concessionaire or a Partner after the Termination Date because of circumstances arising on or before the Termination Date; or

- (2) any amount paid or distributed by the Concessionaire to a Partner on or before the Termination Date or payable or distributable after the Termination Date because of circumstances arising on or before the Termination Date including, for greater certainty only:
 - (A) payments in specie; and
 - (B) Distributions or capital repayments to the Partners; and
- (3) any Taxes paid by the Concessionaire or a Partner on or before the Termination Date or payable by the Concessionaire or a Partner after the Termination Date because of circumstances arising on or before the Termination Date;

gives an IRR on the Partners' Equity equal to the Financial Base Case Equity IRR,

together with such reasonable costs as may be incurred by the Concessionaire, acting in a commercially reasonable manner, directly arising out of the termination of this Agreement by the Concessionaire pursuant to Section 41.2 [Termination Procedure].

- 44.1.3 On payment of the amount referred to in Section 44.1.2 above, 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 clauses (i) and (iii) of Section 44.1.2 above 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 clause (ii) of Section 44.1.2, provided always that:
 - 44.1.4.1 the amount referred to in clause (ii) of Section 44.1.2 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
 - 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 a second time 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 44.7.1 [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 for Failure to Obtain Lieutenant Governor in Council Approval] 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]:
- 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 [Rebidding Election] or the Adjusted Estimated Fair Value according to the no rebidding procedure pursuant to Section 44.2.4 [No Rebidding Procedure], as applicable; and
- 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, within 5 months following termination of this Agreement, at its option to rebid the provision of the Operations in accordance with Section 44.2.3 [Rebidding Election] 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 that there is a Liquid Market and that the Province is proceeding under this Section; and
- 44.2.2.2 either the Concessionaire has not Disputed that there is a Liquid Market within 10 days after receipt of such notice or it has been resolved pursuant to the Dispute Resolution Procedure that there is a Liquid Market, and either:
- 44.2.2.2.1 the Senior Funders have not exercised their right to step-in under Section 4.1 [Step-In] of the Direct Agreement or, if they

have exercised such right, they have 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 the Senior Funders have not 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 [No Rebidding Procedure] and the provisions of that Section will apply.

44.2.3 Rebidding Election

If the Province elects to rebid the provision of the Operations 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.
- 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:
- (i) 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
 - (ii) 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. 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 [No Rebidding Procedure].
- 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 below 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 [Rebidding Election] shall not apply and the provisions of Section 44.2.4 [No Rebidding Procedure] shall apply.
- 44.2.3.13 The discharge by the Province of its payment obligation in Sections 44.2.3.11 and/or 44.2.3.12 above 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 below, 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 two years 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 [Not Used]
- 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 [No Rebidding Procedure] 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 Operations 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 Subject to Section 44.2.4.2, 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 [Rebidding Election] 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], or the Concessionaire is continuing to provide services at the direction of the Province during the no rebidding procedure, then the Province will continue to pay or will pay to the Concessionaire each Post Termination Service Amount until the Compensation Date, or date upon which the Province determines that the services are no longer required to be performed by the Concessionaire, as the case may be, 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:

- (i) 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;
- (ii) the total of all future payments of the full Total Performance Payment (without deductions) forecast to be made will be calculated and discounted to the Termination Date at the Discount Rate;
- (iii) 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 clause (ii) above, such costs to include (without double-counting):
 - (a) a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the Base Case Financial Model;
 - (b) the costs of performing or causing the performance of the Operations 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 Operations to such standard); and

- (c) any rectification costs required to deliver the Operations 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 on the calculation of such rectification costs,

in each case such costs to be forecast at a level that will deliver the Operations to the standards required by this Agreement to achieve the full Total 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 [No Rebidding Procedure], 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 44.7.1 [Payment of Early Termination Payments].
- 44.2.4.6 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 on the Compensation Date.

44.3 Compensation on Termination for 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 Force Majeure] or Section 42.3 [Termination on Relevant

Change in Law], or if the Province terminates this Agreement pursuant to Section 20.8.2.2.2, 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 Sections 44.3.4 to 44.3.6 below, 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 all amounts of the Third Party Junior Debt outstanding at the Termination Date (including accrued interest, but not capitalized interest or interest on overdue interest), but excluding any breakage or other costs payable as a result of a prepayment of the Third Party Junior Debt;
 - 44.3.2.3 the aggregate of all amounts Partners’ Equity less Distributions paid to the Partners (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/or 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”, the Province will be entitled to set-off the value of that Distribution a second time 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 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 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.

44.3.8 The Province will pay the Force Majeure Termination Sum in accordance with Section 44.7.1 [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 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.

44.4.4 The Province will pay the Prohibited Acts Termination Sum in accordance with Section 44.7.1 [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 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 or for Failure to Obtain Lieutenant Governor in Council Approval].

44.5.2 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.

44.5.3 The Province will pay such termination sum in accordance with Section 44.7.1 [Payment of Early Termination Payments].

44.5A **DELETED.**

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 Force Majeure or Relevant Change in Law], 44.4 [Compensation on Termination for Prohibited Acts or for Failure to Obtain Lieutenant Governor in Council Approval] and 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, setting-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. Under this Section 44.6 [Gross-Up of Termination Payments] the Taxes payable to a Canadian Governmental Authority by the Concessionaire shall mean the Taxes payable by the Partners of the Concessionaire to a Canadian Governmental Authority. The Province's obligation under this Section 44.6 [Gross-Up of Termination Payments] shall be limited to the Taxes that would have been payable by the Concessionaire and the Partners if they had operated as single purpose entities formed for the sole purpose of engaging in the business of the Project and having no other business or assets other than those pertaining to their interests in the Project.

44.7 Payment of Early Termination Payments

- 44.7.1 The Province will pay the Termination Sum to the Concessionaire on or before the date falling 60 days after the Notice Date.
- 44.7.2 The Province will pay the Net No Federal Funding Amount (as defined in Section 3A of the Direct Agreement) in accordance with Section 3A of the Direct Agreement and will pay the balance of the **DELETED** and any other amounts required to be paid under Section 44.5A **DELETED** to the Concessionaire, in each case within 60 days of March 31, 2006.

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 33.10 [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 Force Majeure] or a Relevant Change in Law pursuant to Section 42.3 [Termination on Relevant Change in Law] or a failure to obtain Lieutenant Governor in Council Approval pursuant to Section 42.4 [Termination for Failure to Obtain Lieutenant Governor in Council Approval] or is a termination pursuant to Section 42.5 [Termination for Convenience or Relevant Change in Law (Province Enactment)] or Section 57 [Prohibited Acts], or in respect of the Event of Default referred to in Section 40.1.15, 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

Any payment made in full 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 which can be made against the Province or BCTFA by 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 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 relevant compensation amount and save for the right to indemnity pursuant to Section 39.5. The compensation payable under this Section 44 [Compensation on Termination] is the sole and exclusive remedy of the Concessionaire against the Province on any termination of this Agreement and the Concessionaire is excluded from all other rights or remedies in respect thereof.

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.

44A. CUMULATIVE REMEDIES

44A.1 The remedies conferred on the Parties under this Agreement are not exclusive. Each and every remedy is cumulative and is in addition to every other remedy given hereunder or in any Project Document or now or hereafter existing under Laws and Regulations or otherwise. The exercise by a Party of any one or more of its remedies does not preclude the simultaneous or later exercise by such Party of any or all other such remedies.

44A.2 Without limiting the generality of Section 44A.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.

44A.3 Without limiting the generality of Section 44A.1 or Section 44A.2 and for greater certainty, 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 (including those available under this Agreement or by Laws and Regulations or otherwise) separately or concurrently or in any order it deems fit in its absolute and unfettered discretion.

44B. ACKNOWLEDGMENT RE: EQUIVALENT PROJECT RELIEF

44B.1 The Province and BCTFA acknowledge that:

44B.1.1 each of the Design-Build Contract and the Operating and Maintenance Contract define the term “Equivalent Project Relief” which permits the Contractor and the Operator, respectively, to claim relief from the Concessionaire but only if and to the extent that such claim or relief is granted to the Concessionaire under this Agreement; and

44B.1.2 the Concessionaire will not be precluded from advancing any claim or seeking any relief under this Agreement solely by reason that the Concessionaire is not liable to the Contractor only (and not any of its employees, agents, contractors or subcontractors of any tier or the employees of any of them) under the Design-Build Contract or the Operator only (and not any of its employees, agents, contractors or subcontractors of any tier or the employees of any of them) under the Operating and Maintenance Contract respectively until or only to the extent that such claim or relief is granted by the Province to the Concessionaire under this Agreement,

provided that nothing in this Section creates any contract or obligation directly between the Province, BCTFA and the Contractor or the Operator.

PART VI
MISCELLANEOUS

45. ASSIGNMENT, SUB-CONTRACTING 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 Sections 45.2.2 and 45.3 [Change in Control], the Concessionaire will not, and will ensure that no Contracting Affiliate will, in any such case without the prior consent of the Province, assign, novate, transfer or create or allow to subsist any Encumbrance, trust or interest in:

45.2.1.1 this Agreement, 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 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:

45.2.3.1 [Not Used]; and

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 (other than as may be permitted pursuant to the provisions of Section 45.2.1 or 45.2.2 (except Section 45.2.2.1)),

without the Concessionaire having obtained the prior consent of the Province.

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 (other than as may be permitted pursuant to the provisions of Section 45.2.1 or 45.2.2 (except Section 45.2.2.1)) without the Concessionaire having obtained the prior consent of the Province.

45.3 Change in Control

45.3.1A Prior to the date upon which the Deferred Equity Contribution is fully and unconditionally contributed, no Change in Control of the Concessionaire, a Partner, any Shareholder or any company of which a Partner is a subsidiary, shall be permitted without the prior written consent of the Province, provided that such consent will not be unreasonably withheld or delayed where the entity acquiring control has an external credit rating of at least equivalent to A1 as rated by Moody's Investors Services Inc. or A by Standard & Poor's or A (mid) by DBRS (or the equivalent rating from another rating agency) or such entity provides a letter of credit or other form of security which achieves an equivalent credit rating in support of the obligation to provide the equity and neither the entity acquiring control nor any of its Affiliates is a Restricted Person. In any other circumstances the Province may withhold or delay its consent to a Change in Control in its absolute and unfettered discretion.

45.3.1 Subject to Sections 45.3.1A and 45.4 [Sub-Contracting], on or before the date of issue of the Final Completion Certificate, no Change in Control of the Concessionaire, a Partner or of any Shareholder or any company in which a Partner is a subsidiary will be permitted without the prior written consent of the Province, provided that where the Concessionaire has given the Province 20 Working Days' written notice such consent will not be required in the following circumstances:

45.3.1.1 in the case of a reorganization for *bona fide* fiscal purposes of the Concessionaire and/or any Partner and/or any company of which a Partner is a subsidiary where the ultimate control of the Concessionaire and each of the Partners and the Shareholders does not change;

45.3.1.2 where the proposed Change in Control is pursuant to the *bona fide* enforcement of the Pledge of Interest following an Event of Default to an entity of financial standing at least equivalent to A1 as rated by Moody's Investor Services Inc. or A by Standard & Poor's or A (mid) by DBRS and which is not an entity to which the Province has previously refused to give its consent; or

45.3.1.3 where the proposed Change of Control is to an entity of financial standing at least equivalent to A1 as rated by Moody's Investor Services Inc. or A by Standard & Poor's or A (mid) by DBRS and which is not an entity to which the Province has previously refused to give its consent,

provided in each case, however, that neither the entity acquiring control nor any of its Affiliates is a Restricted Person. In any other circumstance, the Province may withhold or delay its consent to a Change in Control if any such Change in Control would in the opinion of the Province, acting reasonably, have a material adverse affect on the Operations.

- 45.3.2A Where a Change in Control under Section 45.3.1A or 45.3.1 relates to any company in which a Partner is a subsidiary and not to the Partner or its Shareholders, unless some other exception under those Sections applies, the Change of Control shall not be permitted without the prior written consent of the Province, which may be unreasonably withheld or delayed if it would result in a change of the management arrangements for the Concessionaire, a Partner or its Shareholders.
- 45.3.2 Subject to Section 45.3.4, following the date of issue of the Final Completion Certificate, no Change in Control of the Concessionaire, a Partner or of any Shareholder or any company in which a Partner is a subsidiary will be permitted where the entity acquiring control or any of its Affiliates is a Restricted Person but otherwise a Change in Control shall be permitted upon the Concessionaire giving the Province 20 Working Days' notice of such Change in Control.
- 45.3.3 For purposes of this Section 45.3 [Change in Control]:
- 45.3.3.1 "Change in Control" means, with respect to a person, any change in ownership, whether direct or indirect and whether beneficial or otherwise, of, or the direct or indirect power to vote or transfer, any of the shares or units of ownership or participating partnership interests of that person having, directly or indirectly, the power to direct or cause the direction of the management, actions or policies of that person and includes, in the case of the Concessionaire, any change in the Partners of the Concessionaire if it results in a Change in Control of the Concessionaire; and
- 45.3.3.2 "Deferred Equity Contribution" means the equity contribution to be made to the Concessionaire but not advanced or contributed as of the date of this Agreement.
- 45.3.4 A Change in Control of a Partner or any Shareholder or any company in which the Partner is a subsidiary which arises from any *bona fide* open market transactions in any shares or other securities of the Partner or Shareholder (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 Sub-Contracting

- 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 the Operator;
- 45.4.1.4 the Quality Management Representative; and
- 45.4.1.5 the Audit Team.

For greater certainty, should the termination of the engagement or employment of any Significant Appointment be permitted pursuant to Section 2.3.2, the Concessionaire shall not be obligated to obtain the prior consent of the Province pursuant to this Section 45.4.1 in respect of such termination.

- 45.4.2A Notwithstanding any other provision of this Agreement including Section 2.3.2.1 and Section 45.4.1, the Concessionaire may only terminate the Operating and Maintenance Contract or terminate, replace or substitute the Operator twice during the Contract Period. Each such resulting change in the Operator shall cure any Event of Default that has occurred under Section 40.1.7.1.
- 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, 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 Operations 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].
- 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 Works may be sub-contracted 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 sub-contracted 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 Operations 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 sub-contractor 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 45.4.1.4 and 45.4.1.5 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 appointment set out in this Agreement and are reasonably sufficient to ensure the satisfaction of the Concessionaire's obligations relating to the Works 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

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 in Sections 45.3.1A, 45.3.1, 45.4.1, 45.4.2 and 45.4.5, any consent or permission to be given by the Province under this Section 45 [Assignment, Sub-Contracting 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 Province Assignment

45.6.1 [Not Used]

45.6.2 The Province may novate, assign or otherwise transfer any of its rights or obligations under this Agreement 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 (including as to its legal capacity, power and authority) provided that, in the case of a novation, assignment or transfer of the Province's obligations under this Agreement, the novatee, assignee or transferee assumes such obligations or enters into a novation of

this Agreement, and enters into an agreement with the Concessionaire and the Senior Funders on substantially the same terms as the Direct Agreement.

- 45.6.3 Upon any novation, assignment or transfer by the Province permitted in accordance with the provisions of Section 45.6.2, other than a novation, assignment or transfer to a person referred to in Section 41.1.3.1, the Province 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 but excluding, for greater certainty, its obligations and liabilities under the guarantee referred to in Section 41.1.3.2. 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 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", "approve", "certify", "report" and "determine" 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

5B – 940 Blanshard Street
Victoria, British Columbia V8W 9T5

Telephone: 250-387-3260
Facsimile: 250-387-6431
Attention: Assistant Deputy Minister, Highways Department
Ministry of Transportation

Concessionaire

675 Cochrane Drive, West Tower, Suite 630
Markham, Ontario L3R 0B8

Telephone: 905-530-2114
Facsimile: 905-530-2214
Attention: John McArthur

Province's Representative

Kicking Horse Project Office
P.O. Box 893
513 – 9th Avenue North
Golden, British Columbia V0A 1H0

Telephone: 250-344-3403
Facsimile: 250-344-3406
Attention: Jon Jensen

Concessionaire's Representative

675 Cochrane Drive, West Tower, Suite 630
Markham, Ontario L3R 0B8

Telephone: 905-530-2114
Facsimile: 905-530-2214
Attention: Steve Perfect, P. Eng

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 three 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 obtain from the Designer, Contractor, Operator and any other person identified by the Province, prior to any such party carrying out any part of the Operations, waivers of liability in favour of the Province, the Province's Representative and BCTFA and in form and substance satisfactory to the Province 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 Operations.

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 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 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 Total Performance Payment and all other payments hereunder, including any compensation for termination hereunder, shall include all applicable Taxes except 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 Except as otherwise provided in the Transportation Investment Act or the *Assessment Act*, R.S.B.C. 1996, c. 20, the Concessionaire 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; provided, however, that (notwithstanding anything to the contrary in this Agreement) the promulgation or implementation of any Legal Requirements pursuant to which the Concessionaire is required to pay property taxes in respect of the "travelled portion" (as such term is defined in subsection 14(1) of the Transportation Investment Act) of the Concession Highway will be deemed to constitute a Relevant Change in Law for purposes of this Agreement.
- 48.5 Notwithstanding any provision to the contrary herein, if GST becomes exigible with respect to any payments hereunder at any time hereafter, all such GST obligations will be paid by the Province.

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, employees, contractors or subcontractors of any tier) for the purposes of the design or construction of the Works, the operation, maintenance, rehabilitation or improvement of the Project Facilities, the Site and the Adjacent Areas or the conduct of the other Operations 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; and
- 49.1.2 make available to the Province and BCTFA all other such materials, documents and data which have been provided to the Concessionaire by third parties as may reasonably be required for the purposes referred to in Section 49.1.1.

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 operation, maintenance, rehabilitation or improvement of the Project Facilities, the Site and the Adjacent Areas or the conduct of any other Operations 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 operation, maintenance, rehabilitation or improvement of the Project Facilities, the Site and the Adjacent Areas, the conduct of any other Operations 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 [Sub-Contracting] 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 operation, maintenance, rehabilitation or improvement of the Project Facilities, the Site and the Adjacent Areas or the conduct of any other Operations.
- 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 3 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.
- 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 3 of Schedule 7 [Concession Highway Intellectual Property], and upon the giving of such notice Part 3 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 at no charge 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 design, construction, completion, commissioning or 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.
- 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, financial institution or other persons 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 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;
 - 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 Section 50.2.8.4, to BCTFA, the Ministry, Partnerships BC and any other Governmental 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 above, 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 Termination 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 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 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 five years following the Termination Date notwithstanding such termination.

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

The Concessionaire will not without the prior consent of the Province (which consent may be granted or withheld in the absolute and unfettered discretion of the Province) 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 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.

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

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 Operations and/or the performance of or failure to perform the Concessionaire's functions, obligations and/or responsibilities under this Agreement) of the Designer, 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.

52. DISPUTES RESOLUTION PROCEDURE

Except as expressly provided in any other provision of this Agreement, 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 obligations under this Agreement regardless of the nature of the Dispute and notwithstanding the referral of the Dispute for resolution under the Disputes Resolution Procedure. 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 or 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) constitutes 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.

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 Operations 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 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 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 a 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 Linda Parsons of Davis & Company LLP (marked for the personal attention of Linda Parsons or Mark Schmidt, also of Davis & Company LLP) 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 any liability of the Province, 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% 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% 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 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 as:
- (a) a single payment in an amount less than or equal to any Distribution made or to be made on or about the date of the Refinancing;
 - (b) a reduction in the Total Performance Payment 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 The Refinancing Gain will be calculated after taking into account the reasonable and proper professional costs that each Party directly incurs in relation to the Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred by the Province will be paid to the Province by the Concessionaire within 30 days of any 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.

62. COUNTERPARTS

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all of the Parties will constitute a full, original and binding agreement for all purposes. Counterparts may be executed either in original or faxed form provided that any Party providing its signature in faxed form will, upon any other Party’s request, promptly forward to such Party an original signed copy of this Agreement which was so faxed.

