

**CONCESSION AGREEMENT  
AND  
GROUND LEASE**

BETWEEN

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

AND

**SYD ROAD LIMITED PARTNERSHIP**

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## CONCESSION AGREEMENT AND GROUND LEASE

THIS CONCESSION AGREEMENT AND GROUND LEASE executed as of June 16, 2004 pursuant to the Ministry of Energy and Mines Act.

BETWEEN:

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

(the “Grantor”)

AND:

**SYD ROAD LIMITED PARTNERSHIP**

(the “Concessionaire”)

NOW THEREFORE in consideration of \$10.00 now paid by each of the parties hereto to the other, the receipt and sufficiency of which are acknowledged by each of them, the parties covenant and agree as follows:

### **ARTICLE 1 DEFINITIONS AND INTERPRETATION**

#### **1.1 Definitions**

Unless otherwise specified or the context otherwise requires, for the purposes of this Agreement the following terms have the following meanings:

- (a) “**Actual Cost**” means 1.15 times the actual out-of-pocket costs and expenses including depreciation, reasonably incurred by the Concessionaire consistent with normal road maintenance practices in any Fiscal Year to perform the OMM Work to the extent such costs and expenses are not incurred as a result of or in relation to the Concessionaire not fulfilling any of its obligations under this Agreement, excluding: (i) Taxes payable, levied, rated, charged or imposed based on income, profit or capital; (ii) insurance proceeds paid to the Concessionaire; and (iii) any liquidated damages or other amounts required to be paid by the Concessionaire to the Grantor under this Agreement.
- (b) “**Additional Moves**” has the meaning ascribed thereto in Section 9.3.

- (c) “**Affiliate**” has the meaning ascribed to that term in the *Canada Business Corporations Act* and, in respect of a partnership, a person will be considered to be an Affiliate of such partnership only if it is an Affiliate of Ledcor Industries Inc.
- (d) “**Agreement**” means this concession agreement and ground sublease, including without limitation all Schedules referred to herein.
- (e) “**Approval**” has the meaning ascribed thereto in Section 1.16, and “**Approved**” has a similar meaning.
- (f) “**Approved Change Request**” means a Change Request which has been Approved by the Grantor.
- (g) “**Arbitrator**” has the meaning ascribed thereto in Section 32.5.
- (h) “**Article**”, “**Section**”, “**Paragraph**” and “**Schedule**” mean and refer to the specified article, section, paragraph or Schedule of or to this Agreement.
- (i) “**Audit**” and similar expressions mean, with respect to any matter or thing relating to the Project or this Agreement, the performance by or on behalf of the Grantor or the Concessionaire of such reviews, investigations, inspections, audits, confirmations, certifications, tests, studies and determinations of or relating to such matter or thing, as the Grantor or the Concessionaire, as the case may be, may determine acting reasonably, to be required, advisable or desirable in the circumstances conducted in each case in accordance with applicable industry or professional accepted practices or requirements, if any.
- (j) “**Availability Fee**” means the aggregate of the Bypass Availability Fee and the SYD Upgrade Availability Fee.
- (k) “**Base Amount**” means that component of the Maintenance Fee which is the fixed amounts more particularly described in Column 2 of Schedule 9(a).
- (l) “**Bona Fide Debt**” or “**Bona Fide Mortgage**” means any debt or Mortgage, as the case may be, owing or granted to a person other than a person related to the Concessionaire, prior to the occurrence of an event giving rise to the payment of amounts for or in respect of termination under this Agreement, and for greater certainty shall include any refinancing of such debt or Mortgage, notwithstanding that the agreement in respect of such refinancing was entered into after the occurrence of the event giving rise to the payment of amounts for or in respect of termination under this Agreement, provided that such refinancing was entered into on commercially reasonable terms having regard to the circumstances of termination and the amount and amortization of such refinancing does not exceed the amount or amortization period of the original debt or Mortgage.
- (m) “**Bona Fide Debt Interest Rate**” means the rate of interest per annum on any particular day equal to the rate of interest per annum paid on such day by the Concessionaire to the Mortgagee that provides the majority of the funding of the costs of the Construction Work.