IN WITNESS WHEREOF the parties hereto have executed this Agreement.

SIGNED on behalf of 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:)
)
)
)
)

(Witness)

JOHN DYBLE
Deputy Minister, Ministry of Transportation

BC TRANSPORTATION FINANCING AUTHORITY

Per: _____
JOHN DYBLE
Chief Executive Officer

TRANS-PARK HIGHWAY GENERAL PARTNERSHIP
by its partners:

TRANS-PARK HIGHWAY INVESTMENT INC.

Per: _____
JOHN McARTHUR
President

Per: _____
STEVE SKELTON
Vice-President

TRANS-PARK HIGHWAY INC.

Per: _____
JOHN McARTHUR
President

Per: _____
STEVE SKELTON
Vice-President

CONTRACTOR'S COLLATERAL AGREEMENT

THIS AGREEMENT is made as of the 28th day of October, 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) **TRANS-PARK HIGHWAY CONSTRUCTORS**, an unincorporated joint venture formed between Flatiron Constructors Canada Ltd., a corporation incorporated under the laws of the Province of British Columbia and Parsons Overseas Company of Canada Ltd., a corporation incorporated under the laws of Canada (the "**Contractor**")

OF THE THIRD PART

AND

- (4) **ROYAL BAM GROUP N.V.**, a corporation incorporated under the laws of the Netherlands ("**Royal**")

OF THE FOURTH PART

AND

- (5) **PARSONS CORPORATION**, a corporation incorporated under the laws of Delaware ("**Parsons**" and together with Royal, the "**Guarantors**")

OF THE FIFTH PART

AND

- (6) **TRANS-PARK HIGHWAY GENERAL PARTNERSHIP**,
a general partnership established under the laws of the
Province of British Columbia
(the "**Concessionaire**")

OF THE SIXTH PART

WHEREAS:

- A. The Province, BCTFA and the Concessionaire have entered into the Concession Agreement pursuant to which the Concessionaire will carry out the Project described therein.
- B. The Concessionaire and the Contractor have entered into the Design-Build Contract pursuant to which the Contractor has agreed to provide design services and perform construction work required to carry out the Project.
- C. The obligations of the Contractor under the Design-Build Contract have been jointly and severally guaranteed by the Guarantors pursuant to the Design-Build Contract Guarantee.
- D. The Contractor has provided the Concessionaire with the Design-Build Contract Performance Securities in connection with the Design-Build Contract.
- E. The Concession Agreement requires the Concessionaire to enter into, and to cause the Contractor and the Guarantors to enter into, this Agreement with the Province and BCTFA.

NOW THEREFORE in consideration of 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:

1. DEFINITIONS

In this Agreement, unless the context otherwise requires:

- (a) "**Agreement**" means this Agreement;
- (b) "**Concession Agreement**" means the agreement titled "Kicking Horse Canyon Project Concession Agreement" made among the Province, BCTFA and the Concessionaire and dated as of the 28th day of October, 2005;
- (c) "**Concessionaire**" has the meaning given on the first page of this Agreement;
- (d) "**Contractor**" has the meaning given on the first page of this Agreement;
- (e) "**Contractor Direct Agreement**" means that certain agreement made among the Contractor, Royal, Parsons and the Concessionaire and dated the 28th day of October, 2005;

- (f) **“Contractor’s Data”** has the meaning given in Section 4(a);
- (g) **“Default Notice”** has the meaning given in Section 5(a);
- (h) **“Design-Build Contract Performance Securities”** means the Performance Securities provided or to be provided by the Contractor pursuant to the terms of the Design-Build Contract;
- (i) **“Designer”** means any person appointed by the Contractor from time to time to undertake the design of any portion of the Project Facilities (including the Works) or any other works in connection with the design, construction, operation, maintenance, rehabilitation or improvement of the Project Facilities or such substitute as may be appointed by the Concessionaire for the time being in accordance with Section 45.4.1 or 45.4.2, in each case being a firm employing duly qualified and experienced Professional Engineers;
- (j) **“Direct Agreement”** means the agreement entitled “Direct Agreement for the Kicking Horse Canyon Project Concession Agreement” made among the Province, BCTFA, CIT Group Securities (Canada) Inc. and the Concessionaire and dated as of the 28th day of October, 2005;
- (k) **“Guarantors”** has the meaning given on the first page of this Agreement;
- (l) **“Interface Agreement”** means the interface agreement dated the 28th day of October, 2005 among the Concessionaire, the Contractor and the Operator;
- (m) **“Party”** means any of the Province, BCTFA, the Contractor, the Guarantors or the Concessionaire, and **“Parties”** means the Province, BCTFA, the Contractor, the Guarantors and the Concessionaire;
- (n) **“Province”** has the meaning given on the first page of this Agreement;
- (o) **“Step-In Notice”** has the meaning given in Section 7(a);
- (p) **“Substitute”** has the meaning given in Section 7(a); and
- (q) other words and expressions with initial capital letters used in this Agreement which are defined in the Concession Agreement have the same meanings when used in this Agreement as are given to them in the Concession Agreement.

2. INTERPRETATION

This Agreement will be interpreted according to the following provisions, save to the extent that the context or the express provisions of this Agreement otherwise require:

- (a) the headings and sub-headings and references to them in this Agreement are for convenience of reference only, do not constitute a part of this Agreement, and shall not be taken into consideration in the interpretation or construction of, or affect the meaning of, this Agreement;

- (b) the words “herein”, “hereto” and “hereunder” and other words of like import refer to this Agreement as a whole and not to the particular provision in which such word may be used;
- (c) all references to Sections are references to Sections of this Agreement;
- (d) words importing the singular include the plural and vice versa;
- (e) words importing a particular gender include all genders;
- (f) all references to any agreement, document, standard, principle or other instrument include (subject to all relevant approvals and any other provision of this Agreement or the Concession Agreement expressly concerning such agreement, document, standard, principle or other instrument or amendments thereto) a reference to that agreement, document, standard, principle or instrument as amended, supplemented, substituted, novated or assigned;
- (g) “person” includes an individual, corporation, partnership, joint venture, association, trust, pension fund, union, government, governmental body, governmental agency, authority, board, tribunal, commission or department and the heirs, beneficiaries, executors, personal or other legal representatives or administrators of an individual, and the receivers and administrators of a corporation;
- (h) whenever the terms “will” or “shall” are used in this Agreement they are to be construed and interpreted as synonymous and are to be read as “shall”;
- (i) the words “includes” or “including” are to be construed as being without limitation;
- (j) general words are not given a restrictive meaning:
 - (i) if they are introduced by the word “other”, by reason of the fact that they are preceded by words indicating a particular class of act, matter or thing; or
 - (ii) by reason of the fact that they are followed by particular examples intended to be embraced by those general words;
- (k) if the time for doing an act falls or expires on a day that is not a Working Day, the time for doing such act will be extended to the next Working Day;
- (l) the words of this Agreement are to be given their natural meaning. The Parties have had the opportunity to take legal advice on this Agreement and no provision is, therefore, to be construed *contra proferentem*;
- (m) no provision of this Agreement is intended to derogate from or be inconsistent with or in conflict with any Laws and Regulations and should not be interpreted in a manner as to result in any derogation, inconsistency or conflict and if any such provision is found by a court of competent jurisdiction to be inconsistent with or in conflict with any Laws and Regulations, the applicable Laws and Regulations will prevail and such provision will be read down or rendered inoperative (either,

generally or in such particular situation, as appropriate), to the extent of such conflict or inconsistency, as the case may be, and if any such provision is found by a court of competent jurisdiction to derogate from any Laws and Regulations, then such provision will be read down or rendered inoperative (either, generally or in such particular situation, as appropriate) to the extent of the derogation and for purposes of this Section 2(m), the following will be excluded from the definition of the defined phrase "Laws and Regulations": "and the law of equity", "ordinances", "codes (including design and construction codes)", "directives", "guidelines", and "rules or policies of any Governmental Authority", and the word "or" will be added between the word "orders," and the word "injunctions"; and

- (n) each and every representation, warranty, covenant and undertaking of the Concessionaire set forth in this Agreement shall be interpreted and construed as a representation, warranty, covenant and undertaking binding upon each of the Partners, on a joint and several basis.

3. AGREEMENTS REGARDING DESIGN-BUILD CONTRACT, INTERFACE AGREEMENT, DESIGN-BUILD CONTRACT PERFORMANCE SECURITIES AND DESIGN-BUILD CONTRACT GUARANTEE

- (a) The Concessionaire and the Contractor will not terminate, make or agree to any material amendment to or variation of, or in any material respect depart from or waive or fail to enforce any rights they may have under, or enter into any agreement or document which would materially affect the interpretation or application of, the terms of the Design-Build Contract or any of the Design-Build Contract Performance Securities except in compliance with the provisions of Section 2.3.2 of the Concession Agreement. The Concessionaire and the Contractor will provide to the Province a certified true copy of all documents entered into in accordance with the foregoing.
- (b) The Concessionaire, the Guarantors and the Contractor will not terminate, make or agree to any material amendment to or variation of, or in any material respect depart from or waive or fail to enforce any rights they may have under, or enter into any agreement or document which would materially affect the interpretation or application of, the terms of the Design-Build Contract Guarantee except in compliance with the provisions of Section 2.3.2 of the Concession Agreement. The Concessionaire, the Guarantors and the Contractor will provide to the Province a certified true copy of all documents entered into in accordance with the foregoing.
- (c) Each of the Province, BCTFA, the Concessionaire, the Contractor and the Guarantors acknowledges having received and reviewed a copy of the Concession Agreement, the Design-Build Contract, the Interface Agreement, each of the Design-Build Contract Performance Securities and the Design-Build Contract Guarantee and acknowledges the terms thereof.
- (d) If the Contractor gives the Concessionaire any notice of any default(s) under the Design-Build Contract and/or the Interface Agreement that may give the Contractor a right to terminate the Design-Build Contract and/or the Interface Agreement or to treat either of them as having been repudiated by the Concessionaire or to discontinue the Contractor's performance thereunder, then

the Contractor will concurrently provide the Province and BCTFA with a copy of such notice and set out in reasonable detail the default(s).

3A. AGREEMENTS REGARDING DESIGN SUBCONTRACT

- (a) The Contractor will perform and will continue to perform all of the terms of any design subcontract in respect of the Works or any portion thereof to be performed on the Contractor's part and will not terminate, make or agree to make any material amendment to or variation of, or in any material respect depart from or waive or fail to enforce any rights it may have under, or enter into any agreement or document which would materially affect the interpretation or application of, the terms of any design subcontract in respect of the Works or any portion thereof 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. The Contractor will provide to the Province a certified true copy of all documents entered into in accordance with the foregoing.
- (b) The Contractor will ensure that all portions of the design provided by the Designer or any other designer under any design subcontract in respect of the Works or any portion thereof are prepared under the supervision and direction of and, where appropriate, are prepared by professional engineers or such other professionals as appropriate to the nature of the design who are registered in British Columbia and lawfully authorized to practice in British Columbia.
- (c) The Contractor will ensure that the Designer or any other designer complies with all provisions of the Concession Agreement (including the Design and Certification Procedure, the Design Management Plan, the Design Quality Management Plan and all other Technical Requirements) applicable to the design work performed and to be performed by the Designer or any other designer pursuant to any design subcontract in respect of the Works or any portion thereof and performs all functions which, pursuant to the terms of the Concession Agreement, are to be performed by the Designer or any other designer.
- (d) The Contractor acknowledges and agrees that neither the entering into of any design subcontract in respect of the Works or any portion thereof nor anything contained therein qualifies, limits or relieves the Contractor from any of its duties or obligations under the Design-Build Contract, and that the Contractor remains and will remain liable for all design and other work to be performed and services to be provided under the terms of the Design-Build Contract notwithstanding any default or failure to perform by the Designer or any other designer under any design subcontract in respect of the Works or any portion thereof.
- (e) All drawings, details, plans, specifications, reports and other documents and data of any nature whatsoever and any designs and inventions contained in them which have been or are hereafter provided by the Designer or any other designer in the course of performing the services provided for in any design subcontract in respect of the Works or any portion thereof will form part of the Contractor's Data as defined in and for the purposes of Section 4 of this Agreement, and the Contractor will ensure that it has full power and authority to grant the perpetual,

unrestricted, transferable and assignable, non exclusive, worldwide, irrevocable and non terminable, royalty free licence or sub-licence (carrying the right to grant sub licences) in respect of all such drawings, details, plans, specifications, reports, documents, data, designs and inventions to the Province and BCTFA as contemplated by Section 4(a) of this Agreement, including the right to make any alterations, adaptations or additions to any of the same.

4. CONTRACTOR'S DATA

- (a) In relation to all drawings, details, plans, specifications, reports and other documents and data of any nature whatsoever and any designs and inventions contained in them which have been or are hereafter provided by the Contractor in the course of performing the works and services provided for in the Design-Build Contract (including any and all design data and construction data now or hereafter owned by the Contractor and including all drawings, details, plans, specifications, reports, documents, data, designs and inventions created by the Contractor or the Designer) (collectively, the "Contractor's Data"), the Contractor hereby grants to the Province and BCTFA a perpetual, unrestricted, transferable and assignable, non-exclusive, worldwide, irrevocable and non-terminable royalty-free licence (which term as used in this Section 4 includes, where applicable, a sub licence) (carrying the right to grant sub-licences) to use and reproduce all or any of the Contractor's Data for any purpose (whether during or after the Contract Period) relating to the design, construction, completion, commissioning or testing of the Works, the operation, maintenance, rehabilitation or improvement of the Project Facilities, the Site and the Adjacent Areas or the conduct of any other Operations or the carrying out of any statutory or other duties or functions in respect of the Project Facilities, the Site and the Adjacent Areas, including the right to make any alterations, adaptations or additions to any Contractor's Data.
- (b) With respect to Contractor's Data arising during the Contract Period, the licence granted pursuant to Section 4(a) will take effect immediately upon the coming into existence of such Contractor's Data.
- (c) The Contractor agrees on a reasonable request at any time and following reasonable prior written notice to give and to cause the Designer to give the Province and BCTFA or any person(s) authorized by either of them access to the Contractor's Data and to provide and to cause the Designer to provide copies (including copy negatives and CAD disks) thereof at the Province's or BCTFA's (as the case may be) expense.
- (d) The Contractor represents and warrants to and covenants with the Province and BCTFA that each item of Contractor's Data is its own original work or, if any item of Contractor's Data is not its own original work, the Contractor 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:
 - (i) such item to be so acquired or brought into existence and to be used for the purposes of the Project by the Contractor and the Concessionaire and their respective contractors or subcontractors of any tier; and

- (ii) the Contractor to grant the licence granted in Section 4(a) and to comply with all of its obligations under this Section 4,

and that 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.

- (e) The Contractor undertakes at the request of the Province or BCTFA to execute and, where requested by the Province, to cause the Designer 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 4(a).
- (f) The provisions of this Section 4 will survive the expiry or termination of this Agreement for any reason.

5. NO TERMINATION BY CONTRACTOR WITHOUT DEFAULT NOTICE

- (a) The Contractor will not exercise any right it may have to terminate the Design-Build Contract and/or the Interface Agreement or to treat either of them as having been repudiated by the Concessionaire or to discontinue the Contractor's performance thereunder unless:
 - (i) the Contractor first delivers a written notice (a "Default Notice") to the Province and BCTFA setting out in reasonable detail the default(s) on which the Contractor intends to rely in terminating the Design-Build Contract and/or the Interface Agreement or treating either of them as having been repudiated by the Concessionaire or discontinuing the Contractor's performance thereunder; and
 - (ii) within 90 days of the Province and BCTFA receiving the Default Notice:
 - A. the default(s) on which the Contractor intends to rely in terminating the Design-Build Contract and/or the Interface Agreement or treating either of them as having been repudiated by the Concessionaire or discontinuing the Contractor's performance thereunder have not been remedied; and
 - B. the Contractor has not received a Step-In Notice from the Province or BCTFA; and
 - (iii) the Senior Funders have not exercised their step-in or novation rights under the Direct Agreement or the Contractor Direct Agreement.

- (b) If the Contractor delivers a Default Notice to the Province and BCTFA pursuant to Section 5(a)(i), the Province will pay the Contractor in accordance with and at the times specified in the Design-Build Contract for work performed by the Contractor during the period commencing on the date when the Contractor, but for the provisions of Section 5(a) above, would have been entitled to suspend its performance under or terminate the Design-Build Contract as a consequence of the default(s) specified in the Default Notice and ending on the earliest to occur of:
- (i) the date upon which the Province gives the Contractor a written notice confirming that neither the Province nor BCTFA are exercising their step-in rights under Section 7(a);
 - (ii) the date upon which a Step-In Notice is given by the Province or BCTFA under Section 7(a) (in which event the provisions of Section 7(b) will apply in accordance with its terms);
 - (iii) the date upon which the Senior Funders (or the Agent or any other Representative) exercise any right to step-in and assume any of the Concessionaire's rights and/or obligations under the Design-Build Contract or to transfer, novate or assign the Design-Build Contract; and
 - (iv) the expiry of the 90-day period referred to in Section 5(a).

For greater certainty, the Province will not be liable pursuant to the provisions of this Section 5(b) for payment of any amounts owing by the Concessionaire to the Contractor under the Design-Build Contract for work performed by the Contractor prior to the time at which the Contractor, but for the provisions of Section 5(a) above, would have been entitled to suspend its performance under or terminate the Design-Build Contract as a consequence of the default(s) specified in the Default Notice.

6. DUTY OF CARE, REPRESENTATION AND WARRANTY

The Contractor represents and warrants to and covenants with the Province and BCTFA on behalf of itself and its subcontractors of any tier (including the Designer) that:

- (a) it has performed and will continue to perform all of the terms of the Design-Build Contract and the Interface Agreement to be performed on the Contractor's part and that it has carried out, supplied and performed and will carry out, supply and perform the works and services it is to carry out, supply and perform under the Design-Build Contract in accordance with the Design-Build Contract;
- (b) it has provided and will maintain in full force and effect all of the Design-Build Contract Performance Securities in accordance with the terms of the Design-Build Contract;
- (c) it has carried out and supplied and will carry out, supply and complete the works and services it is to carry out, supply and complete under the Design-Build Contract in a good and workmanlike manner using suitable goods, materials and methods and in accordance with the Design-Build Contract; and

- (d) it has exercised and will continue to exercise all reasonable professional skill, care and diligence in carrying out, supplying and completing the works and services under the Design-Build Contract to be expected of a properly qualified design-build contractor experienced in carrying out, supplying and completing works and services of similar scope, size, type and complexity as the Project, including, without limiting the generality of the foregoing, the selection of goods and materials, design and the satisfaction of the performance specifications and requirements referred to in or to be inferred from the Design-Build Contract and the Technical Requirements.

Notwithstanding the foregoing, the Province and BCTFA shall not be entitled to rely on the Contractor's representation, warranty and covenant in this Section 6 as a basis for an action against the Contractor until the Province and/or BCTFA exercises its Step-in Rights under Section 7 of this Agreement.

6A. DELAY

The Contractor will not, by reason of the exercise by the Province or BCTFA of their rights under this Agreement, have any liability for delay in the completion of the work to be completed by it under the Design-Build Contract except to the extent such liability to the Province or BCTFA arises under the Design-Build Contract after the exercise by the Province or BCTFA of their Step-In-Rights under this Agreement.

7. STEP-IN RIGHTS

- (a) Subject to the provisions of the Direct Agreement including without limitation Section 3.5 thereof, and the provisions of the Contractor Direct Agreement, the Province or BCTFA may at any time:

- (i) within 90 days of the Province and BCTFA receiving a Default Notice, unless prior to expiry of such 90-day period the default(s) on which the Contractor intends to rely in terminating the Design-Build Contract and/or the Interface Agreement or treating either of them as having been repudiated by the Concessionaire or discontinuing the Contractor's performance thereunder have been remedied; or
- (ii) if the Province's right to terminate the Concession Agreement has arisen and is continuing,

deliver a notice (a "Step-In Notice") electing to replace the Concessionaire under the Design-Build Contract and the Interface Agreement with the Province or BCTFA or a third party designated by the Province or BCTFA in the Step-In Notice (the "Substitute").

- (b) Subject to Section 7(d), upon receipt by the Contractor of a Step-In Notice:

- (i) the Concessionaire and the Contractor will be deemed to be released from their obligations under the Design-Build Contract and the Interface Agreement to each other (except with respect to any and all indemnities from the Concessionaire in favour of the Contractor and from the Contractor in favour of the Concessionaire); and the Province, BCTFA or

- the Substitute, as applicable, and the Contractor will be deemed to assume those same obligations towards each other (except with respect to any and all indemnities from the Concessionaire in favour of the Contractor in respect of matters occurring in the period prior to receipt by the Contractor of the Step-In Notice);
- (ii) the rights of the Concessionaire against the Contractor under the Design-Build Contract and the Interface Agreement and vice versa will be deemed to be cancelled (except with respect to any and all indemnities from the Concessionaire in favour of the Contractor and from the Contractor in favour of the Concessionaire); and the Province, BCTFA or the Substitute, as applicable, and the Contractor will be deemed to acquire those same rights against each other (except with respect to any and all indemnities from the Concessionaire in favour of the Contractor in respect of matters occurring in the period prior to receipt by the Contractor of the Step-In Notice);
 - (iii) the Guarantors and each of them will be deemed to be released from its obligations to the Concessionaire under the Design-Build Contract Guarantee (except with respect to claims under the Design-Build Contract Guarantee arising in respect of matters occurring prior to the date of receipt of the Step-In Notice by the Contractor); and the rights and benefits previously available to the Concessionaire under the Design-Build Contract Guarantee (without prejudice to claims by the Concessionaire under the Design-Build Contract Guarantee in respect of matters occurring prior to the date of receipt of the Step-In Notice by the Contractor) will be deemed to have been granted in favour of the Province, BCTFA or the Substitute, as applicable (provided, for greater certainty, that any limitations on the maximum liability of the Guarantors under the Design-Build Contract Guarantee will continue in effect);
 - (iv) the rights and benefits previously available to the Concessionaire under the Design-Build Contract Performance Securities (without prejudice to claims by the Concessionaire under the Design-Build Contract Performance Securities in respect of matters occurring prior to the date of receipt of the Step-In Notice by the Contractor or in respect of the debt service component of delay liquidated damages payable under the Design-Build Contract) will be transferred and assigned to the Province, BCTFA or the Substitute, as applicable (provided, for greater certainty, that any limitations on the maximum liability of the issuers of the Design-Build Contract Performance Securities under the Design-Build Contract Performance Securities will continue in effect);
 - (v) at the Province's or BCTFA's request, the Contractor will enter into, and the Province or BCTFA will or will cause the Substitute to enter into, as applicable, all such agreements or other documents as reasonably necessary to give effect to the foregoing, including without limitation an agreement between the Province, BCTFA or the Substitute, as applicable, and the Contractor on substantially the same terms as the Design-Build Contract (except for claims under any indemnities from the Concessionaire in favour of the Contractor or from the Contractor in

favour of the Concessionaire arising in respect of matters occurring on or prior to the date of the new agreement) and the Interface Agreement;

- (vi) at the Province's or BCTFA's request, the Guarantors will execute and deliver to the Province, BCTFA or the Substitute, as applicable, an agreement of joint and several guarantee from the Guarantors in favour of the Province, BCTFA or the Substitute, as applicable, on the same terms as the Design-Build Contract Guarantee (except with respect to necessary ministerial changes and which agreement, for greater certainty, will be consistent with the provisions of paragraph 7(b)(iii) above) together with all such other documents and further assurances as may reasonably be requested by the Province or BCTFA to give effect to the provisions of this Section 7(b); and
- (vii) at the Province's or BCTFA's request, the Contractor will and will cause the issuers of the Design-Build Contract Performance Securities to enter into, and the Province or BCTFA will or will cause the Substitute, as applicable, to enter into all such agreements or other documents necessary to give effect to the provisions of this Section 7(b), including assignments and necessary consents to assignments of the Design-Build Contract Performance Securities to the Province, BCTFA or the Substitute, as applicable, or replacement performance securities from the issuers of the Design-Build Contract Performance Securities in favour of the Province, BCTFA or the Substitute, as applicable, on the same terms as the Design-Build Contract Performance Securities except with respect to necessary ministerial changes (which assignments or replacement performance securities, for greater certainty, will be consistent with the provisions of paragraph 7(b)(iv) above) and, in the case of the issuance of replacement performance securities as aforesaid, the original Design-Build Contract Performance Securities (except with respect to claims by the Concessionaire thereunder in respect of matters occurring prior to the date of receipt of the Step In Notice by the Contractor) will be cancelled.

If the Province or BCTFA replaces the Concessionaire under the Design-Build Contract and the Interface Agreement pursuant to a Step In Notice and subsequently designates a Substitute, the relevant Parties will enter into (and the Province or BCTFA (as the case may be) will cause the Substitute to enter into and, in the case of the Design-Build Contract Performance Securities, the Contractor will cause the issuers of the Design-Build Contract Performance Securities to enter into) all such agreements or other documents necessary to effect and confirm the succession of the Substitute to the rights and obligations of the Province or BCTFA (as the case may be) under the agreements and other documents referred to in this Section 7(b) previously entered into by or for the benefit of the Province or BCTFA (as the case may be) and to release the Province or BCTFA (as the case may be) from all obligations and liabilities under such agreements and other documents.

In the event the Province or BCTFA causes a Substitute to enter into the agreements and other documents as are necessary to give effect to the

foregoing, the Contractor will have no right to approve the Substitute where such Substitute is any of the following:

- (viii) any Ministry, office, instrumentality or agency of the Province;
- (ix) any person whose obligations under such agreements or other documents are guaranteed by the Province or any Ministry, office, instrumentality or agency of the Province;
- (x) a Qualifying Bidder as defined in the Concession Agreement in circumstances of an assignment, transfer or novation of the Concession Agreement; or
- (xi) any person who has the financial standing and the financial resources reasonably necessary to enable it to perform the obligations of the Concessionaire under the Design-Build Contract.

Otherwise, the Substitute shall be subject to the approval of the Contractor, such approval not to be unreasonably withheld or delayed and the Province or BCTFA will provide such information relating to any proposed Substitute not falling within subparagraphs 7(b)(x) and (xi) as the Contractor may reasonably request to demonstrate to the Contractor, acting reasonably, that the Substitute has the financial standing and the financial resources reasonably necessary to enable it to perform the obligations of the Concessionaire under the Design-Build Contract to the extent such information is readily available to the Province or BCTFA.

- (c) Subject to Section 7(d), the Concessionaire will, at its own cost, cooperate fully with the Province, BCTFA and any Substitute in order to achieve a smooth, efficient and orderly transfer of the Design-Build Contract to the Province, BCTFA or the Substitute, as applicable, and to avoid or mitigate in so far as reasonably practicable any inconvenience, including the administration of the Design-Build Contract, ongoing supervisory activities and scheduling.
- (d) A notice in writing from the Agent exercising the Senior Funders' right under the Direct Agreement or the Contractor Direct Agreement to step-in and assume the Concessionaire's rights and obligations under the Design-Build Contract or to novate or assign the Design-Build Contract that is received by the Contractor prior to the receipt of a Step-In Notice given pursuant to this Agreement will have priority over the Step-In Notice given pursuant to this Agreement, and in such circumstances only the notice received from the Agent will take effect and the Step-In Notice given pursuant to this Agreement will not bind the Contractor.
- (e) If a Step-In Notice is given by the Province or BCTFA pursuant to this Agreement and, prior to the expiration of the 90-day period of time following delivery of a Province Collateral Agreement Notice (as defined in the Direct Agreement), a notice in writing from the Agent exercising the Senior Funders' right under the Direct Agreement or the Contractor Direct Agreement to step-in and assume the Concessionaire's rights and obligations under the Design-Build Contract or to transfer, novate or assign the Design-Build Contract is received by the Contractor, then, unless by such time the Design-Build Contract has been transferred, novated or assigned to a Substitute, the exercise by the Province or

BCTFA, as the case may be, of its step-in rights pursuant to this Agreement will be deemed to have terminated, all rights and obligations of the Province arising from delivery of the Step-In Notice will be deemed to be cancelled and the provisions of Section 7(b) that would come into force and effect upon the delivery of a Step-In Notice will be deemed not to have come into force or effect.

- (f) The Contractor will ensure, through measures satisfactory to the Province and BCTFA, acting reasonably, that the terms of the Design-Build Contract Performance Securities permit the exercise by the Province and BCTFA of their step-in rights under this Agreement and that the exercise by the Province or BCTFA of their step-in rights under this Agreement will not entitle the issuer of any Design-Build Contract Performance Security to terminate, alter, amend or not comply with its obligations under the Design-Build Contract Performance Security, and that the terms of all Design-Build Contract Performance Securities will remain in full force and effect notwithstanding the exercise of such step-in rights and will provide further that upon the Province exercising its step-in rights, the Province will be entitled to all rights and benefits under such Design-Build Contract Performance Securities as though the Province were the originally named beneficiary thereunder.

7A. AMOUNTS PAID BY THE PROVINCE, BCTFA OR SUBSTITUTE

Any amounts paid by the Province, BCTFA or a Substitute to the Contractor pursuant to this Agreement or any agreement or other document entered into pursuant hereto (including, for greater certainty, any amounts paid by the Province to the Contractor pursuant to Section 5 hereof and any amounts paid by the Province, BCTFA or a Substitute pursuant to Section 7(b) hereof or any agreement or other document entered into pursuant thereto) will be deemed to be amounts owing by the Concessionaire to the Province under the Concession Agreement and, subject to Section 44.8 [Rights of Set-Off] of the Concession Agreement, may be set-off against any payments to be made by the Province to the Concessionaire under the Concession Agreement including the Total Performance Payment and any Termination Sum (which term, for this purpose, will be deemed to include any Adjusted Highest Qualifying Bid Price).

7B. APPROPRIATION

The Contractor, the Guarantors and the Concessionaire acknowledge that they are aware of the provisions of subsection 28(2) of the *Financial Administration Act*, R.S.B.C. 1996, c. 138.

8. CONTRACTOR LIABILITY

- (a) The obligations and liabilities of the Contractor under this Agreement, the Design-Build Contract and/or the Interface Agreement and the obligations and liabilities of the Guarantors and each of them under this Agreement and the Design-Build Contract Guarantee will not be modified, released, limited, diminished or in any way affected by:
- (i) any independent inspection, investigation or enquiry into any matter which may be made or carried out by or on behalf of the Province or

BCTFA, or by any failure or omission to carry out any such inspection, investigation or enquiry; or

- (ii) the appointment by the Province or BCTFA of any other person to make or carry out any inspection, investigation or enquiry or to review the progress of or otherwise report to the Province in respect of the Project or any aspect thereof, or by any action or omission of such person whether or not such action or omission might give rise to any independent liability of such person to the Province.
- (b) In the event that the Province or BCTFA delivers a Step-In Notice:
- (i) the Contractor will have no greater liability to the Province, BCTFA or any Substitute than it would have had to the Concessionaire under the Design-Build Contract, and the Contractor will be entitled in any proceedings by the Province, BCTFA or any Substitute to rely on any liability limitations in the Design-Build Contract; and
 - (ii) the Guarantors and each of them will have no greater liability to the Province, BCTFA or any Substitute than they would have had to the Concessionaire under the Design-Build Contract Guarantee, and the Guarantors will be entitled in any proceedings by the Province, BCTFA or any Substitute to rely on any liability limitations in the Design-Build Contract Guarantee.

9. DISCLOSED DATA DISCLAIMER AND INDEMNITY

- (a) 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 the date of execution of this Agreement) relevant or material to the Project, the Project Facilities, the Site or the Adjacent Areas or any obligations undertaken by the Contractor under the Design-Build Contract and/or the Interface Agreement. Neither the Province nor BCTFA will be liable to the Contractor, the Guarantors or either of them or the Designer in respect of any failure to disclose or make available (whether before or after the execution of this Agreement) to the Concessionaire, the Contractor, the Guarantors or either of them or the Designer any information, documents or data, nor to keep the Disclosed Data up to date, nor to inform the Concessionaire, the Contractor, the Guarantors or either of them or the Designer (whether before or after execution of this Agreement) of any inaccuracy, error, omission, unfitness for purpose, defect or inadequacy in the Disclosed Data.
- (b) Neither the Province nor BCTFA will have any liability to the Contractor or the Designer (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, and the joint and several liability of the Guarantors under the Design-Build Contract Guarantee will not be released, lessened or limited in any way as a result of, any inaccuracy, error, omission, unfitness for purpose, defect or inadequacy of any kind whatsoever in the Disclosed Data.

- (c) Prior to the Designer performing any of the Operations the Contractor will cause the Designer to provide the Province and BCTFA with an acknowledgement of the provisions of this Section 9 and a waiver of liability in respect of the Disclosed Data in a form satisfactory to the Province (acting reasonably).

10. CONCESSIONAIRE AS PARTY

The Concessionaire is a party to this Agreement for the purpose of giving its consent to and agreeing to be bound by the provisions hereof. The Concessionaire acknowledges and agrees that the Contractor will not be in breach of the Design-Build Contract or the Interface Agreement and the Guarantors will not be in breach of the Design-Build Contract Guarantee by reason of complying with its obligations hereunder. Any default by the Concessionaire in the performance of its obligations under this Agreement will constitute a default by the Concessionaire under and for all purposes of the Concession Agreement.

11. ASSIGNMENT

- (a) The Concessionaire will not, without the prior written consent of the Province and BCTFA, assign, transfer, charge, subcontract, subparticipate or otherwise dispose of any interest in this Agreement except to the extent it is entitled to do so under the Concession Agreement.
- (b) The Province and BCTFA may assign or otherwise dispose of the benefit of the whole or part of this Agreement in conjunction with a permitted assignment under the terms of the Concession Agreement and only to a permitted assignee thereunder, on written notice to the Concessionaire and the Contractor and otherwise will not, without the prior written consent of the Concessionaire or the Contractor not to be unreasonably withheld or delayed, assign or otherwise dispose of the benefit of the whole or part of this Agreement. Notwithstanding the foregoing, no consent of the Concessionaire or the Contractor will be required in the event of an assignment by the Province or BCTFA or other disposal of the benefit of the whole or part of this Agreement to any person referred to in subparagraphs 7(b)(viii), (ix), (x) and (xi).
- (c) Neither the Contractor nor the Guarantors or either of them will, without the prior written consent of the Province and BCTFA, assign, transfer, charge, subcontract, subparticipate or otherwise dispose of any interest in this Agreement.

12. NOTICES

Any notices required or permitted under this Agreement will be in writing and (a) delivered personally, (b) sent by a recognized express mail or courier service, with delivery receipt requested, or (c) sent by confirmed facsimile transmission with telephonic confirmation, to the following addresses:

If to the Province
or BCTFA: 5B – 940 Blanshard Street
Victoria, British Columbia V8W 9T5

Tel No.: 250-387-3260
Fax No.: 250-387-6431
Attn: Assistant Deputy Minister, Highways Department
Ministry of Transportation

If to the Contractor: **Trans-Park Highway Constructors**
Suite 240 – 3011 Viking Way
Richmond, British Columbia V6V 1W1

Tel No.: 604-244-7343
Fax No.: 604-244-7340
Attn: Robert French

If to the Guarantors: **Royal BAM Group N.V.**
Runnenburg 9
Postal code: 3981 AZ
City: Bunnik

Tel No.: +31(0)30 659 89 88
Fax No.: +31(0)30 659 89 43
Attn: Adrian J.D. Franklin

and: **Parsons Corporation**
100 West Walnut Street
Pasadena, California 91124

Tel No.: 626-440-2000
Fax No.: 626-440-2630
Attn: Curtis Bower

If to the
Concessionaire: **Trans-Park Highway General Partnership**
675 Cochrane Drive, West Tower, Suite 630
Markham, Ontario L3R 0B8

Tel No.: 905-530-2114
Fax No.: 905-530-2214
Attn: John McArthur

- (a) Where any notice is provided or submitted to a Party via facsimile, an original of the notice sent via facsimile will also promptly be delivered personally or sent by a recognized express mail or courier service, with delivery receipt requested.
- (b) A Party may at any time and from time to time change its nominated address or facsimile number by prior notice to the other Parties, and such change will be effective on the day that next follows the recipient Parties' receipt of such notice.
- (c) Notices given by mail will be effective upon the earlier of (i) actual receipt, and (ii) 7 days after mailing if mailed within Canada, and 21 days after mailing if

mailed outside of Canada. Notices delivered personally will be effective upon delivery. Notices given by facsimile will be deemed to have been received where there is confirmation of uninterrupted transmission by a transmission report and where there has been no telephonic communication by the recipient to the sender (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 between the hours of 9 a.m. and 4 p.m.; or
 - (ii) by noon on the next following Working Day, if sent after 4 p.m. on a Working Day but before 9 a.m. on that next following Working Day.
- (d) If the Party giving the notice or communication knows or ought reasonably to know of difficulties or disruption with the postal system which might affect the delivery of mail:
- (i) any such notice will not be mailed but will be made or given by personal delivery or by facsimile transmission; and
 - (ii) where such difficulties or disruption arise after mailing but before the date of receipt as provided in this Section 12, the Party giving such notice will make or give such notice by personal delivery or by facsimile transmission.
- (e) To be effective, notices and all formal communications under this Agreement must be in writing and delivered as provided in this Section 12, and must be signed by an authorized representative of the Party giving the notice. E-mails will not be used for and will not constitute notices under this Agreement.
- (f) Oral communications will not constitute formal communication under this Agreement and no Party has any obligation to act on any oral communication, instruction or assurance unless and until it is confirmed in writing. Any action taken by a Party based on oral communications, instructions or assurances will be at that Party's sole risk and will be without liability to or recourse against the other Parties.

13. AMENDMENTS

No oral or written amendment or modification of this Agreement, either before or after execution and delivery of this Agreement, will be of any force or effect unless such amendment or modification is in writing and is signed by a duly authorized officer of each Party sought to be bound thereby.

14. WAIVER

- (a) No waiver of any rights under this Agreement will be binding or effective unless the waiver is in writing and signed by an authorized representative of the Party giving such waiver.

- (b) Any Party's waiver of any of its rights under this Agreement or of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of this Agreement at any time will not in any way affect, limit, modify, or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition and other provision hereof, any course of dealing or custom of the trade notwithstanding.

15. TIME IS OF THE ESSENCE

Time is of the essence of this Agreement and each provision herein.

16. INDEPENDENT CONTRACTOR

The Parties are independent contractors. This Agreement is not intended to and does not create or establish between the Parties any relationship as partners, joint venturers, employer and employee, master and servant or principal and agent. Neither the Concessionaire nor the Contractor nor any of its or their representatives are or will be deemed to be an employee or agent of the Province or BCTFA for any purpose.

17. ENTIRE AGREEMENT

Except where provided otherwise in this Agreement, this Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings, whether oral, written, express or implied, concerning the subject matter of this Agreement.

18. SEVERABILITY

If any provision of this Agreement is declared invalid, unenforceable or illegal by the courts of any jurisdiction to which it is subject, such provision may be severed and such invalidity, unenforceability or illegality will not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement.

19. ENUREMENT

This Agreement will enure to the benefit of and be binding upon each of the Parties and their respective successors and permitted transferees and assigns.

20. DISPUTE RESOLUTION

Any dispute under this Agreement will be resolved in accordance with the Disputes Resolution Procedure.