- (n) **“Books and Records”** has the meaning ascribed thereto in Section 2.14.
- (o) **“Breakage Costs”** means any commercially reasonable breakage costs, make-whole payment or other prepayment amounts that are required to be paid by the Concessionaire under any Bona Fide Debt relating to the Project as a result of the early repayment of such debt prior to its scheduled maturity date.
- (p) **“Builders Lien”** has the meaning ascribed thereto in Section 3.7(a).
- (q) **“Bypass”** means that portion of the Industrial Concession Highway comprising the by-pass from the end of the pavement of Airport Drive in the City of Fort Nelson to approximately kilometre 30.5, including the bridge over the Fort Nelson River to be constructed by the Concessionaire and more particularly described in the Construction Requirements.
- (r) **“Bypass Availability Fee”** means the amount described in Section 9.9, which, for greater certainty, includes the \$6,000,000 lump sum payment referred to therein.
- (s) **“Change Order”** means a written order prepared by or on behalf of the Grantor directing the Concessionaire to:
  - (i) add or perform work in respect of the Project in addition to that provided for in this Agreement, including work related to the integration of the Industrial Concession Highway with other highways;
  - (ii) dispense with, delete or change the dimensions, character, quantity, quality, description, location or position of the whole or any part of the Work or make other changes to the Work;
  - (iii) implement and comply with any changes to the Construction Requirements prior to Total Completion for the particular Phase where such changes result from anything other than a change to Laws and Regulations or to safety standards; or
  - (iv) implement and comply with any changes to the Maintenance Requirements where such changes result from anything other than a Non-Capital Change,

but shall not include:

- (v) any upgrades or other improvements to be done by the Concessionaire in accordance with Article 11.
- (t) **“Change Request”** means a written request in respect of the Project prepared by or on behalf of the Concessionaire and addressed to the Grantor seeking to dispense with, delete or change the dimensions, character, quantity, quality, description, location or position of the whole or any part of the Work or make other changes to the Work, provided that, for the avoidance of doubt, no Change Request shall be necessary to

implement any change in the Work not specifically mandated or prohibited or otherwise regulated by the Governing Documentation or Laws and Regulations.

- (u) “**Claim**” means any claim, demand, liability, damage, loss, suit, action or cause of action and all costs and expenses relating thereto, including without limitation legal fees on a solicitor and own client basis. Where this Agreement provides that the Concessionaire “waives any Claim”, the word “Claim” shall not include the right to dispute any matter arising out of this Agreement in accordance with Article 32.
- (v) “*Commercial Arbitration Act*” means the *Commercial Arbitration Act* (British Columbia).
- (w) “**Commissioned and Opened**” means, with respect to each Phase of the Industrial Concession Highway which is the subject of the Construction Work, that such Phase is determined by the Grantor by notice to the Concessionaire to be available for safe use as a Highway and which notice does not relieve the Concessionaire from any of its obligations under this Agreement, and in particular its obligations under Article 20, and “**Commissioning and Opening**” shall have a corresponding meaning.
- (x) “**Complete Term**” means the period from the Effective Date to the End Date.
- (y) “**Concession**” has the meaning ascribed thereto in Section 2.1.
- (z) “**Concession Assets**” means, collectively, the Concession and any and all equipment and other assets used in the operation of the Concession.
- (aa) “**Concession FMV**” means an amount equal to the fair market value of the Concession Assets immediately prior to the End Date or, in the case of Section 26.1, the date of a Discriminatory Action, if sold on a going concern basis on the assumption that the Concession would continue until the 16<sup>th</sup> anniversary of the Execution Date, and free and clear of all Bona Fide Mortgages.
- (bb) “**Concession Highway Lands**” means those lands comprising:
  - (i) the Travelled Portion of the Industrial Concession Highway; and
  - (ii) any and all land adjoining the Travelled Portion of the Industrial Concession Highway that is necessary for the safe and efficient use of the Travelled Portion, including without limitation any and all secondary roads and adjoining lands,all as more particularly described in Schedule 2.2, and as such lands may be extended, expanded or modified from time to time by the agreement of the parties.
- (cc) “**Concessionaire Default**” has the meaning ascribed thereto in Section 27.1.