21. GOVERNING LAW AND JURISDICTION

- (a) This Agreement will be governed by and construed in accordance with the laws of the Province of British Columbia and the laws of Canada applicable therein and will be treated in all respects as a contract in the Province of British Columbia, without regard to conflict of laws principles.

(b) Subject to the provisions of Section 20, the Parties agree to submit to the non-exclusive jurisdiction of the courts of British Columbia as regards any claim or matter arising in relation to this Agreement.

22. FURTHER ASSURANCE

Each Party shall do all things and execute all further documents necessary to give full effect to this Agreement.

23. PARTNERSHIP

The Concessionaire is a general partnership and, accordingly, each of its partners will execute and deliver this Agreement under the name and style of the Concessionaire and will be jointly and severally liable for the obligations of the Concessionaire under this Agreement.

24. PROOF OF AUTHORITY

The Province reserves the right to require everyone executing this Agreement on behalf of the Concessionaire or the Contractor to provide proof, in a form acceptable to the Province, that they have the requisite authority to execute this Agreement on behalf of and to bind the Concessionaire or the Contractor, respectively.

25. CONFIDENTIALITY

The Contractor will comply with the obligations on the part of the Concessionaire contained in Section 50 [Confidentiality] of the Concession Agreement.

26. COUNTERPARTS

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all of the Parties will constitute a full, original and binding agreement for all purposes. Counterparts may be executed either in original or faxed form provided that any Party providing its signature in faxed form will, upon any other Party's request, promptly forward to such Party an original signed copy of this Agreement which was so faxed.

IN WITNESS WHEREOF the Parties have executed this Agreement as of the day and year first above written:

SIGNED on behalf of 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:)
)
)
)
)
)
)
)

 JOHN DYBLE
 Deputy Minister, Ministry of Transportation

 (Witness)

BC TRANSPORTATION FINANCING AUTHORITY

Per: _____
JOHN DYBLE
Chief Executive Officer

FLATIRON CONSTRUCTORS CANADA LTD.

Per: _____
Authorized Signatory

PARSONS OVERSEAS COMPANY OF CANADA LTD.

Per: _____
Authorized Signatory

ROYAL BAM GROUP N.V.

Per: _____
Authorized Signatory

PARSONS CORPORATION

Per: _____
Authorized Signatory

TRANS-PARK HIGHWAY GENERAL PARTNERSHIP
by its partners:

TRANS-PARK HIGHWAY INVESTMENT INC.

Per: _____
Authorized Signatory

TRANS-PARK HIGHWAY INC.

Per: _____
Authorized Signatory

**HER MAJESTY THE QUEEN IN RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA, as represented by the
MINISTER OF TRANSPORTATION**

and

BC TRANSPORTATION FINANCING AUTHORITY

and

CIT GROUP SECURITIES (CANADA) INC.

and

TRANS-PARK HIGHWAY GENERAL PARTNERSHIP

and

TRANS-PARK HIGHWAY FINANCE INC.

**Direct Agreement
for the
Kicking Horse Canyon Project
Concession Agreement**

THIS DIRECT AGREEMENT is made as of the 28th day of October, 2005

BETWEEN:

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

AND

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

AND

- (3) **CIT GROUP SECURITIES (CANADA) INC.**, a corporation incorporated under the laws of the Province of Ontario, for itself and as agent and trustee for and on behalf of the Senior Funders (the "**Agent**")

AND

- (4) **TRANS-PARK HIGHWAY GENERAL PARTNERSHIP**, a general partnership established under the laws of the Province of British Columbia (the "**Concessionaire**")

AND

- (5) **TRANS-PARK HIGHWAY FINANCE INC.**, a corporation incorporated under the laws of British Columbia (the "**Issuer**")

WHEREAS:

- (A) The Province, BCTFA and the Concessionaire have entered into the Concession Agreement.
- (B) By the Senior Funding Agreements, the Senior Funders have agreed to make available certain credit facilities to the Issuer and the Concessionaire.
- (C) It is a requirement of the Concession Agreement and of the Senior Funding Agreements that this Agreement will be entered into by the Parties hereto.

NOW THEREFORE in consideration of 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 hereto hereby covenant and agree as follows:

1. **DEFINITIONS AND INTERPRETATION**

1.1 **Definitions**

In this Agreement (including the recitals), unless the context otherwise requires, the following expressions have the following meanings:

“**Agent’s Election**” has the meaning given in Section 27.3.

“**Appointed Representative**” means a Representative that has assumed the Concessionaire’s rights under the Concession Agreement pursuant to Section 4.1.2.

“**Appointed Representative Notice**” has the meaning given in Section 4.1.1.

“**Associate**” means, in respect of a relevant person, a person that is an “associate” as that term is defined in the *Canada Business Corporations Act* as at the date of this Agreement. For greater certainty, this definition will not be changed in the event of an amendment to the definition of “associate” contained in the said *Canada Business Corporations Act* following the date of this Agreement.

“**Availability/Performance Deductions**” has the meaning given in the Concession Agreement.

“**Collateral Agreement**” has the meaning given in the Concession Agreement.

“**Concession Agreement**” means the agreement titled “Kicking Horse Canyon Project Phase 2 Concession Agreement” among the Province, BCTFA and the Concessionaire dated as of the 28th day of October, 2005 pursuant to which the Concessionaire has been engaged to carry out the Project, as the same may be amended, modified, supplemented or replaced from time to time.

“**Court**” means any court of competent jurisdiction.

“**Default Interest Rate**” means **DELETED** per annum above the Interest Rate.

“**Design-Build Contract**” has the meaning given in the Concession Agreement.

“**Enforcement Action**” means any acceleration of amounts due and owing under any of the Senior Funding Agreements and/or any enforcement procedure or enforcement action commenced or taken under any of the Security (including, for greater certainty, the exercise of any step-in rights under any direct or collateral agreement with the Contractor or the Operator).

“**Enforcement Event**” means an event of default under any of the Senior Funding Agreements or the Security Documents or any other event which permits Enforcement Action.

“**Event of Default**” has the meaning given in the Concession Agreement.

“**Exercise Date**” has the meaning given in Section 3.5.2.

“Indebtedness Notice” has the meaning given in Section 3.1.1.2.

“Interest Rate” has the meaning given in the Concession Agreement.

“Liquid Market” has the meaning given in the Concession Agreement.

“Net No Federal Funding Amount” has the meaning given in Section 3A.1.

“No Federal Funding Account” means a bank account established at a bank in British Columbia by the Agent on behalf of the Senior Funders.

“No Liquid Market Notice” has the meaning given in Section 3.6.1.

“Novation Effective Date” means the later of:

- (a) the Proposed Novation Date (unless an approval of the Lieutenant Governor in Council is required to be obtained pursuant to subsection 2(1) of the Transportation Investment Act in connection with the proposed novation and is not obtained by such date); and
- (b) the date which is 7 days after the date on which: (a) the Province has consented in accordance with this Agreement, and (b) any required approval of the Lieutenant Governor in Council has been obtained, in respect of the proposed novation.

“Operating and Maintenance Contract” has the meaning given in the Concession Agreement.

“Operations” has the meaning given in the Concession Agreement.

“Project” has the meaning given in the Concession Agreement.

“Project Documents” has the meaning given in the Concession Agreement.

“Project Facilities” has the meaning given in the Concession Agreement.

“Proposed Novation Date” means the date on which it is proposed by the Agent under Section 5.1 [Proposed Substitute Concessionaire] that a novation will become effective.

“Proposed Novation Notice” has the meaning given in Section 5.1 [Proposed Substitute Concessionaire].

“Proposed Substitute Concessionaire” has the meaning given in Section 5.1 [Proposed Substitute Concessionaire].

“Province Collateral Agreement Notice” has the meaning given in Section 3.5.1.1.

“Province’s Representative” has the meaning given in the Concession Agreement.

“Representative” means:

- (a) the Agent, any Senior Funder and/or any of their Affiliates;

- (b) an administrative receiver, receiver or receiver and manager of the Concessionaire appointed under the Security Documents or by an order of the Court;
- (c) an administrator of the Concessionaire;
- (d) a person directly or indirectly owned or controlled by the Agent and/or any Senior Funder(s); or
- (e) any other person approved by the Province (such approval not to be unreasonably withheld or delayed).

“Required Period” means, subject to Section 3.6 [No Liquid Market], the period starting on the date of a Termination Notice and ending 90 days later.

“Restricted Person” has the meaning given in the Concession Agreement.

“Security” means the security interests in the Project Documents, the Concession Agreement and any other assets which the Province has the right to acquire or obtain pursuant to the Concession Agreement, which security interests are granted by the Concessionaire to the Agent pursuant to the Security Documents and such other security documents as may be required by the Senior Funders and granted in conformity with the requirements of the Concession Agreement.

“Security Documents” means:

- (a) General Security Agreement granted by the Issuer in favour of CIT Group Securities (Canada) Inc., indenture trustee and noteholders;
- (b) General Security Agreement granted by the Concessionaire in favour of CIT Group Securities (Canada) Inc., indenture trustee and noteholders;
- (c) Design-Builder - Funders Direct Agreement granted by Flatiron Constructors Canada Limited and Parsons Overseas Company of Canada Ltd. in favour of CIT Group Securities (Canada) Inc., indenture trustee and noteholders;
- (d) Operator-Funders Direct Agreement granted by the Operator in favour of CIT Group Securities (Canada) Inc., indenture trustee and noteholders;
- (e) Pledge by Trans-Park Highway Investment Inc. of its partnership interest in the Concessionaire, and of its shares in Trans-Park Highway Inc., in favour of CIT Group Securities (Canada) Inc., indenture trustee and noteholders;
- (f) Pledge by Trans-Park Highway Inc. of its partnership interest in the Concessionaire in favour of CIT Group Securities (Canada) Inc., indenture trustee and noteholders;
- (g) Pledge by Trans-Park Highway Holding Inc. of its shares in Trans-Park Highway Investment Inc. and Trans-Park Finance Inc., and any related limited recourse guarantee, in favour of CIT Group Securities (Canada) Inc., indenture trustee and noteholders;

- (h) Assignment by way of security of all the Issuer / Concessionaire rights in Accounts and Insurance in favour of CIT Group Securities (Canada) Inc., indenture trustee and noteholders;
- (i) Blocked Accounts Agreement (Proceeds) between the Issuer, the Concessionaire, Citibank, CIT Group Securities (Canada) Inc. and indenture trustee;
- (j) Blocked Accounts Agreement (General) between the Issuer, the Concessionaire, Citibank, CIT Group Securities (Canada) Inc. and indenture trustee; and
- (k) Assignment by way of security of all Concessionaire rights in Material Agreements in favour of CIT Group Securities (Canada) Inc., indenture trustee and noteholders; and
- (l) Permitted Investment Agreement between the Issuer, the Concessionaire, Royal Bank of Canada, CIT Group Securities (Canada) Inc. and indenture trustee,

each in the form delivered to the Province by the Concessionaire on the Commencement Date as the same may be amended, modified, supplemented and/or replaced from time to time to the extent permitted under Section 2.3.3 of the Concession Agreement.

“Senior Funders” has the meaning given in the Concession Agreement.

“Senior Funding Agreements” means:

- (a) Note Indenture among the Issuer as issuer, the Concessionaire as guarantor, Computershare Trust Company of Canada as indenture trustee, and CIT Group Securities (Canada) Inc. as the administrative agent;
- (b) [Not Used]; and
- (c) the documents described in the definition of Security Documents,

each in the form delivered to the Province by the Concessionaire on the Commencement Date as the same may be amended, modified, supplemented and/or replaced from time to time to the extent permitted under Section 2.3 [Project Documents] of the Concession Agreement.

“Shareholders” has the meaning given in the Concession Agreement.

“Step-In Date” means the later of:

- (a) the date on which the Province receives a Step-In Notice from the Agent; and
- (b) the date on which any required approval of the Lieutenant Governor in Council has been obtained in respect of the proposed step-in.

“Step-In Date” means the date on which the Province receives a Step-In Notice from the Agent.

“**Step-In Expiry Date**” means the date which is 24 months after the Step-In Date.

“**Step-In Notice**” has the meaning given in Section 4.1.2.

“**Step-In Period**” means the period commencing on the Step-In Date and ending on the earlier of:

- (a) the Step-In Expiry Date;
- (b) the Step-Out Date; and
- (c) the Novation Effective Date.

“**Step-Out Date**” has the meaning given in Section 4.2.1.

“**Subcontracts**” has the meaning given in Section 3.5.1.

“**Subsequent Indebtedness Notice**” has the meaning given in Section 3.1.2.

“**Substitute**” has the meaning given in the Collateral Agreements.

“**Substitute Designation Notice**” has the meaning given in the Collateral Agreements.

“**Suitable Substitute Concessionaire**” has the meaning given in Section 5.5.1.

“**Termination Notice**” has the meaning given in Section 3.1.1.1.

“**Warning Notice**” has the meaning given in the Concession Agreement.

“**Working Day**” has the meaning given in the Concession Agreement.

“**Works**” has the meaning given in the Concession Agreement.

1.2 Interpretation

Except to the extent that the context or the express provisions of this Agreement otherwise require:

- 1.2.1 headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- 1.2.2 all capitalized terms used in this Agreement which are not otherwise defined will have the respective meanings given to such terms in the Concession Agreement;
- 1.2.3 all references to Sections are references to Sections of this Agreement;
- 1.2.4 all references to any agreement, document, standard, principle or other instrument include (subject to all relevant approvals and any other provision of this Agreement and the Concession Agreement expressly concerning such agreement, document, standard, principle or other instrument) a reference to that agreement, document,

- standard, principle or instrument as amended, supplemented, substituted, novated or assigned;
- 1.2.5 all references to time of day are references to Pacific Standard time or Pacific Daylight Saving time, as the case may be;
- 1.2.6 all monetary amounts are expressed in Canadian Dollars;
- 1.2.7 words importing the singular include the plural and vice versa;
- 1.2.8 words importing a particular gender include all genders;
- 1.2.9 “person” includes an individual, corporation, partnership, joint venture, association, trust, pension fund, union, government, governmental body, governmental agency, authority, board, tribunal, commission or department and the heirs, beneficiaries, executors, personal or other legal representatives or administrators of an individual, and the receivers and administrators of a corporation;
- 1.2.10 any reference to a public organization shall be deemed to include a reference to any successor to such public organization or any organization or entity which has taken over the functions or responsibilities of such public organization;
- 1.2.11 references to “Parties” mean the parties to this Agreement (including, in the case of references to the Agent, the Senior Funders) and references to a “Party” mean any one of the parties to this Agreement;
- 1.2.12 whenever the terms “will” or “shall” are used in this Agreement they are to be construed and interpreted as synonymous and are to be read as “shall”;
- 1.2.13 all accounting and financial terms used herein are, unless otherwise indicated, to be interpreted and applied in accordance with Canadian generally accepted accounting principles, consistently applied;
- 1.2.14 the words of this Agreement are to be given their natural meaning. The Parties have had the opportunity to take legal advice on this Agreement and no term is, therefore, to be construed *contra proferentem*;
- 1.2.15 the words “includes” or “including” are to be construed as being without limitation;
- 1.2.16 general words are not given a restrictive meaning:
- 1.2.16.1 if they are introduced by the word “other”, by reason of the fact that they are preceded by words indicating a particular class of act, matter or thing; or
- 1.2.16.2 by reason of the fact that they are followed by particular examples intended to be embraced by those general words;
- 1.2.17 if the time for doing an act falls or expires on a day that is not a Working Day, the time for doing such act will be extended to the next Working Day;

- 1.2.18 the Province will not be imputed with knowledge of any fact, matter or thing unless that fact, matter or thing is within the actual knowledge of those of its employees or agents (including the Province's Representative) who have responsibilities in connection with the conduct of the Operations or the Project;
- 1.2.19 no provision of this Agreement is intended to derogate from or be inconsistent with or in conflict with any Laws and Regulations and should not be interpreted in a manner as to result in any derogation, inconsistency or conflict and if any such provision is found by a court of competent jurisdiction to be inconsistent with or in conflict with any Laws and Regulations, the applicable Laws and Regulations will prevail and such provision will be read down or rendered inoperative (either, generally or in such particular situation, as appropriate), to the extent of such conflict or inconsistency, as the case may be, and if any such provision is found by a court of competent jurisdiction to derogate from any Laws and Regulations, then such provision will be read down or rendered inoperative (either, generally or in such particular situation, as appropriate) to the extent of the derogation and for purposes of this Section 1.2.19, the following will be excluded from the definition of the defined phrase "Laws and Regulations": "and the law of equity", "ordinances", "codes (including design and construction codes)", "directives", "guidelines", and "rules or policies of any Governmental Authority", and the word "or" will be added between the word "orders," and the word "injunctions"; and
- 1.2.20 each and every representation, warranty, covenant and undertaking of the Concessionaire set forth in this Agreement shall be interpreted and construed as a representation, warranty, covenant and undertaking binding upon each of the Partners, on a joint and several basis.

2. NOTICE AND ACKNOWLEDGMENTS

2.1 Notice of Security Interests

Without prejudice and subject to Section 6 [Rights of the Province], the Agent on behalf of the Senior Funders hereby gives notice to the Province that the Concessionaire has, concurrently with the execution and delivery of this Agreement, assigned, pledged, charged and granted a security interest under the Security Documents of the right, title, benefit and interest of the Concessionaire in and to the Concession Agreement and the Project Documents.

2.2 Acknowledgment of Security Assignment

Without prejudice and subject to Section 6 [Rights of the Province], the Province acknowledges that it has received notice of and to the extent necessary consents to the assignment, pledge, charge and grant referred to in Section 2.1 [Notice of Security Interests]. The Province confirms that it has not received notice of any other assignment or security interest granted over the Concessionaire's rights under the Concession Agreement and the Project Documents.

2.3 Concession Agreement Dealings

Notwithstanding the assignment referred to in Section 2.1 [Notice of Security Interests] or the granting of any other Encumbrance in or over the Concession Agreement by or pursuant to

the Senior Funding Agreements, and without prejudice to Section 6 [Rights of the Province], until the Province is notified by the Agent to the contrary the Province will be entitled (save to the extent expressly provided otherwise in this Agreement) to exercise or enforce all rights, discretions and remedies under or in respect of the Concession Agreement and to perform or discharge its obligations under the Concession Agreement to the Concessionaire as if the Concessionaire was at all times the absolute and beneficial owner of all right, title, benefit and interest in and to the Concession Agreement. Without limiting the generality of the foregoing, the Province may make all payments under the Concession Agreement to the account of the Concessionaire specified in the relevant invoice issued by the Concessionaire, until otherwise notified by the Agent at least 7 Working Days prior to the payment date (whereupon any such payment will be made to or to the order of the Agent).

2.4 Agreements and Security Documents

- 2.4.1 The Concessionaire, the Agent and the Senior Funders will not amend or modify the Senior Funding Agreements, or any of them, except where the Concessionaire is permitted to do so pursuant to the Concession Agreement.
- 2.4.2 The Agent acknowledges having received a copy of the Concession Agreement and a copy of the Collateral Agreements with each of the Contractor and the Operator.
- 2.4.3 The Province acknowledges having received copies of the Senior Funding Agreements.
- 2.4.4 The Agent confirms to the Province that the copies of the Senior Funding Agreements provided to the Province for acknowledgement under Section 2.4.3 constitute all of the Senior Funding Agreements.

2.5 Assignment of Security Documents, Project Documents and Concession Agreement

- 2.5.1 Except for a transfer to a successor Agent to whom the rights and obligations of the Agent under this Agreement have been assigned or transferred in accordance with Section 8.2, the Agent will not exercise any right it may have pursuant to the Security Documents to assign, transfer or otherwise dispose of any right, title or interest it may have in, or obligations it may have pursuant to, the Security Documents in respect of the Concession Agreement or the Project Documents without the prior written consent of the Province.
- 2.5.2 Except as provided for in this Agreement, the Agent will not exercise any right it may have pursuant to the Security Documents to assign, transfer or otherwise dispose of the Project Documents or the Concession Agreement or any of them or any interest therein without the prior written consent of the Province.

2.6 Notification re Additional Permitted Borrowing

The Agent, in respect of Section 2.6.1 below, and the Concessionaire, in respect of Section 2.6.2 below, will promptly notify the Province of:

- 2.6.1 the details and amount of any proposed Additional Permitted Borrowing, including:
 - 2.6.1.1 the circumstances giving rise to the Additional Permitted Borrowing and reasons for the Additional Permitted Borrowing; and
 - 2.6.1.2 the terms on which the Additional Permitted Borrowing will be borrowed;
- 2.6.2 on the first Working Day of each calendar month during which any Additional Permitted Borrowing is, or may be, subsisting, the amount outstanding under the Senior Funding Agreements, and, to the extent it is aware (having made reasonable and proper enquiry):
 - 2.6.2.1 the amount of any Distribution made by the Concessionaire; and
 - 2.6.2.2 the amount of any credit balance on any account of the Concessionaire.

3. NOTICES OF TERMINATION AND ENFORCEMENT

3.1 Termination Notice

- 3.1.1 The Province will not terminate or give a notice terminating the Concession Agreement as a result of an Event of Default (other than in accordance with this Agreement) unless:
 - 3.1.1.1 the Province gives the Agent at least the Required Period of prior written notice (a "**Termination Notice**") specifying the Event of Default in reasonable detail;
 - 3.1.1.2 within 30 days of delivering a Termination Notice the Province gives notice (an "**Indebtedness Notice**") to the Agent setting out:
 - 3.1.1.2.1 all amounts of which the Province is aware which are due and payable by the Concessionaire under the Concession Agreement as at the date on which the Province delivered the Termination Notice; and
 - 3.1.1.2.2 all amounts of which the Province is aware which will become due and payable by the Concessionaire under the Concession Agreement on or before the end of the Required Period; and
 - 3.1.1.3 within the Required Period the Province has not received a Step-In Notice from the Agent.

- 3.1.2 At any time after the Province delivers an Indebtedness Notice but before the Province receives a Step-In Notice, if the Province discovers amounts that have become owing by the Concessionaire to the Province but which were not included in the Indebtedness Notice, the Province may deliver a further notice (a “**Subsequent Indebtedness Notice**”) to the Agent setting out those amounts.

3.2 Revocation of Notice

A Termination Notice can be revoked (by notice to the Agent) by the Province prior to the expiry of the Required Period. Upon any such revocation, the rights and obligations of the Parties will be construed as if the relevant Termination Notice had not been given.

3.3 Notice of Exercise of Other Remedies

The Province will notify the Agent promptly, and in any event within 7 days, of a notice given by or on behalf of the Province to the Concessionaire under Section 26 [Monitoring of Performance] or Section 40 [Default] of the Concession Agreement.

3.4 Notice of Enforcement or Intention to Enforce by Agent

The Agent undertakes to give notice to the Province:

- 3.4.1 of the occurrence of any Enforcement Event, specifying particulars of the Enforcement Event in reasonable detail; and
- 3.4.2 at the same time as it requests the agreement or authority of any of the Senior Funders, or gives notice to any of the Senior Funders of its intention, to take any Enforcement Action, specifying particulars of the Enforcement Action in respect of which the request is made or the notice is given in reasonable detail.

The notice referred to in Section 3.4.1 will be given promptly and in any event not less than 7 days before any Enforcement Action is taken in respect of the Concession Agreement or any of the Project Documents.

3.5 Priorities of Step-In Rights under Collateral Agreements

- 3.5.1 Notwithstanding any provision in the Collateral Agreements, neither the Province nor BCTFA will, prior to the Exercise Date, exercise any right it may have to step-in and assume (or cause a third party designated by the Province or BCTFA to step-in and assume) the Concessionaire’s rights and obligations under the Design-Build Contract or the Operating and Maintenance Contract (collectively, the “**Subcontracts**”) (including, without limitation, the issuance of a step-in notice by the Province or BCTFA pursuant to any Collateral Agreement), or to transfer, novate or assign such Subcontract, unless:

- 3.5.1.1 the Province or BCTFA delivers notice (a “**Province Collateral Agreement Notice**”) to the Agent of the Province’s or BCTFA’s intention to step-in and assume (or cause a third party designated by the Province or BCTFA to step-in and assume) the Concessionaire’s rights and obligations under any such Subcontract, or to transfer, novate or assign any such Subcontract; and

- 3.5.1.2 within 30 days of sending the Province Collateral Agreement Notice the Province has not received a copy of a notice sent by the Agent and received by the Concessionaire exercising the Senior Funders' rights to step-in and assume any of the Concessionaire's rights or obligations under such contract, or to transfer, novate or assign such contract (and, if the Agent on behalf of the Senior Funders completes such step-in and assumption of the Concessionaire's rights and obligations under such contract or such transfer, novation or assignment of such contract subsequent to the expiry of the aforesaid 30 day period and within 90 days of delivery of the Province Collateral Agreement Notice then the Province Collateral Agreement Notice will cease to have effect provided the relevant contract has not been transferred, novated or assigned by the Province).
- 3.5.2 From the date of termination of the Concession Agreement (the "**Exercise Date**"), provided always that the Province has complied with Sections 6.2 and 6.3 of this Agreement, the Province or BCTFA will be entitled to exercise its rights under the Collateral Agreements to step-in and assume (or cause a third party designated by the Province or BCTFA to step-in and assume) the Concessionaire's rights and obligations under, or to transfer, novate or assign the Subcontracts (or any thereof) in accordance with the Collateral Agreements.
- 3.5.3 The Agent will release and discharge at no cost to the Province all Security in respect of the Design-Build Contract and/or the Operating and Maintenance Contract if such contract is assumed, transferred, novated or assigned by the Province (or by a third party designated by the Province or BCTFA) pursuant to a Collateral Agreement; provided, however, that where any such contract is assumed, transferred, novated or assigned by the Province following termination of the Concession Agreement pursuant to Section 40 [Default] of the Concession Agreement and the termination sum paid by the Province pursuant to Section 44.2 [Compensation on Termination for Concessionaire Default] of the Concession Agreement is less than the Revised Senior Debt Termination Sum, the Agent will not (to the extent only of the difference between the Revised Senior Debt Termination Sum and the termination sum paid by the Province as aforesaid) be required to release its security in respect of any claims which the Concessionaire may have against the Contractor or the Operator (as the case may be) which arose prior to the date of the aforesaid assumption, transfer, novation or assignment.
- 3.5.4 Without prejudice to Section 3.5.3 of this Agreement, the Agent will release and discharge all Security as soon as reasonably possible after the Exercise Date and the payment of any termination sum payable under Section 44 [Compensation on Termination] of the Concession Agreement (provided, however, that notwithstanding such release and discharge of the Security the Agent will retain the benefit of the Security in respect of claims which the Concessionaire may have against the Province or BCTFA under the Concession Agreement which arose prior to the Exercise Date if and to the extent only that the termination sum payable by the Province pursuant to Section 44.2 [Compensation on Termination for Concessionaire Default] of the Concession Agreement is less than the Revised Senior Debt Termination Sum).

- 3.5.5 Neither the Senior Funders nor the Agent or any Representative will transfer, novate or assign any Project Documents referred to in Sections 2.3.1.5 to 2.3.1.7 (inclusive) of the Concession Agreement except to a Suitable Substitute Concessionaire in conjunction with a permitted transfer, novation or assignment of the Concession Agreement to that Suitable Substitute Concessionaire.

3.6 **No Liquid Market**

- 3.6.1 At any time during the Required Period the Agent may issue a written notice (the “**No Liquid Market Notice**”) to the Province setting out the reasons why the Agent does not believe that a Liquid Market exists.
- 3.6.2 On or before the date falling 14 days after the date on which a No Liquid Market Notice is received by the Province, the Province will notify the Agent of its opinion as to whether or not a Liquid Market exists. Where the Province believes that a Liquid Market does exist, such notice will set out the reasons for the Province’s belief. If the parties do not agree whether or not a Liquid Market exists, then either the Province or the Agent may refer the dispute to be determined in accordance with Section 52 [Disputes Resolution Procedure] of the Concession Agreement.
- 3.6.3 If the parties agree or it is determined in accordance with Section 52 [Disputes Resolution Procedure] of the Concession Agreement that no Liquid Market exists, the Concession Agreement will automatically terminate and the provisions of Section 44.2.4 [No Rebidding Procedure] of the Concession Agreement will apply.
- 3.6.4 If any dispute relating to this Section 3.6 is determined under Section 52 [Disputes Resolution Procedure] of the Concession Agreement, the Required Period will be extended by the period of time spent determining such dispute under Section 52 [Disputes Resolution Procedure].

3A. **DELETED**

4. **STEP-IN AND STEP-OUT**

4.1 **Step-In**

- 4.1.1 At least 10 days before the Agent delivers a Step-In Notice, the Agent will deliver notice (an “**Appointed Representative Notice**”) to the Province of:
- 4.1.1.1 its intention to deliver a Step-In Notice; and
 - 4.1.1.2 the identity of its proposed Appointed Representative.
- 4.1.2 If, at any time:
- 4.1.2.1 during the Required Period, or
 - 4.1.2.2 during which an Enforcement Event is subsisting (whether or not a Termination Notice has been given by the Province),

the Agent gives notice (a “**Step-In Notice**”) to the Province electing to appoint the Appointed Representative identified in an Appointed Representative Notice delivered pursuant to Section 4.1.1, together with a written consent from the Appointed Representative confirming its consent to act in such capacity, then during the Step-In Period the Appointed Representative will assume, jointly with the Concessionaire, all of the Concessionaire’s rights under the Concession Agreement.

- 4.1.3 During the Step-In Period, the Province will deal with the Appointed Representative instead of the Concessionaire in connection with all matters related to the Concession Agreement, and the Concessionaire agrees to be bound by all such dealings between the Province and the Appointed Representative to the same extent as if they had been between the Province and the Concessionaire. The Appointed Representative will at all times during the Step-In Period grant to the Province and its authorized representatives timely, full, complete and unrestricted access to all of the Concessionaire’s and the Appointed Representative’s books, records and information in order to enable the Province to monitor the performance of the obligations under the Concession Agreement.

4.2 **Step-Out**

- 4.2.1 The Agent or the Appointed Representative (where an Appointed Representative has been appointed) may at any time during the Step-In Period give the Province at least 60 days notice to terminate the Step-In Period on a date (to be specified in the notice) (the “**Step-Out Date**”) prior to the Step-In Expiry Date.
- 4.2.2 On the Step-Out Date the Appointed Representative will be released from all of its obligations and liabilities to the Province under the Concession Agreement arising prior to the Step-Out Date and all rights of the Appointed Representative against the Province and BCTFA under the Concession Agreement will be cancelled.
- 4.2.3 The Concessionaire will continue to be bound by the terms of the Concession Agreement, notwithstanding the occurrence of the Step-Out Date.

5. **NOVATION**

5.1 **Proposed Substitute Concessionaire**

At any time:

- 5.1.1 after an Enforcement Event has occurred; or
- 5.1.2 prior to the expiry of a Termination Notice; or
- 5.1.3 during the Step-In Period,

the Agent may give notice on behalf of the Senior Funders (a “**Proposed Novation Notice**”) to the Province that it wishes to novate the Concessionaire’s rights and obligations under the Concession Agreement to another person (a “**Proposed Substitute Concessionaire**”) in accordance with the provisions of Section 5.5 [Implementation of Novation]. The Proposed Novation Notice will specify a Working Day, falling not later than 60 days after the date of the

Proposed Novation Notice, on which such novation is to be effective. Subject to Sections 5.3.3 and 6.2.4, if a Proposed Novation Notice is given pursuant to Section 5.1.2 and no Step-In Notice has been given, the Province will not be entitled to give a notice terminating the Concession Agreement as a result of the occurrence of an Event of Default prior to the expiry of the 60-day period referred to above; provided, however, that the Province's right to terminate the Concession Agreement due solely to the expiry of the aforesaid 60-day period or to the fact that a Novation Effective Date has not occurred within such period will be suspended in the circumstances described in Section 5.3.3 pending resolution of any dispute referred to therein.

5.2 Information for Consent to Novation

Without limiting any other provisions of this Agreement, a novation in accordance with a Proposed Novation Notice will only be effective if the Province consents to that novation in writing in accordance with Section 5.3 [Grant of Consent]. The Agent will (as soon as practicable) supply the Province with such information as the Province reasonably requires to enable the Province to decide whether to grant such consent, including without limitation in relation to the Proposed Substitute Concessionaire:

- 5.2.1 its name and registered address;
- 5.2.2 the names of its shareholders and the share capital held by each of them;
- 5.2.3 the names of its directors and officers;
- 5.2.4 the manner in which it is proposed to finance the Proposed Substitute Concessionaire and the extent to which such financing is committed; and
- 5.2.5 the resources (including employees with appropriate qualifications, experience and technical competence, and contracts) which are available to the Proposed Substitute Concessionaire to enable it (as relevant) to construct, complete, maintain, operate and rehabilitate the Project Facilities, the Site and the Adjacent Areas and otherwise perform the obligations of the Concessionaire under the Concession Agreement.

5.3 Grant of Consent

- 5.3.1 The Province will not unreasonably withhold its consent to a proposed novation, but it will, without limitation, be reasonable for the Province to withhold its consent if the Agent has failed to show to the Province's reasonable satisfaction:
 - 5.3.1.1 the legal capacity, power and authority of the Proposed Substitute Concessionaire to become a party to and perform the obligations of the Concessionaire under the Concession Agreement;
 - 5.3.1.2 that the technical competence, experience and financial standing of the Proposed Substitute Concessionaire and the technical and financial resources available to the Proposed Substitute Concessionaire (including committed financing referred to in Section 5.2.4 and contracts referred to in Section 5.2.5) are sufficient to perform the obligations of the Concessionaire under the Concession Agreement;

- 5.3.1.3 that:
- 5.3.1.3.1 all of the shares in the Proposed Substitute Concessionaire; and
 - 5.3.1.3.2 all rights to control and/or influence the activities of the Proposed Substitute Concessionaire,
- are held or exercisable by entities which have been at all times wholly independent of and unconnected with the Concessionaire and any Associate of the Concessionaire and are not held or exercisable by any Restricted Person;
- 5.3.1.4 (if, in the case of a Proposed Novation Notice given pursuant to Section 5.1.2, the Termination Notice was given following the occurrence of the Event of Default referred to in Section 40.1.2 of the Concession Agreement) that the Proposed Substitute Concessionaire and each of the entities referred to in Section 5.3.1.3 is wholly independent of and unconnected with any person who acquired an interest in the Concessionaire, a Partner or Shareholder (as the case may be) giving rise to that Event of Default; and
- 5.3.1.5 that neither the Proposed Substitute Concessionaire nor any of its shareholders nor any Affiliates of the Proposed Substitute Concessionaire or any of its shareholders is a Restricted Person.
- 5.3.2 The Province will notify the Agent within 30 days of the later of receipt of a Proposed Novation Notice and receipt of all information required under Section 5.2 [Information for Consent to Novation] whether or not the Province has decided to grant such consent to the proposed novation.
- 5.3.3 If the Province notifies the Agent under Section 5.3.2 that the Province has decided not to consent to the proposed novation, then the Agent on behalf of the Senior Funders may by issuing and serving proceedings on the Province within 15 days of such notification refer any dispute concerning such matter to the Court and, where a Step-In Notice has been given, the Step-In Period will continue and the Province's right to terminate due solely to expiry of the Required Period will be suspended pending resolution of any dispute referred to in this Section 5.3.3 until it is finally agreed or determined by the Court or otherwise resolved between the parties whether the Province was reasonable in withholding its consent. If the Agent does not issue and serve such proceedings on the Province within such period of 15 days, it will be conclusively deemed to have accepted the Province's decision and neither the Agent, the Concessionaire nor any of the Senior Funders will be entitled to challenge the same.

5.4 Subsequent Proposed Novations

If the Province exercises its right under Section 5.3 [Grant of Consent] to withhold its consent to a proposed novation, this will not prejudice the ability of the Agent to give one or more subsequent Proposed Novation Notices pursuant to the provisions of Section 5.1

[Proposed Substitute Concessionaire] containing changed particulars relating to the same Proposed Substitute Concessionaire or particulars relating to another Proposed Substitute Concessionaire which the Agent has good cause to believe would fulfil the requirements of Section 5.3.1, provided that only one Proposed Novation Notice may be outstanding at any one time.

5.5 **Implementation of Novation**

If the Province consents to a novation pursuant to a Proposed Novation Notice, then on the Novation Effective Date:

- 5.5.1 the Proposed Substitute Concessionaire will become a party to the Concession Agreement (in such capacity, the “**Suitable Substitute Concessionaire**”) in place of the Concessionaire and thereafter will be treated as if it was named as a party thereto in place of the Concessionaire;
- 5.5.2 subject to Section 43 [Effect of Termination] of the Concession Agreement, the Province and BCTFA will be released from all of their obligations to the Concessionaire under the Concession Agreement and all rights of the Concessionaire against the Province and BCTFA under the Concession Agreement will be cancelled and terminate;
- 5.5.3 the Province, BCTFA, the Concessionaire and the Suitable Substitute Concessionaire will enter into a novation agreement and any other requisite agreements in form and substance satisfactory to the Province, acting reasonably, pursuant to which the Suitable Substitute Concessionaire will be granted all of the rights and assume all of the obligations and liabilities of the Concessionaire under the Concession Agreement (whether actual, accrued, contingent or otherwise and whether arising on, before or after the Novation Effective Date) and the Concessionaire will be released from any obligations under or in connection with the Concession Agreement which arise from and after the date of the novation agreement, provided that the Province and BCTFA will not be in breach of any of their obligations hereunder if the Suitable Substitute Concessionaire or the Concessionaire fails to enter into such agreements;
- 5.5.4 the Province and BCTFA will owe their respective obligations under the Concession Agreement arising on and after the Novation Effective Date to the Suitable Substitute Concessionaire and the receipt, acknowledgement or acquiescence of the Suitable Substitute Concessionaire will be a good discharge;
- 5.5.5 the Province and BCTFA will enter into a direct agreement with the Senior Funders lending to the Suitable Substitute Concessionaire on substantially the same terms as this Agreement;
- 5.5.6 any Availability/Performance Deductions and Warning Notices that arose or were given prior to the Proposed Novation Date will be cancelled; and
- 5.5.7 any then subsisting grounds for termination of the Concession Agreement by the Province will be deemed to have no effect and any subsisting Termination Notice will be automatically revoked.

5.6 Continuation of Step-in Period

For greater certainty, if a Proposed Novation Notice is served during the Step-In Period and the Province does not consent to the proposed novation or any required approval of the Lieutenant Governor in Council is not obtained, the Step-In Period will continue (subject to the terms of this Agreement).

6. RIGHTS OF THE PROVINCE

6.1 Rights Not Prejudiced

The Parties hereby acknowledge that nothing in the Senior Funding Agreements, the Security Documents, this Agreement or any other agreement between any of them and the Concessionaire or the Province (including in particular but without limitation the service by the Agent of a Step-In Notice) will, except as expressly set out in this Agreement, affect in any way the rights of the Province under the Concession Agreement (but an exercise by the Province of those rights will not preclude a proper exercise by the Agent of its rights under this Agreement).