- (dd) **“Concessionaire Information”** means:
- (i) all plans, “as built” drawings, materials, records, studies, tests, test results, certificates, investigations, samples, surveys, reports, statements, documents, facts, information, traffic information (including without limitation volume counts, classification counts, origin and destination data, speed and travel time information and vehicle jurisdiction data) and data (including without limitation test data) provided, prepared, produced, created, collected, recorded, analyzed, characterized, categorized, processed, howsoever generated or stored by the Concessionaire or any of the Concessionaire’s Advisors in connection with the Project, other than that to which solicitor client privilege may be reasonably claimed;
  - (ii) all reports, certificates, schedules, notices, requests, information, materials, test results, samples, plans, projections, files, correspondence, and proper, complete and accurate books, records, accounts and documents of the Concessionaire or any of the Concessionaire’s Advisors relating to the Project, including without limitation any of the foregoing stored electronically or on computer-related media, but excluding any of the foregoing to which solicitor client privilege may be reasonably claimed; and
  - (iii) all financial information of the Concessionaire relating to the OMM Work, including without limitation income statements, balance sheets, statements of cash flow and changes in financial position, details regarding (including without limitation accounts receivable ageing and billable and non-billable trips), operating expenses, capital expenditures and budgeted operating results.
- (ee) **“Concessionaire Losses”** means all losses (including without limitation actual and estimated losses of Fees), damages, costs (including without limitation administrative costs), expenses, liabilities, judgments, awards, taxes, fines, penalties, charges and amounts paid in settlement (net of insurance proceeds actually received), including without limitation:
- (i) Subcontractor Losses;
  - (ii) reasonable legal fees of the Concessionaire on a solicitor and own client basis and reasonable fees or other charges of accountants and other advisors; and
  - (iii) interest computed on money paid by the Concessionaire in respect of any of the foregoing at a variable nominal rate per annum equal on each day to the Variable Interest Rate then in effect, calculated from the date of demand therefor until the date such payment is made by such person in full,

less, and to the extent applicable in the circumstances:

- (iv) costs and expenses that the Concessionaire would otherwise expend or incur in order to comply with the Governing Documentation; and
  - (v) costs and expenses that the Concessionaire would otherwise expend or incur in the ordinary course of the performance of the Concession or the carrying on of business in the ordinary course.
- (ff) **“Concessionaire’s Advisors”** means the agents, advisors, consultants, engineers, auditors, legal counsel, contractors and subcontractors of the Concessionaire, as listed in Schedule 1.1(ff) or as otherwise Approved by the Grantor.
- (gg) **“Concessionaire’s Interest”** means the right, title and interest, including without limitation the economic interest, of the Concessionaire in and to the Project (including without limitation the leasehold estate of the Concessionaire in the Concession Highway Lands created by this Agreement), the Project Agreements and the Governing Documentation.
- (hh) **“Concessionaire Permitted Encumbrances”** means:
- (i) a security interest taken or reserved in personal property forming part of the Project to secure payment of all or part of its price, provided such security interest is not in default;
  - (ii) a personal property security interest taken by a person who gives value for the purpose of enabling the Concessionaire to acquire rights in or to personal property which is to form part of the Project to the extent that the value is applied to acquire such rights, provided such security interest is not in default;
  - (iii) inchoate or statutory liens for Taxes or utility rates or charges in connection with the Project not at the time overdue;
  - (iv) inchoate or statutory liens for overdue Taxes or utility rates or charges in connection with the Project the validity or amount of which the Concessionaire is contesting in good faith, but only for so long as such contestation effectively postpones enforcement of any such liens;
  - (v) statutory liens (including without limitation any deposits to secure same) incurred or deposits made in the ordinary course of the operation of the Project in connection with workers compensation, employment insurance and similar Laws and Regulations;
  - (vi) liens and privileges arising out of any judgments with respect to which the Concessionaire intends to prosecute appeals or proceedings for review, but only for so long as there is a stay of execution pending the determination of such appeals or proceedings for review;