6.2 Rights of Termination

If:

- 6.2.1 a Termination Notice expires and no Step-In Notice or Proposed Novation Notice has been given (or any Proposed Novation Notice given has been withdrawn) prior to such expiry; or
- 6.2.2 the Step-In Period is terminated in accordance with Section 4.2 [Step-Out]; or
- 6.2.3 the Step-In Period ends and no Novation Effective Date has occurred; or
- 6.2.4 no Novation Effective Date has occurred within the period referred to in the second last sentence of Section 5.1 [Proposed Substitute Concessionaire], where applicable, unless: (a) in the case of a proposed novation to which the Province has consented pursuant to Section 5 [Novation], the Novation Effective Date has not occurred within the aforesaid period solely by reason of the approval of the Lieutenant Governor in Council being required to be obtained, pursuant to subsection 2(1) of the Transportation Investment Act, in relation to the proposed novation and such approval not having been obtained on or before that date which is 60 days after the Proposed Novation Date; and (b) an Agent's Election has been given to the Province within 15 days after the Agent first became entitled to give such election under Section 27.3,

then the Province will be entitled to act upon any grounds for termination available to it under the Concession Agreement whenever occurring and to terminate the Concession Agreement without further notice to the Agent.

6.3 Termination of Concession Agreement During Step-In Period

During the Step-In Period the Province will not exercise any right it may have to terminate the Concession Agreement:

- 6.3.1 solely on the grounds that the Agent has delivered a Step-In Notice or Proposed Novation Notice or (subject to compliance with the requirements of this Agreement) taken any Enforcement Action;
- 6.3.2 for an Event of Default that occurred before the Step-In Date that was not continuing at the Step-In Date;
- 6.3.3 for an Event of Default that occurred before the Step-In Date and was continuing at the Step-In Date, unless:
 - 6.3.3.1 the Event of Default relates to amounts referred to in Section 3.1.1.2.1 and the Province has not received full payment by the Step-In Date;
 - 6.3.3.2 the Event of Default relates to amounts referred to in Section 3.1.1.2.2 and the Province has not received full payment by the last day of the Required Period;
 - 6.3.3.3 the Event of Default relates to amounts set out in a Subsequent Indebtedness Notice and the Province has not received full payment by the date which is 30 days after the date on which the Province sent the Subsequent Indebtedness Notice to the Agent or the Step-In Date, whichever is later;
 - 6.3.3.4 the Event of Default relates to amounts, of which the Province was not aware at the time the Termination Notice was given, which subsequently become payable and are not discharged on or before the date falling 30 days after the date upon which the liability for the amounts is notified to the Agent;
 - 6.3.3.5 the Event of Default relates to the Works, and the Appointed Representative is failing to use all reasonable efforts (including without limitation the implementation of any remedial program pursuant to Section 40.3.1.4(b) of the Concession Agreement) to remedy the Event of Default, or the Substantial Completion Date or the Final Completion Date does not occur on or before the date which is 6 months (or longer period, if agreed to in writing by the Province) after the Substantial Completion Longstop Date or the Final Completion Longstop Date, as applicable; or
 - 6.3.3.6 the Event of Default relates to any aspect of the Operations other than the Works, and the Appointed Representative is failing to use all reasonable efforts (including without limitation implementation of any remedial program pursuant to Section 40.3.1.4.(b) of the Concession Agreement) to remedy the Event of Default, or the Event of Default remains unremedied on the date which is 60 days after the Step-In Date or such longer period of time, as may be agreed to by the

Province and the Agent, each in its sole discretion, if the Event of Default is capable of being remedied but is not capable of being remedied by the Appointed Representative using all reasonable efforts during the initial 60 day period of time; or

- 6.3.4 on the basis of any Availability/Performance Deductions made or Warning Notices given to the Concessionaire before the Step-In Date, provided that all such Availability/Performance Deductions and Warning Notices will continue to have effect for all other purposes.

For greater certainty, the Province will be entitled to terminate the Concession Agreement by written notice to the Concessionaire and the Appointed Representative for an Event of Default that occurs during the Step-In Period in accordance with the terms of the Concession Agreement, provided that for the purposes of termination under the Concession Agreement, Availability/Performance Deductions made or Warning Notices given to the Concessionaire before the Step-In Date will not be taken into account during the Step-In Period but will be taken into account after the Step-In Period and for all other purposes.

6.4 Province's Step-In Rights

- 6.4.1 For greater certainty and without limiting the generality of Section 6.1 [Rights Not Prejudiced], the Province will be entitled at all times to exercise its rights under Sections 26.5 [Province's Remedial Rights], 40.3.1.3 and 43.1 [Step-In Rights] of the Concession Agreement respectively.

- 6.4.2 Without prejudice to the Province's rights under Sections 26.5 [Province's Remedial Rights] and 40.3.1.3 of the Concession Agreement, the Province's rights under Section 43.1 [Step-In Rights] and Section 26.5.1 of the Concession Agreement will continue until such time as the Appointed Representative or the Suitable Substitute Concessionaire has demonstrated to the reasonable satisfaction of the Province that it will ensure the performance and is capable of ensuring the performance of the obligations of the Concessionaire under the Concession Agreement, whereupon the Appointed Representative during the Step-In Period or the Suitable Substitute Concessionaire (as the case may be) will be entitled to have access to the Site and the Adjacent Areas for the purpose of ensuring the performance of such obligations.

6.5 Set-off and Withholding of Payment

For greater certainty and without limiting the generality of Section 6.1 [Rights Not Prejudiced], the Parties acknowledge that the Province is entitled in priority to any competing claims:

- 6.5.1 to set-off, withhold, suspend or retain payments due to the Concessionaire under the Concession Agreement in accordance with the provisions of the Concession Agreement;
- 6.5.2 to require the application of insurance proceeds in accordance with the provisions of Section 20.7 [Application of Proceeds] of the Concession Agreement; and

6.5.3 without prejudice to Section 3.5.3 or Section 3.5.4 of this Agreement, to exercise rights in respect of the transfer of assets under the Concession Agreement including pursuant to Sections 43.4, 44.1.3, 44.2.1.2, 44.3.7, 44.4.3 and 44.5.2 of the Concession Agreement,

and the Parties (other than the Province and BCTFA) further acknowledge and undertake that any right, title or interest in the Concession Agreement or any rights arising thereunder acquired by the Agent or any of the Senior Funders under or pursuant to any of the Senior Funding Agreements, the Security Documents, this Agreement or any other agreement or instrument will at all times be subject to such entitlement to set-off, withhold, suspend or retain payments or contractual requirement or any other right or equity of or in favour of the Province in respect of the Concession Agreement. If and to the extent any of the Parties (other than the Province and BCTFA but including any of the Senior Funders) receives any proceeds of any insurance policy which have not been applied as they were required to be applied in accordance with the Concession Agreement, that Party will cause such proceeds to be so applied. If the Province exercises its rights to transfer assets under the Concession Agreement including pursuant to Sections 43.4, 44.1.3, 44.2.1.2, 44.3.7, 44.4.3 and 44.5.2 of the Concession Agreement such transfer will (subject to compliance with the Province's obligations under Section 43.4 of the Concession Agreement and without prejudice to Section 3.5.3 and Section 3.5.4 of this Agreement,) be made free of any rights of the Agent or any of the Senior Funders under or pursuant to any of the Senior Funding Agreements, the Security Documents or this Agreement and the Agent, at no cost to the Province, will release and discharge any such rights.

6.6 Retention Account

For greater certainty and without limiting the generality of Section 6.1 [Rights Not Prejudiced], and Section 6.5 [Set-off and Withholding of Payment], the Parties acknowledge the rights of the Province in the Concession Agreement in relation to the creation and operation of, and the application of sums standing to the credit of, the Retention Account, and the Agent on behalf of the Senior Funders agrees to execute such documents and take such action as may be reasonably required from time to time to give effect to such provisions of the Concession Agreement.

6.7 [Not Used]

6.8 Concessionaire's Obligations to Continue

Subject to the terms of the novation and other agreements referred to in Section 5.5.3, the Concessionaire will continue to be liable for all of its obligations and liabilities, whenever occurring, under or arising from the Concession Agreement notwithstanding:

- 6.8.1 the giving of a Step-In Notice or the expiry of the Step-In Period; or
- 6.8.2 the giving of a Proposed Novation Notice; or
- 6.8.3 any other provision of this Agreement.

7. NATURE OF OBLIGATIONS

7.1 Province's and BCTFA's Obligations, etc.

All of the obligations, undertakings and liabilities given, undertaken or arising on the part of the Province and BCTFA under this Agreement are given or owed solely to the Agent on behalf of the Senior Funders and (except as expressly provided herein) do not confer any rights on or in favour of the Concessionaire or any Associate of the Concessionaire, the Issuer or any other person.

7.2 Concessionaire Acknowledgment

The Concessionaire joins in this Agreement to acknowledge for itself the arrangements effected hereby and agrees with each of the other Parties to observe the provisions of this Agreement at all times and not in any way to prejudice or affect the enforcement hereof or to do or permit to be done anything which would be a breach hereof.

7.3 Issuer Jointly and Severally Liable

The Issuer shall be jointly and severally liable to observe and perform each of the obligations and liabilities of the Concessionaire hereunder.

8. ASSIGNMENT

8.1 The Concessionaire and the Issuer will not, without the prior written consent of the Province, assign, transfer, charge or otherwise dispose of any interest in this Agreement except to the extent permitted by the Concession Agreement and only if made concurrent with a permitted assignment, transfer, charge or other disposition of any of its interest in the Concession Agreement.

8.2 The Agent will not, without the prior written consent of the Province, assign, transfer, charge or otherwise dispose of any interest in this Agreement, provided that the Agent may (subject to the successor Agent entering into an agreement satisfactory to the Province ensuring that the successor Agent is bound by the terms of this Agreement and that the Agent will have assigned or transferred to the successor Agent all right, title and interest of the Agent in and to the Concession Agreement and the Project Documents held by the Agent pursuant to the Security Documents) assign or transfer its rights and obligations to a bank or financial institution as a successor Agent under the Senior Funding Agreements without the consent of the Province provided that:

8.2.1 the Province's prior written consent to any such assignment or transfer will be required if and for so long as any Party (other than the Province or BCTFA) is in default of any of its obligations or liabilities under this Agreement; and

8.2.2 any such assignment or transfer will be without prejudice to the rights and remedies of the Province against the relevant Agent in respect of any liability or obligation of such Agent under this Agreement which is outstanding or undischarged at or prior to the date of such assignment or transfer.

8.3 The Province and BCTFA may novate, assign or otherwise transfer the benefit of the whole or part of this Agreement to any person who is a permitted novatee, assignee or transferee

under Section 45.6 of the Concession Agreement and will notify the Concessionaire and the Agent in writing upon completion of such novation, assignment or transfer. If and to the extent that such novatee, assignee or transferee has assumed the obligations and liabilities of the Province under the Concession Agreement in connection with any novation, assignment or transfer effected pursuant to Section 45.6 of the Concession Agreement, the Province will cause the aforesaid novatee, assignee or transferee to assume the obligations and liabilities of the Province under this Agreement, whereupon the Province will be released from all of its obligations and liabilities hereunder. The Concessionaire and the Agent will do all things and execute all further documents as may be necessary in connection therewith.

8.4 Nothing in this Section 8 [Assignment] will prevent any Senior Funder from assigning or transferring its rights under the Senior Funding Agreements and the Security Documents in accordance with the terms of the Senior Funding Agreements and the Security Documents.

9. COUNTERPARTS

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the Parties will constitute a full, original and binding agreement for all purposes. Counterparts may be executed either in original or faxed form provided that any Party providing its signature in faxed form will, upon any other Party's request, promptly forward to such Party an original signed copy of this Agreement which was so faxed.

10. PAYMENT

10.1 Payments

Any payment required to be made by any Party pursuant to this Agreement will be made in Canadian Dollars for value on the due date to such bank account of the recipient (located in the City of Victoria or the City of Vancouver, British Columbia) as the recipient may have specified for this purpose.

10.2 GST

All payments required to be made by any Party pursuant to this Agreement will be deemed to be exclusive of GST.

11. DEFAULT INTEREST

Each Party will be entitled, without prejudice to any other right or remedy, to receive interest on any payment under this Agreement not made on the due date calculated at the Default Interest Rate on a daily basis and on the basis of a 365 day year from the due date up to but excluding the date of payment.

12. WAIVER

12.1 Direct Agreement

Failure by the Province at any time to enforce any provision of this Agreement or to require performance by the Agent or the Concessionaire 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 the Province to enforce any provision in accordance with its terms.

12.2 **Concession Agreement**

Without prejudice to Section 6.1 [Rights Not Prejudiced], no failure to exercise or delay in exercising any rights of the Province under or in relation to the Concession Agreement (whether or not arising out of or in connection with or as a consequence of the discharge of the Province's rights under this Agreement) will be construed as a waiver of any such right nor will it affect the validity of the Concession Agreement or any part thereof or the right of the Province to enforce any provision of the Concession Agreement in accordance with its terms.

13. **PARTIAL INVALIDITY**

If at any time any provision of this Agreement is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions of this Agreement nor the legality, validity or enforceability of such provision under the law of any other jurisdiction will in any way be affected or impaired thereby.

14. **CONFIDENTIALITY**

14.1 **Confidentiality**

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 information provided to or arising or acquired by it pursuant to the terms or performance of this Agreement or otherwise in relation to the Project (including without limitation all documents and information supplied in the course of legal proceedings) (together the "**Confidential Information**").

14.2 **Exceptions**

Notwithstanding Section 14.1 [Confidentiality], a Party will be entitled to disclose the whole or any part of the Confidential Information:

- 14.2.1 to its directors, officers, employees, sub-contractors, 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; or
- 14.2.2 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; or
- 14.2.3 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; or

- 14.2.4 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; or
- 14.2.5 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; or
- 14.2.6 in the case of the Agent, to the Senior Funders and prospective permitted assignees and participants under the Senior Funding Agreements to the extent reasonably required by the Senior Funders in connection with their position as Senior Funders to the Project and to a prospective novatee of this Agreement; or
- 14.2.7 in the case of the Province and BCTFA:
 - 14.2.7.1 to the extent required for the purpose of the design, construction, completion, commissioning and testing of the Works, the operation, maintenance, rehabilitation or improvement of the Project Facilities or the carrying out by the Province, BCTFA or the Minister of any statutory or other duties or functions in respect of the Project Facilities in the event of termination of the Concession Agreement;
 - 14.2.7.2 (without limiting Section 14.2.2) in relation to the outcome of the procurement process for the Project as may be required to be published;
 - 14.2.7.3 to any department, office or agency of or constituting any Governmental Authority (including for greater certainty the Auditor General and the Office of the Comptroller General) where required for parliamentary, governmental, statutory or judicial purposes;
 - 14.2.7.4 whether or not falling within Section 14.2.7.2, to the Ministry, Partnerships BC and any other Governmental Authority; or
 - 14.2.7.5 as required pursuant to the Freedom of Information and Protection of Privacy Act,

and, in the case of Section 14.2.1 and Section 14.2.6 above, upon 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.

14.3 Continuation of Confidentiality Obligations

The obligations of the parties under this Section 14 [Confidentiality] will continue for a period of 5 years following the date of termination of the Concession Agreement.

14.4 Publicity Regarding Disputes

Neither the Agent nor any of the Senior Funders will without the prior written consent of the Province 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 under obligations of confidentiality and

except and to the extent that such publication arises out of any statutory or regulatory obligation applicable to the Agent or the relevant Senior Funder.

14.5 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 14 [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 14 [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.

15. ENTIRE AGREEMENT

This Agreement (when read together with the Concession Agreement but without prejudice thereto, save to the extent affected hereby, and without prejudice to the Senior Funding Agreements and the Security Documents) contains or expressly refers to the entire agreement between the Parties with respect to the specific subject matter hereof and expressly excludes any warranty, condition or other undertaking implied at law or by custom and supersedes all previous agreements and understandings between the Parties with respect thereto, and each of the Parties acknowledges and confirms that it does not enter into this Agreement in reliance on any representation, warranty or other undertaking not fully reflected in the terms of this Agreement.

16. EXPIRY

16.1 Extinguishment of Rights

If:

- 16.1.1 the Concession Agreement expires or is terminated (except by the Province in breach of this Agreement) for whatever reason and, in the case of termination, any termination compensation payable by the Province as a consequence of the termination in accordance with the provisions of the Concession Agreement is paid; or
- 16.1.2 all sums due and owing to the Senior Funders by the Concessionaire under the Senior Funding Agreements are repaid by the Concessionaire and the Senior Funders are not required to make further advances to the Concessionaire under the Senior Funding Agreements,

then the rights of the Agent for itself and on behalf of the Senior Funders under this Agreement will be extinguished and the Agent, at no cost to the Province, will (subject to Sections 3.5.3 and 3.5.4 of this Agreement) release and discharge any Security over the Concession Agreement, the Project Documents and the Assets which has not previously been released and discharged. The Agent will provide notice to the Province of the date referred to in Section 16.1.2 within 30 days of its occurrence.

16.2 Agent's Rights

The right of the Agent to serve a Step-In Notice in accordance with Section 4.1 [Step-In] or a Proposed Novation Notice in accordance with Section 5.1 [Proposed Substitute Concessionaire], including in accordance with Section 5.4 [Subsequent Proposed Novations], will be exercisable on more than one occasion, provided that any Event of Default existing at the commencement of the prior Step-In Period or occurring during the prior Step-In Period was cured by the time of delivery of the subsequent Step-In Notice and further provided that no more than one Step-In Notice or Proposed Novation Notice may be outstanding at any particular time.

17. AUTHORITY

17.1 Warranty of Authority

The Agent represents and warrants to and undertakes with each of the Province, BCTFA and the Concessionaire that the Agent is duly authorized by each of the Senior Funders to assume the obligations expressed to be assumed by it pursuant to this Agreement and to undertake on behalf of each Senior Funder in the terms of this Agreement so as to bind such Senior Funder as if it were a party to this Agreement, and each such Senior Funder will be so bound in accordance with the terms of this Agreement.

17.2 Authority

The Parties:

17.2.1 are entitled to assume that any act done, document executed or entered into or waiver given by the Agent has been duly authorized by each of the Senior Funders; and

17.2.2 are not obliged to make any enquiry as to the authority of the Agent in doing, executing, entering into or giving such act, document or waiver.

18. AMENDMENTS

No purported amendment or modification of this Agreement will be valid unless in writing executed by the Parties (and in the case of the Senior Funders, it will be sufficient if the same are executed on their behalf by the Agent).

19. NOTICES

19.1 Requirement for Writing

Wherever in this Agreement provision is made for the giving or issuing of any notice, consent or approval by any person (a "Notice"), unless otherwise specified such Notice will be in writing and the words "notify", "consent" or "approval" will be construed accordingly.

19.2 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

5B – 940 Blanshard Street
Victoria, British Columbia V8W 9T5

Telephone: (250) 387-3260
Fax No.: (250) 387-6431
Attention: Assistant Deputy Minister, Highways Department
Ministry of Transportation

Agent

207 Queen Quay West, Suite 700
Toronto, Ontario M5J 1A7

Telephone: (416) 507-2400
Fax No.: (416) 594-3849
Attention: Chief Operating Officer

Concessionaire

675 Cochrane Drive, West Tower, Suite 630
Markham, Ontario L3R 0B8

Telephone: (905) 530-2114
Fax No.: (905) 530-2214
Attention: John McArthur

Issuer

675 Cochrane Drive, West Tower, Suite 630
Markham, Ontario L3R 0B8

Telephone: (905) 530-2114
Fax No.: (905) 530-2214
Attention: John McArthur

19.3 Changes

Any Party may change its address for notice to another address in British Columbia by prior notice to the other Parties.

19.4 Receipt

Any Notice will be deemed to have been received:

19.4.1 if sent by personal delivery or by an express mail or courier service, when delivered;

- 19.4.2 if sent by facsimile, upon sending, subject to:
- 19.4.2.1 confirmation of uninterrupted transmission by a transmission report, and
 - 19.4.2.2 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,

provided that any Notice given by facsimile will be confirmed by letter sent by personal delivery or by a recognized express mail or courier service, with delivery receipt requested, but without prejudice to the original fax Notice if received in accordance with this Section 19.4.2

20. ACKNOWLEDGMENTS AND WAIVER

20.1 Acknowledgments

The Agent on behalf of the Senior Funders acknowledges that the Disclosed Data made available to the Concessionaire prior to the date of the Concession Agreement has been made available on the basis set out in Sections 6.1 [Site Inspection and Investigations], 38.2 [Disclaimer] and 39 [Indemnities] of the Concession Agreement.