- (vii) security given by the Concessionaire to a public or private utility or common carrier or any Governmental Authority when required by such utility, carrier or authority in the ordinary course of operating the Project, which singularly or in the aggregate do not materially detract from the value of the asset concerned or materially impair its use in the operation of the business of the Concessionaire;
- (viii) construction, builders, repair or storage liens arising in the ordinary course of the Concessionaire's business for sums which are not overdue or the validity or amount of which is being contested in good faith, but only for so long as such contestation effectively postpones enforcement of any such liens;
- (ix) easements, statutory rights of way, rights of way and any registered restrictions or covenants that run with the Project Lands provided that they have been complied with and that, with respect to the Concession Highway Lands, they do not in the aggregate materially and adversely affect the use of the Industrial Concession Highway for Highway Purposes and do not otherwise in the aggregate materially and adversely affect the use of any of the Project Lands for their intended purposes;
- (x) easements, statutory rights of way or rights of way for, or reservations or rights of others relating to, sewers, water lines, gas lines, pipelines, electric lines, cable television, telegraph and telephone lines, telecommunications services and other similar products or services, provided that they have been complied with and that, with respect to the Concession Highway Lands, they do not in the aggregate materially and adversely affect the use of the Industrial Concession Highway for Highway Purposes and do not otherwise in the aggregate materially and adversely affect the use of any of the Project Lands for their intended purposes;
- (xi) zoning by-laws, official community plans, agricultural land reserve designations, ordinances or restrictions as to the use of real property, and agreements with other persons registered against title to the Project Lands, provided that they have been complied with and that, with respect to the Concession Highway Lands, they do not materially and adversely affect the use of the Industrial Concession Highway for Highway Purposes and do not otherwise in the aggregate materially and adversely affect the use of any of the Project Lands for their intended purposes;
- (xii) any discrepancies or encroachments that up-to-date surveys of the Project Lands might reveal, provided that, with respect to the Concession Highway Lands, they do not materially and adversely affect the use of the Industrial Concession Highway for Highway Purposes and do not otherwise in the aggregate materially and adversely affect the use of any of the Project Lands for their intended purposes;



- (xiii) good faith deposits made in the ordinary course of business to secure the performance of bids, tenders, contracts (other than for the payment of borrowed money), leases, surety, customs, performance bonds and other similar obligations;
  - (xiv) the rights reserved to or vested in any Governmental Authority by any statutory provision;
  - (xv) any other Encumbrance expressly permitted hereunder;
  - (xvi) a Bona Fide Mortgage; and
  - (xvii) any amendment, extension, renewal or replacement of any of the foregoing.
- (ii) **“Construction Requirements”** means the requirements of the Grantor set out in Schedule 7.12 as of the Effective Date as the same may be amended, supplemented or replaced from time to time after the Effective Date and prior to Total Completion of the particular Phase in accordance with this Agreement.
  - (jj) **“Construction Work”** means the construction, management, upgrade and repair of certain portions of the Industrial Concession Highway including the Bypass and the SYD Upgrade all in accordance with the Construction Requirements.
  - (kk) **“Consumer Price Index”** means the index issued monthly by Statistics Canada which is used to measure the rate of price change for goods and services bought by British Columbia consumers.
  - (ll) **“Control”**, in respect of a company, means ownership of a sufficient number of shares which allows the holder or holders to elect a majority of the directors to the board of directors of such company.
  - (mm) **“Corridor Management Requirements”** means the corridor management specifications of the Grantor set out in Schedule 7.2 as of the Effective Date and as the same may be amended, supplemented or replaced from time to time after the Effective Date in accordance with this Agreement, which form part of the Maintenance Requirements.
  - (nn) **“DDB Work”** means the Development Work, the Design Work and the Construction Work.
  - (oo) **“Delay Costs”** has the meaning ascribed thereto in Section 25.8.
  - (pp) **“Delay Event”** has the meaning ascribed thereto in Section 25.1.
  - (qq) **“Delay Event Termination Value”** has the meaning ascribed thereto in Section 25.7.
  - (rr) **“Delivery Plan”** means the schedule of timing for the commencement and completion of the Construction Work as set out in Schedule 7.12.

- (ss) “**Design Work**” means the design of the Bypass and the SYD Upgrade in accordance with the Governing Requirements as at the Effective Date, as may be amended, supplemented or replaced from time to time after the Effective Date and prior to Total Completion of the particular Phase in accordance with this Agreement, Governing Documentation and Laws and Regulations, including, without limitation, Schedule 7.12.
- (tt) “**Designated Consultant**” has the meaning ascribed thereto in Section 7.14(a), and references to a Designated Consultant refer to the Designated Consultant retained to perform the relevant functions described in the sections of this Agreement in which the reference to such Designated Consultant appears.
- (uu) “**Development Work**” means the development obligations in this Agreement relating to the DDB Work and/or the Project, or any portion thereof in accordance with the Governing Requirements as at the Effective Date, as may be amended, supplemented or replaced from time to time after the Effective Date and prior to Total Completion of the particular Phase in accordance with this Agreement, Governing Documentation and Laws and Regulations, including, without limitation, Schedule 7.12.
- (vv) “**Discriminatory Action**” has the meaning ascribed thereto in Section 26.1.
- (ww) “**Discriminatory Action Compensation**” has the meaning ascribed thereto in Section 26.2.
- (xx) “**Document**” has the meaning ascribed thereto in Section 1.17.
- (yy) “**Drilling Rig Move**” means the moving of a drilling rig over the Industrial Concession Highway to a new well drilling location for which a fee is charged under the Regulations of the *Build BC Act*, or any comparable or replacement legislation, but does not include a drilling rig move if the only use of the Industrial Concession Highway is to move the rig from one side of the road to the other.
- (zz) “**Effective Date**” means December 1, 2003.
- (aaa) “**Employment Payments**” means all amounts that the Concessionaire is legally required to pay to its employees as a direct result of the termination of their employment upon termination of this Agreement.
- (bbb) “**Enactment**” has the meaning ascribed to it in the *Interpretation Act* (British Columbia).
- (ccc) “**Encumbrance**” means any mortgage, lien, judgment, execution, pledge, charge, security interest, restriction, claim, trust, deemed trust or encumbrance of any nature whatsoever, whether arising by operation of law, statute, whether granted voluntarily or arising by way of adverse claim or otherwise created.
- (ddd) “**End Date**” means the date on which the Term expires or this Agreement is terminated, whichever is earlier.

(eee) “**Environmental Laws**” means:

- (i) all requirements and provisions under or prescribed by any and all applicable Laws and Regulations;
- (ii) all applicable rules, regulations, orders-in-council, codes, protocols, guidelines, policies, procedures, concessions, grants, franchises, licences, permits, approvals, plans, authorizations, agreements and any other governmental requirements, promulgated under or pursuant to any Laws and Regulations; and
- (iii) all applicable judicial, administrative or regulatory judgments, orders, decisions and exemptions, including without limitation those rendered by any Governmental Authority,

all as may be amended from time to time, relating to the protection of the natural environment or of plant, animal or human health, including without limitation those relating to occupational health and safety requirements and procedures, that would, in the ordinary and usual course of the operation, management, maintenance, repair, rehabilitation, construction, upgrade, reconstruction of the Industrial Concession Highway by any person, be recognized, followed and implemented by such person.

(fff) “**Environmental Management Plan**” means the detailed strategy developed by the Concessionaire for meeting the environmental requirements of this Agreement, including, without limitation, compliance with federal and provincial environmental legislation, acceptability of operating and maintenance practices, and strategy for environmental quality control and risk management during operating and maintenance activities, as set out in Schedule 1.1(fff).

(ggg) “**Execution Date**” means the date first above written on page 1, being the date on which this Agreement is executed by the parties.

(hhh) “**Existing Improvements**” means:

- (i) all improvements (including without limitation paving and sub-base, but excluding any fee simple interest), signage (including, without limitation, all road entry and exit signage), chattels, vehicles, machinery, equipment, materials, supplies, tools, appurtenances and fixtures forming a part of and used in connection with the Industrial Concession Highway or the Concession Highway Lands as of the Execution Date, including without limitation those set out in Schedule 2.7;
- (ii) all other facilities, fixtures, appurtenances and tangible and intangible personal property in connection with the Industrial Concession Highway as at the Execution Date (other than receivables and the trade marks, names and logos licensed to the Concessionaire), including without limitation inventories of any nature whatsoever contained on or attaching to the Industrial Concession Highway or the Concession Highway Lands

or used in connection with the Industrial Concession Highway or the Concession Highway Lands, including without limitation those set out in Schedule 2.7; and