20.2 Waiver

Without prejudice to Section 20.1[Acknowledgments]:

- 20.2.1 the Agent on behalf of the Senior Funders agrees and confirms that the Province will not be liable to any of the Agent or the Senior Funders (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 any of its 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;
- 20.2.2 the Province gives no warranty or undertaking to the Agent or the Senior Funders or any of them that the Disclosed Data represents all of the information in its possession or power (either during the procurement process for the Project or at the execution of this Agreement or the Concession Agreement) relevant or material to the Project or the obligations undertaken by the Agent or any other person under this Agreement;
- 20.2.3 the Province will not be liable to the Agent or the Senior Funders or any of them in respect of any failure to disclose or make available (whether before or after the

execution of this Agreement) to any of them or the Concessionaire or the Issuer any information, documents or data, nor to keep the Disclosed Data up to date, nor to inform any of such parties (whether before or after execution of this Agreement or the Concession Agreement) of any inaccuracy, error, omission, unfitness for purpose, defects or inadequacy in the Disclosed Data;

- 20.2.4 the Agent on behalf of the Senior Funders acknowledges and confirms that it will not be entitled to make any claim against the Province whether in damages or for extensions of time or additional payments under this Agreement or the Concession Agreement 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] of the Concession Agreement or on the grounds that incorrect or insufficient information relating thereto or to the Site or Adjacent Areas was given to it by any person, whether or not in the employ of the Province, or by or on behalf of the Concessionaire. Nor will any Party be relieved from any risks or obligations imposed on or undertaken by it under this Agreement on any such ground.

20.3 Appropriation

The Concessionaire, the Issuer and the Agent on behalf of the Senior Funders acknowledge that they are aware of the provisions of subsection 28(2) of the *Financial Administration Act*, R.S.B.C. 1996, c. 138.

21. GOVERNING LAW AND JURISDICTION

21.1 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 and will be treated in all respects as a British Columbia contract, without regard to conflict of laws principles.

21.2 Jurisdiction

The Parties agree that the Courts of the Province of British Columbia will have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with or arising out of this Agreement and hereby irrevocably attorn to the jurisdiction of such Courts.

22. CONSENTS AND APPROVALS

- 22.1 Unless otherwise specified, where any consent, permission, expression of satisfaction or other approval is to be given by the Province under the terms of this Agreement, the same may be given or withheld in the absolute and unfettered discretion of the Province.
- 22.2 The provisions of this Agreement and the rights and obligations of the parties hereunder are subject and without prejudice to and in no way limit or constitute a waiver of any requirement to obtain the approval of the Lieutenant Governor in Council pursuant to section 2(1) of the Transportation Investment Act in respect of the entering into of an agreement as

contemplated in the aforesaid section 2(1) that may result from or be required under the provisions of this Agreement or as a result of any action taken in the exercise of rights hereunder after the date hereof.

23. 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, the Issuer, the Agent or any of its or their representatives are or shall be deemed to be an employee or agent of the Province or BCTFA.

24. ENUREMENT

This Agreement will be binding upon each of the Parties and their respective successors, transferees and assigns and will enure to the benefit of the Parties and their respective successors and permitted transferees and assigns.

25. CONFLICT IN DOCUMENTS

In the event of any ambiguity, conflict or inconsistency between the provisions of this Agreement and the provisions of the Concession Agreement, the provisions of this Agreement will prevail.

26. FURTHER ASSURANCES

Each Party will do all things and execute all further documents necessary to give full effect to this Agreement.

27. MISCELLANEOUS

27.1 The Province and BCTFA will, at the Concessionaire's expense, take whatever action the Agent or an Appointed Representative effecting a novation in accordance with Section 5.5 [Implementation of Novation] may require for perfecting any transfer or release under Sections 4 [Step-In and Step-Out] and 5 [Novation], including the execution of any transfer or assignment and the giving of any notice, order or direction and the making of any registration which, in each case, the Agent or Appointed Representative reasonably requires.

27.2 Neither the Province nor BCTFA will take any action to appoint a receiver or receiver-manager or institute proceedings in respect of the bankruptcy, liquidation, dissolution or winding-up of the Concessionaire.

27.3 If:

27.3.1 the Agent has given a Step-In Notice to the Province pursuant to Section 4.1 [Step-In] or the Province has consented in writing to a proposed novation of the

Concessionaire's rights and obligations under the Concession Agreement to another person pursuant to Section 5 [Novation]; and

- 27.3.2 the approval of the Lieutenant Governor in Council is required to be obtained, pursuant to subsection 2(1) of the Transportation Investment Act, in relation to the appointment of an Appointed Representative under Section 4.1 [Step-In] or a

proposed novation to which the Province has consented pursuant to Section 5 [Novation]; and

27.3.3 the approval of the Lieutenant Governor in Council has not been obtained on or before that date which is 60 days after: (a) the date on which the Province receives a Step-In Notice from the Agent (in the case of an appointment of an Appointed Representative), or (b) the Proposed Novation Date (in the case of a proposed novation to which the Province has consented pursuant to Section 5 [Novation]),

the Agent, on behalf of the Senior Funders, will be entitled to give a notice to the Province (the "Agent's Election") requiring the termination of the Concession Agreement. Within 10 days of receipt by the Province of the Agent's Election, the Province will terminate the Concession Agreement pursuant to Section 42.4 [Termination for Failure to Obtain Lieutenant Governor in Council Approval] of the Concession Agreement.

28. PROOF OF AUTHORITY

The Province reserves the right to require any person executing this Agreement on behalf of the Concessionaire or the Agent to provide proof, in a form acceptable to the Province, that they have the requisite authority to execute this Agreement on behalf of and to bind the Concessionaire or the Agent and the Senior Funders, as applicable.

IN WITNESS WHEREOF this Agreement has been executed as of the day and year first before written.

SIGNED on behalf of 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:)

_____)
(Witness) _____)

JOHN DYBLE
Deputy Minister, Ministry of Transportation

BC TRANSPORTATION FINANCING AUTHORITY

Per: _____
JOHN DYBLE
Chief Executive Officer

CIT GROUP SECURITIES (CANADA) INC.

Per: _____
Name:
Title:

TRANS-PARK HIGHWAY GENERAL PARTNERSHIP

by its partners:

TRANS-PARK HIGHWAY INVESTMENT INC.

Per: _____
JOHN McARTHUR
President

Per: _____
STEVE SKELTON
Vice-President

TRANS-PARK HIGHWAY INC.

Per: _____
JOHN McARTHUR
President

Per: _____
STEVE SKELTON
Vice-President

TRANS-PARK HIGHWAY FINANCE INC.

Per: _____
JOHN McARTHUR
President

Per: _____
STEVE SKELTON
Vice-President

OPERATOR'S COLLATERAL AGREEMENT

THIS AGREEMENT is made as of the 28th day of October, 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) **H M C SERVICES INC.**, a corporation incorporated under the laws of the Province of British Columbia (the "**Operator**")

OF THE THIRD PART

AND

- (4) **TRANS-PARK HIGHWAY GENERAL PARTNERSHIP**, a general partnership established under the laws of the Province of British Columbia (the "**Concessionaire**")

OF THE FOURTH PART

WHEREAS:

- A. The Province, BCTFA and the Concessionaire have entered into the Concession Agreement pursuant to which the Concessionaire will carry out the Project described therein.
- B. The Concessionaire and the Operator have entered into the Operating and Maintenance Contract pursuant to which the Operator has agreed to perform work and provide services in connection with the operation, maintenance and rehabilitation of the Project Facilities, the Site and the Adjacent Areas.

- C. The Operator has provided the Concessionaire with the Operating and Maintenance Contract Performance Securities in connection with the Operating and Maintenance Contract.
- D. The Concession Agreement requires the Concessionaire to enter into, and to cause the Operator to enter into, this Agreement with the Province and BCTFA.

NOW THEREFORE in consideration of 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:

1. **DEFINITIONS**

In this Agreement, unless the context otherwise requires:

- (a) **"Agreement"** means this Agreement;
- (b) **"Concession Agreement"** means the agreement titled "Kicking Horse Canyon Project Concession Agreement" made among the Province, BCTFA and the Concessionaire and dated as of the 28th day of October, 2005;
- (c) **"Concessionaire"** has the meaning given on the first page of this Agreement;
- (d) **"Contractor"** means Trans-Park Highway Constructors, an unincorporated joint venture formed between Flatiron Constructors Canada Ltd. and Parsons Overseas Company of Canada Ltd.;
- (e) **"Default Notice"** has the meaning given in Section 5(a);
- (f) **"Direct Agreement"** means the agreement titled "Direct Agreement for the Kicking Horse Canyon Project Concession Agreement" made among the Province, BCTFA, CIT Group Securities (Canada) Inc. and the Concessionaire and dated as of the 28th day of October, 2005;
- (g) **"Interface Agreement"** means the Interface Agreement dated as of the 28th day of October, 2005 among the Concessionaire, the Contractor and the Operator;
- (h) **"Operating and Maintenance Contract Performance Securities"** means the Performance Securities provided or to be provided by or on behalf of the Operator pursuant to the terms of the Operating and Maintenance Contract;
- (i) **"Operator"** has the meaning given on the first page of this Agreement;
- (j) **"Operator Direct Agreement"** means that certain agreement made among the Operator, the Concessionaire, and CIT Group Securities (Canada) Inc. as the administrative agent and dated as of the 28th day of October, 2005;
- (k) **"Operator's Data"** has the meaning given in Section 4(a);
- (l) **"Party"** means any of the Province, BCTFA, the Operator or the Concessionaire, and **"Parties"** means the Province, BCTFA, the Operator and the Concessionaire;

- (m) **“Province”** has the meaning given on the first page of this Agreement;
- (n) **“Step-In Notice”** has the meaning given in Section 7(a);
- (o) **“Substitute”** has the meaning given in Section 7(a); and
- (p) other words and expressions with initial capital letters used in this Agreement which are defined in the Concession Agreement have the same meanings when used in this Agreement as are given to them in the Concession Agreement.

2. **INTERPRETATION**

This Agreement will be interpreted according to the following provisions, save to the extent that the context or the express provisions of this Agreement otherwise require:

- (a) the headings and sub-headings and references to them in this Agreement are for convenience of reference only, do not constitute a part of this Agreement, and shall not be taken into consideration in the interpretation or construction of, or affect the meaning of, this Agreement;
- (b) the words “herein”, “hereto” and “hereunder” and other words of like import refer to this Agreement as a whole and not to the particular provision in which such word may be used;
- (c) all references to Sections are references to Sections of this Agreement;
- (d) words importing the singular include the plural and vice versa;
- (e) words importing a particular gender include all genders;
- (f) all references to any agreement, document, standard, principle or other instrument include (subject to all relevant approvals and any other provision of this Agreement or the Concession Agreement expressly concerning such agreement, document, standard, principle or other instrument or amendments thereto) a reference to that agreement, document, standard, principle or instrument as amended, supplemented, substituted, novated or assigned;
- (g) “person” includes an individual, corporation, partnership, joint venture, association, trust, pension fund, union, government, governmental body, governmental agency, authority, board, tribunal, commission or department and the heirs, beneficiaries, executors, personal or other legal representatives or administrators of an individual, and the receivers and administrators of a corporation;
- (h) whenever the terms “will” or “shall” are used in this Agreement they are to be construed and interpreted as synonymous and are to be read as “shall”;
- (i) the words “includes” or “including” are to be construed as being without limitation;

- (j) general words are not given a restrictive meaning:
 - (i) if they are introduced by the word “other”, by reason of the fact that they are preceded by words indicating a particular class of act, matter or thing; or
 - (ii) by reason of the fact that they are followed by particular examples intended to be embraced by those general words;
- (k) if the time for doing an act falls or expires on a day that is not a Working Day, the time for doing such act will be extended to the next Working Day;
- (l) the words of this Agreement are to be given their natural meaning. The Parties have had the opportunity to take legal advice on this Agreement and no provision is, therefore, to be construed *contra proferentem*;
- (m) no provision of this Agreement is intended to derogate from or be inconsistent with or in conflict with any Laws and Regulations and should not be interpreted in a manner as to result in any derogation, inconsistency or conflict and if any such provision is found by a court of competent jurisdiction to be inconsistent with or in conflict with any Laws and Regulations, the applicable Laws and Regulations will prevail and such provision will be read down or rendered inoperative (either, generally or in such particular situation, as appropriate), to the extent of such conflict or inconsistency, as the case may be, and if any such provision is found by a court of competent jurisdiction to derogate from any Laws and Regulations, then such provision will be read down or rendered inoperative (either, generally or in such particular situation, as appropriate) to the extent of the derogation and for purposes of this Section 2(m), the following will be excluded from the definition of the defined phrase “Laws and Regulations”: “and the law of equity”, “ordinances”, “codes (including design and construction codes)”, “directives”, “guidelines”, and “rules or policies of any Governmental Authority”, and the word “or” will be added between the word “orders,” and the word “injunctions”; and
- (n) each and every representation, warranty, covenant and undertaking of the Concessionaire set forth in this Agreement shall be interpreted and construed as a representation, warranty, covenant and undertaking binding upon each of the Partners, on a joint and several basis.

3. AGREEMENTS REGARDING OPERATING AND MAINTENANCE CONTRACTS, INTERFACE AGREEMENT AND OPERATING AND MAINTENANCE CONTRACT PERFORMANCE SECURITIES

- (a) Except to the extent permitted in the Concession Agreement, the Concessionaire and the Operator will not terminate, make or agree to any material amendment to or material variation of, or in any material respect depart from, or waive or fail to enforce any rights they may have under, or enter into any agreement or document which would materially affect the interpretation or application of, the terms of the Operating and Maintenance Contract except in compliance with the provisions of Section 2.3.2 of the Concession Agreement. The Concessionaire and the Operator will provide to the Province a certified true copy of all documents entered into in accordance with the foregoing.

- (b) Each of the Parties acknowledges having received and reviewed a copy of the Concession Agreement, the Operating and Maintenance Contract, the Interface Agreement and the Operating and Maintenance Contract Performance Securities and acknowledges the terms thereof.
- (c) If the Operator gives the Concessionaire any notice of any default(s) under the Operating and Maintenance Contract and/or the Interface Agreement that may give the Operator a right to terminate the Operating and Maintenance Contract and/or the Interface Agreement or to treat either of them as having been repudiated by the Concessionaire or to discontinue the Operator's performance thereunder, then the Operator will concurrently provide the Province and BCTFA with a copy of such notice and set out in reasonable detail the default(s).

4. OPERATOR'S DATA

- (a) In relation to all drawings, details, plans, specifications, reports and other documents and data of any nature whatsoever and any designs and inventions contained in them which have been or are hereafter provided by the Operator in the course of carrying out and performing its obligations under the Operating and Maintenance Contract (including any and all Design Data now or hereafter owned by the Operator) (the "Operator's Data"), the Operator hereby grants to the Province and BCTFA a perpetual, unrestricted, transferable and assignable, non-exclusive, worldwide, irrevocable and non-terminable royalty-free licence (which term as used in this Section 4 includes, where applicable, a sub-licence) (carrying the right to grant sub-licences) to use and reproduce all or any of the Operator's Data for any purpose (whether during or after the Contract Period) relating to the design, construction, completion, commissioning or testing of the Works, the operation, maintenance, rehabilitation or improvement of the Project Facilities, the Site and the Adjacent Areas or the conduct of any other Operations or the carrying out of any statutory or other duties or functions in respect of the Project Facilities, the Site and the Adjacent Areas, including the right to make any alterations, adaptations or additions to any Operator's Data.
- (b) With respect to Operator's Data arising during the Contract Period, the licence granted pursuant to Section 4(a) will take effect immediately upon the coming into existence of such Operator's Data.
- (c) The Operator agrees on a reasonable request at any time and following reasonable prior written notice to give the Province and BCTFA or any person(s) authorized by either of them access to the Operator's Data and to provide copies (including copy negatives and CAD disks) thereof at the Province's or BCTFA's (as the case may be) expense.

- (d) The Operator represents and warrants to and covenants with the Province and BCTFA that each item of Operator's Data is its own original work or, if any item of Operator's Data is not original, the Operator 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:
- (i) such item to be so acquired or brought into existence and to be used for the purposes of the Project by the Operator and the Concessionaire and their respective contractors or subcontractors of any tier; and
 - (ii) the Operator to grant the licence granted in Section 4(a) and to comply with all of its obligations under this Section 4,
- and that 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.
- (e) The Operator undertakes at the request of the Province or BCTFA 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 4(a).
- (f) The provisions of this Section 4 will survive the expiry or termination of this Agreement for any reason.

5. NO TERMINATION BY OPERATOR WITHOUT DEFAULT NOTICE

- (a) The Operator will not exercise any right it may have to terminate the Operating and Maintenance Contract or to treat it as having been repudiated by the Concessionaire or to discontinue the Operator's performance thereunder unless:
- (i) the Operator first delivers a written notice (a "Default Notice") to the Province and BCTFA setting out in reasonable detail the default(s) on which the Operator intends to rely in terminating the Operating and Maintenance Contract or to treat it as having been repudiated by the Concessionaire or to discontinue the Operator's performance thereunder; and
 - (ii) within 90 days of the Province and BCTFA receiving the Default Notice:
 - A. the default(s) on which the Operator intends to rely in terminating the Operating and Maintenance Contract or to treat it as having been repudiated by the Concessionaire or to discontinue the Operator's performance thereunder have not been remedied; and
 - B. the Operator has not received a Step-In Notice from the Province or BCTFA; and
 - (iii) the Senior Funders have not exercised their step-in rights under the Direct Agreement or Operator Direct Agreement.

- (b) If the Operator delivers a Default Notice to the Province and BCTFA pursuant to Section 5(a)(i), the Province will pay the Operator in accordance with and at the times specified in the Operating and Maintenance Contract for work performed by the Operator during the period commencing on the date when the Operator, but for the provisions of Section 5(a) above, would have been entitled to suspend its performance under or terminate the Operating and Maintenance Contract as a consequence of the default(s) specified in the Default Notice and ending on the earliest to occur of:
- (i) the date upon which the Province gives the Operator a written notice confirming that neither the Province nor BCTFA are exercising their step-in rights under Section 7(a);
 - (ii) the date upon which a Step-In Notice is given by the Province or BCTFA under Section 7(a) (in which event the provisions of Section 7(b) will apply in accordance with its terms); and
 - (iii) the date upon which the Senior Funders (or the Agent or any other Representative) exercise any right to step-in and assume any of the Concessionaire's rights and/or obligations under the Operating and Maintenance Contract or to transfer, novate or assign the Operating and Maintenance Contract; and
 - (iv) the expiry of the 90-day period referred to in Section 5(a).

For greater certainty, the Province will not be liable pursuant to the provisions of this Section 5(b) for payment of any amounts owing by the Concessionaire to the Operator under the Operating and Maintenance Contract for work performed by the Operator prior to the time at which the Operator, but for the provisions of Section 5(a) above, would have been entitled to suspend its performance under or terminate the Operating and Maintenance Contract as a consequence of the default(s) specified in the Default Notice.

6. DUTY OF CARE, REPRESENTATION AND WARRANTY

The Operator represents and warrants to and covenants with the Province and BCTFA on behalf of itself and its subcontractors of any tier that:

- (a) it has performed and will continue to perform all of the terms of the Operating and Maintenance Contract and the Interface Agreement to be performed on the Operator's part and that it has carried out, supplied and performed and will carry out, supply and perform the works and services it is to carry out, supply and perform under the Operating and Maintenance Contract in a good and workmanlike manner using suitable goods, materials and methods and in accordance with the Operating and Maintenance Contract;
- (b) it has provided and will maintain in full force and effect all of the Operating and Maintenance Contract Performance Securities in accordance with the terms of the Operating and Maintenance Contract; and

- (c) it has exercised and will continue to exercise all the reasonable professional skill, care and diligence to be expected of a properly qualified contractor experienced in carrying out, providing and performing works and services of similar scope, size, type and complexity including, without limiting the generality of the foregoing, the selection of goods and materials, any design and the satisfaction of the performance specifications and requirements referred to or to be inferred from the Operating and Maintenance Contract and the Technical Requirements.

Notwithstanding the foregoing, the Province and BCTFA shall not be entitled to rely on the Operator's representation, warranty and covenant in this Section 6 as a basis for an action against the Operator until the Province and/or BCTFA exercises its Step-in Rights under Section 7 of this Agreement.

6A. DELAY

The Operator will not, by reason of the exercise by the Province or BCTFA of their rights under this Agreement, have any liability for delay in the completion of the work to be completed by it under the Operating and Maintenance Contract except to the extent such liability to the Province or BCTFA arises under the Operating and Maintenance Contract after the exercise by the Province or BCTFA of their Step-In-Rights under this Agreement.

7. STEP-IN RIGHTS

- (a) Subject to the provisions of the Direct Agreement including without limitation Section 3.5 thereof and the provisions of the Operator Direct Agreement, the Province or BCTFA may at any time:
 - (i) within 90 days of the Province and BCTFA receiving a Default Notice unless prior to expiry of such 90-day period the default(s) on which the Operator intends to rely in terminating the Operating and Maintenance Contract or treat it as having been repudiated by the Concessionaire or to discontinue the Operator's performance thereunder have been remedied; or
 - (ii) if the Province's right to terminate the Concession Agreement has arisen and is continuing,

deliver a notice (a "Step-In Notice") electing to replace the Concessionaire under the Operating and Maintenance Contract and the Interface Agreement with the Province or BCTFA or a third party designated by the Province or BCTFA in the Step-In Notice (the "Substitute").

- (b) Subject to Section 7(d), upon receipt by the Operator of a Step-In Notice:
 - (i) the Concessionaire and the Operator will be deemed to be released from their obligations under the Operating and Maintenance Contract and the Interface Agreement to each other (except with respect to any and all indemnities from the Concessionaire in favour of the Operator and from the Operator in favour of the Concessionaire); and the Province, BCTFA or the Substitute, as applicable, and the Operator will be deemed to

assume those same obligations towards each other (except with respect to any and all indemnities from the Concessionaire in favour of the Operator in respect of matters occurring in the period prior to receipt by the Operator of the Step-In Notice);

- (ii) the rights of the Concessionaire against the Operator under the Operating and Maintenance Contract and the Interface Agreement and vice versa will be deemed to be cancelled (except with respect to any and all indemnities from the Concessionaire in favour of the Operator and from the Operator in favour of the Concessionaire); and the Province, BCTFA or the Substitute, as applicable, and the Operator will be deemed to acquire those same rights against each other (except with respect to any and all indemnities from the Concessionaire in favour of the Operator in respect of matters occurring in the period prior to receipt by the Operator of the Step-In Notice);
- (iii) the rights and benefits previously available to the Concessionaire under the Operating and Maintenance Contract Performance Securities (without prejudice to claims by the Concessionaire under the Operating and Maintenance Contract Performance Securities arising in respect of matters occurring prior to the date of receipt of the Step-In Notice by the Operator) will be transferred and assigned to the Province, BCTFA or the Substitute, as applicable (provided, for greater certainty, that any limitations on the maximum liability of the issuers of the Operating and Maintenance Contract Performance Securities will continue in effect);
- (iv) at the Province's or BCTFA's request, the Operator will enter into, and the Province or BCTFA will or will cause the Substitute to enter into, as applicable, all such agreements or other documents as reasonably necessary to give effect to the foregoing, including without limitation an agreement between the Province, BCTFA or the Substitute, as applicable, and the Operator on substantially the same terms as the Operating and Maintenance Contract (except for claims under any indemnities from the Concessionaire in favour of the Operator or from the Operator in favour of the Concessionaire arising in respect of matters occurring on or prior to the date of the new agreement) and the Interface Agreement;
- (v) at the Province's or BCTFA's request, the Operator will and will cause the issuers of the Operating and Maintenance Contract Performance Securities to enter into, and the Province or BCTFA will or will cause the Substitute, as applicable, to enter into all such agreements or other documents necessary to give effect to the provisions of this Section 7(b), including assignments and necessary consents to assignments of the Operating and Maintenance Contract Performance Securities to the Province, BCTFA or the Substitute, as applicable, or replacement performance securities from the issuers of the Operating and Maintenance Contract Performance Securities in favour of the Province, BCTFA or the Substitute, as applicable, on the same terms as the Operating and Maintenance Contract Performance Securities except with respect to necessary ministerial changes (which assignments or

replacement performance securities, for greater certainty, will be consistent with the provisions of paragraph 7(b)(iii) above) and, in the case of the issuance of replacement performance securities as aforesaid, the original Operating and Maintenance Contract Performance Securities (except with respect to claims by the Concessionaire thereunder in respect of matters occurring prior to the date of receipt of the Step In Notice by the Operator) will be cancelled.

In the event the Province or BCTFA causes a Substitute to enter into the agreements and other documents as are necessary to give effect to the foregoing, the Operator will have no right to approve the Substitute where such Substitute is any of the following:

- (vi) any Ministry, office, instrumentality or agency of the Province;
- (vii) any person whose obligations under such agreements or other documents are guaranteed by the Province or any Ministry, office, instrumentality or agency of the Province;
- (viii) a Qualifying Bidder as defined in the Concession Agreement in circumstances of an assignment, transfer or novation of the Concession Agreement; or
- (ix) any person who has the financial standing and the financial resources reasonably necessary to enable it to perform the obligations of the Concessionaire under the Operating and Maintenance Contract.

Otherwise, the Substitute shall be subject to the approval of the Operator, such approval not to be unreasonably withheld or delayed and the Province or BCTFA will provide such information relating to any proposed Substitute not falling within subparagraphs 7(b)(vi) and (vii) as the Operator may reasonably request to demonstrate to the Operator, acting reasonably, that the Substitute has the financial standing and the financial resources reasonably necessary to enable it to perform the obligations of the Concessionaire under the Operating and Maintenance Contract to the extent such information is readily available to the Province or BCTFA.

- (c) Subject to Section 7(d), the Concessionaire will, at its own cost, cooperate fully with the Province, BCTFA and any Substitute in order to achieve a smooth, efficient and orderly transfer of the Operating and Maintenance Contract, the Interface Agreement and the Operating and Maintenance Contract Performance Securities to the Province, BCTFA or the Substitute, as applicable, and to avoid or mitigate in so far as reasonably practicable any inconvenience, including the administration of the Operating and Maintenance Contract and the Interface Agreement, ongoing supervisory activities and scheduling.
- (d) A notice in writing from the Agent exercising the Senior Funders' rights under the Direct Agreement or the Operator Direct Agreement to step-in and assume the Concessionaire's rights and obligations under the Operating and Maintenance Contract or to novate or assign the Operating and Maintenance Contract that is received by the Operator prior to the receipt of a Step-In Notice given pursuant to

this Agreement will have priority over the Step-In Notice given pursuant to this Agreement, and in such circumstances only the notice received from the Agent will take effect and the Step-In Notice given pursuant to this Agreement will not bind the Operator.

- (e) If a Step-In Notice is given by the Province or BCTFA pursuant to this Agreement and, prior to the expiration of the 90-day period of time following delivery of a Province Collateral Agreement Notice (as defined in the Direct Agreement), a notice in writing from the Agent exercising the Senior Funders' right under the Direct Agreement or the Operator Direct Agreement to step-in and assume the Concessionaire's rights and obligations under the Operating and Maintenance Contract or to transfer, novate or assign the Operating and Maintenance Contract is received by the Operator, then, unless by such time the Operating and Maintenance Contract has been transferred, novated or assigned to a Substitute, the exercise by the Province or BCTFA, as the case may be, of its step-in rights pursuant to this Agreement will be deemed to have terminated, all rights and obligations of the Province arising from delivery of the Step-In Notice will be deemed to be cancelled and the provisions of Section 7(b) that would come into force and effect upon the delivery of a Step-In Notice will be deemed not to have come into force or effect.
- (f) The Operator will ensure, through measures satisfactory to the Province and BCTFA acting reasonably, that the terms of the Operating and Maintenance Contract Performance Securities permit the exercise by the Province and BCTFA of their step-in rights under this Agreement and that the exercise by the Province or BCTFA of their step-in rights under this Agreement will not entitle the issuer of any Operating and Maintenance Contract Performance Security to terminate, alter, amend or not comply with its obligations under the Operating and Maintenance Contract Performance Security, and that the terms of all Operating and Maintenance Contract Performance Securities will remain in full force and effect notwithstanding the exercise of such step-in rights and will provide further that upon the Province exercising its step-in rights, the Province will be entitled to all rights and benefits under such Operating and Maintenance Contract Performance Securities as though the Province were the originally named beneficiary thereunder.

7A. AMOUNTS PAID BY THE PROVINCE, BCTFA OR SUBSTITUTE

Any amounts paid by the Province, BCTFA or a Substitute to the Operator pursuant to this Agreement or any agreement or other document entered into pursuant hereto (including, for greater certainty, any amounts paid by the Province to the Operator pursuant to Section 5 hereof and any amounts paid by the Province, BCTFA or a Substitute pursuant to Section 7(b) hereof or any agreement or other document entered into pursuant thereto) will be deemed to be amounts owing by the Concessionaire to the Province under the Concession Agreement and, subject to Section 44.8 [Rights of Set-Off] of the Concession Agreement, may be set-off against any payments to be made by the Province to the Concessionaire under the Concession Agreement including the Total Performance Payment and any Termination Sum (which term, for this purpose, will be deemed to include any Adjusted Highest Qualifying Bid Price).

7B. Appropriation

The Operator and the Concessionaire acknowledge that they are aware of the provisions of subsection 28(2) of the *Financial Administration Act*, R.S.B.C. 1996, c. 138.

8. OPERATOR LIABILITY

- (a) The obligations and liabilities of the Operator under this Agreement, the Operating and Maintenance Contract and/or the Interface Agreement will not be modified, released, limited, diminished or in any way affected by:
- (i) any independent inspection, investigation or enquiry into any matter which may be made or carried out by or on behalf of the Province or BCTFA, or by any failure or omission to carry out any such inspection, investigation or enquiry;
 - (ii) the appointment by the Province or BCTFA of any other person to make or carry out any inspection, investigation or enquiry or to review the progress of or otherwise report to the Province in respect of the Project or any aspect thereof, or by any action or omission of such person whether or not such action or omission might give rise to any independent liability of such person to the Province.
- (b) In the event that the Province or BCTFA delivers a Step-In Notice, the Operator will have no greater liability to the Province, BCTFA or any Substitute than it would have had to the Concessionaire under the Operating and Maintenance Contract, and the Operator will be entitled in any proceedings by the Province, BCTFA or any Substitute to rely on any liability limitations in the Operating and Maintenance Contract.

9. DISCLOSED DATA DISCLAIMER AND INDEMNITY

- (a) 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 the date of execution of this Agreement) relevant or material to the Project, the Project Facilities, the Site or the Adjacent Areas or any obligations undertaken by the Operator under the Operating and Maintenance Contract. Neither the Province nor BCTFA will be liable to the Operator in respect of any failure to disclose or make available (whether before or after the execution of this Agreement) to the Concessionaire or the Operator any information, documents or data, nor to keep the Disclosed Data up to date, nor to inform the Concessionaire or the Operator (whether before or after execution of this Agreement) of any inaccuracy, error, omission, unfitness for purpose, defect or inadequacy in the Disclosed Data.
- (b) Neither the Province nor BCTFA will have any liability to the Operator (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.

10. **CONCESSIONAIRE AS PARTY**

The Concessionaire is a party to this Agreement for the purpose of giving its consent to the provisions hereof. The Concessionaire acknowledges and agrees that the Operator will not be in breach of the Operating and Maintenance Contract by complying with its obligations hereunder.

11. **ASSIGNMENT**

- (a) The Concessionaire will not, without the prior written consent of the Province and BCTFA, assign, transfer, charge, subcontract, subparticipate or otherwise dispose of any interest in this Agreement except to the extent it is entitled to do so under the Concession Agreement.
- (b) The Province and BCTFA may assign or otherwise dispose of the benefit of the whole or part of this Agreement in conjunction with a permitted assignment under the terms of the Concession Agreement and only to a permitted assignee thereunder, on written notice to the Concessionaire and the Operator and otherwise will not, without the prior written consent of the Concessionaire or the Operator not to be unreasonably withheld or delayed, assign or otherwise dispose of the benefit of the whole or part of this Agreement. Notwithstanding the foregoing, no consent of the Concessionaire or the Operator will be required in the event of an assignment by the Province or BCTFA or other disposal of the benefit of the whole or part of this Agreement to any person referred to in subparagraphs 7(b)(vi), (vii), (viii) and (ix).
- (c) The Operator will not, without the prior written consent of the Province and BCTFA, assign, transfer, charge, subcontract, subparticipate or otherwise dispose of any interest in this Agreement.

12. **NOTICES**

Any notices required or permitted under this Agreement will be in writing and (a) delivered personally, (b) sent by a recognized express mail or courier service, with delivery receipt requested, or (c) sent by confirmed facsimile transmission with telephonic confirmation, to the following addresses:

If to the Province or BCTFA:	5B – 940 Blanshard Street Victoria, British Columbia V8W 9T5
	Tel No.: 250-387-3260
	Fax No.: 250-387-6431
	Attn: Assistant Deputy Minister, Highways Department Ministry of Transportation

If to the Operator: **H M C Services Inc.**
2310 Kirton Avenue
Armstrong, British Columbia V0E 1B0

Tel No.: 250-546-6389
Fax No.: 250-546-8761
Attn: Joe Wrobel

If to the
Concessionaire: **Trans-Park Highway General Partnership**
675 Cochrane Drive, West Tower, Suite 630
Markham, Ontario L3R 0B8

Tel No.: 905-530-2114
Fax No.: 905-530-2214
Attn: John McArthur

- (a) Where any notice is provided or submitted to a Party via facsimile, an original of the notice sent via facsimile will also promptly be delivered personally or sent by a recognized express mail or courier service, with delivery receipt requested.
- (b) A Party may at any time and from time to time change its nominated address or facsimile number by prior notice to the other Parties, and such change will be effective on the day that next follows the recipient Parties' receipt of such notice.
- (c) Notices given by mail will be effective upon the earlier of (i) actual receipt, and (ii) 7 days after mailing if mailed within Canada, and 21 days after mailing if mailed outside of Canada. Notices delivered personally will be effective upon delivery. Notices given by facsimile will be deemed to have been received where there is confirmation of uninterrupted transmission by a transmission report and where there has been no telephonic communication by the recipient to the sender (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 between the hours of 9 a.m. and 4 p.m.; or
 - (ii) by noon on the next following Working Day, if sent after 4 p.m. on a Working Day but before 9 a.m. on that next following Working Day.
- (d) If the Party giving the notice or communication knows or ought reasonably to know of difficulties or disruption with the postal system which might affect the delivery of mail:
 - (i) any such notice will not be mailed but will be made or given by personal delivery or by facsimile transmission; and
 - (ii) where such difficulties or disruption arise after mailing but before the date of receipt as provided in this Section 12, the Party giving such notice will make or give such notice by personal delivery or by facsimile transmission.
- (e) To be effective, notices and all formal communications under this Agreement must be in writing and delivered as provided in this Section 12, and must be

signed by an authorized representative of the Party giving the notice. E-mails will not be used for and will not constitute notices under this Agreement.

- (f) Oral communications will not constitute formal communication under this Agreement and no Party has any obligation to act on any oral communication, instruction or assurance unless and until it is confirmed in writing. Any action taken by a Party based on oral communications, instructions or assurances will be at that Party's sole risk and will be without liability to or recourse against the other Parties.

13. AMENDMENTS

No oral or written amendment or modification of this Agreement, either before or after execution and delivery of this Agreement, will be of any force or effect unless such amendment or modification is in writing and is signed by a duly authorized officer of each Party sought to be bound thereby.

14. WAIVER

- (a) No waiver of any rights under this Agreement will be binding or effective unless the waiver is in writing and signed by an authorized representative of the Party giving such waiver.
- (b) Any Party's waiver of any of its rights under this Agreement or of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of this Agreement at any time will not in any way affect, limit, modify, or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition and other provision hereof, any course of dealing or custom of the trade notwithstanding.

15. TIME IS OF THE ESSENCE

Time is of the essence of this Agreement and each provision herein.

16. INDEPENDENT CONTRACTOR

The Parties are independent contractors. This Agreement is not intended to and does not create or establish between the Parties any relationship as partners, joint venturers, employer and employee, master and servant or principal and agent. Neither the Concessionaire nor the Operator nor any of its or their representatives are or will be deemed to be an employee or agent of the Province or BCTFA for any purpose.

17. ENTIRE AGREEMENT

Except where provided otherwise in this Agreement, this Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings, whether oral, written, express or implied, concerning the subject matter of this Agreement.

18. SEVERABILITY

If any provision of this Agreement is declared invalid, unenforceable or illegal by the courts of any jurisdiction to which it is subject, such provision may be severed and such invalidity, unenforceability or illegality will not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement.

19. ENUREMENT

This Agreement will enure to the benefit of and be binding upon each of the Parties and their respective successors and permitted transferees and assigns.

20. DISPUTE RESOLUTION

Any dispute under this Agreement will be resolved in accordance with the Disputes Resolution Procedure.

21. GOVERNING LAW AND JURISDICTION

- (a) This Agreement will be governed by and construed in accordance with the laws of the Province of British Columbia and the laws of Canada applicable therein and will be treated in all respects as a contract in the Province of British Columbia, without regard to conflict of laws principles.
- (b) Subject to the provisions of Section 20, the Parties agree to submit to the non-exclusive jurisdiction of the courts of British Columbia as regards any claim or matter arising in relation to this Agreement.

22. FURTHER ASSURANCE

Each Party shall do all things and execute all further documents necessary to give full effect to this Agreement.

23. PROOF OF AUTHORITY

The Province reserves the right to require everyone executing this Agreement on behalf of the Concessionaire or the Operator to provide proof, in a form acceptable to the Province, that they have the requisite authority to execute this Agreement on behalf of and to bind the Concessionaire or the Operator, respectively.

24. CONFIDENTIALITY

The Operator will comply with the obligations on the part of the Concessionaire contained in Section 50 [Confidentiality] of the Concession Agreement.

25. COUNTERPARTS

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all of the Parties will constitute a full, original and binding agreement for all purposes. Counterparts may be executed either in original or faxed form provided that any Party providing its signature in faxed form will,

upon any other Party's request, promptly forward to such Party an original signed copy of this Agreement which was so faxed.

IN WITNESS WHEREOF the Parties have executed this Agreement as of the day and year first above written:

SIGNED on behalf of 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:)

(Witness)

JOHN DYBLE
Deputy Minister, Ministry of Transportation

BC TRANSPORTATION FINANCING AUTHORITY

Per: _____
JOHN DYBLE
Chief Executive Officer

H M C SERVICES INC.

Per: _____
JOE WROBEL
President

TRANS-PARK HIGHWAY GENERAL PARTNERSHIP

by its partners:

TRANS-PARK HIGHWAY INVESTMENT INC.

Per: _____
JOHN McARTHUR
President

Per: _____
STEVE SKELTON
Vice-President

TRANS-PARK HIGHWAY INC.

Per: _____
JOHN McARTHUR
President

Per: _____
STEVE SKELTON
Vice-President