- (iii) all mechanical, electrical and other systems installed or used in connection with any of the foregoing as at the Execution Date.
- (iii) “**Fees**” means the aggregate of the Availability Fee and the Maintenance Fee.
- (jjj) “**First Nation**” means an aboriginal governing body, however organized and established by aboriginal people within their traditional territory.
- (kkk) “**Fiscal Year**” means the 12-month period commencing on December 1 and ending on November 30.
- (III) “**Force Majeure**” means any event beyond the reasonable control of the party to this Agreement claiming Force Majeure, excluding flood of the Fort Nelson River Bridge or any of the other bridges on the Industrial Concession Highway (including the Snake River Bridge, the PetroCan 1 Bridge and the PetroCan 2 Bridge), or their respective approach embankments, of a magnitude which is equal to or less than a 100 year flood event, and including, without limitation, an intervening act of God or public enemy, war (declared or undeclared), invasion, armed conflict, act of foreign enemy, blockade, revolution, act of terror, sabotage, civil commotions, interference by civil or military authorities, governmental expropriation or confiscation of property or equipment by any Governmental Authority (other than a Provincial Entity), nuclear or other explosion, radioactive or chemical contamination or ionizing radiation, fire, flood of the Fort Nelson River Bridge or any of the other bridges on the Industrial Concession Highway (including the Snake River Bridge, the PetroCan 1 Bridge and the PetroCan 2 Bridge), or their respective approach embankments, of a magnitude which is greater than a 100 year flood event, flood of any other portion of the Industrial Concession Highway of any magnitude, earthquake, epidemic, quarantine restriction, strike, labour dispute or other labour action or protest other than with respect to the Concessionaire’s own employees, contractors, subcontractors or those for whom the Concessionaire is in law responsible, stop-work order or injunction issued by a court or public authority having jurisdiction and governmental embargo, which materially delays or interrupts the performance of any material obligation under this Agreement, provided that such event does not arise by reason of the occurrence of any Non-Excusable Event.
- (mmm) “**Fort Nelson River Bridge**” means the bridge to be constructed by the Concessionaire over the Fort Nelson River as part of the Bypass.
- (nnn) “**Fundamental Change in Oil and Gas Exploration Activity**” means a material reduction in oil and gas drilling and exploration activities on the Concession Highway Lands and surrounding area which would reasonably be considered to result in a significant decrease in the use of the Industrial Concession Highway by industrial road users.

- (ooo) **“Fundamental Change in Road Usage”** means change in industry activity on the Concession Highway Lands and surrounding area which would reasonably be considered to result in increased use of the Industrial Concession Highway by industrial road users, which would include, without limitation, the construction or activation of a new mine, a significant increase in logging practice, the construction, upgrade or installation of a pipeline, the construction of major infrastructure, or the development of an energy project.
- (ppp) **“Governing Documentation”** means this Agreement, including without limitation the schedules hereto, the Permits, the Governmental Authorizations and the Other Authorizations.
- (qqq) **“Governing Requirements”** means, collectively, the Construction Requirements, Maintenance Requirements, the specifications referred to in Article 7, and the safety standards referred to in Article 5.
- (rrr) **“Government Agreements”** has the meaning ascribed thereto in Section 3.11.
- (sss) **“Governmental Authority”** means, at any time, any federal, provincial, regional, local or municipal government and any federal, provincial, regional, local or municipal governmental, quasi-governmental, judicial, public or statutory authority, commission, tribunal, agency, department, ministry, body or any other entity having the constitutional authority to exercise a governmental function.
- (ttt) **“Governmental Authorization”** means any approval, certificate of approval, authorization, consent, waiver, variance, exemption, declaratory order, exception, licence, filing, registration, permit, notarization, lease or licence or other requirement of any Governmental Authority, whether existing or to be obtained which is necessary in connection with the Project or any part thereof.
- (uuu) **“Grantor Default”** has the meaning ascribed thereto in Section 27.3.
- (vvv) **“Grantor Information”** means:
- (i) any and all plans, “as built” drawings, materials, records, studies, tests, test results, certificates, investigations, samples, surveys, reports, statements, documents, facts, information, traffic information (including without limitation volume counts, classification counts, origin and destination data, speed and travel time information and vehicle jurisdiction data) and data (including without limitation test data) in connection with the Project; and
  - (ii) any and all reports, certificates, schedules, notices, requests, information, materials, test results, samples, plans, projections, files, correspondence, books, records, accounts and documents relating to the Project, including without limitation any of the foregoing stored electronically or on computer-related media; and

- (iii) any and all financial information of the Grantor relating to the Project, including without limitation income statements, balance sheets, statements of cash flow and changes in financial position, details regarding operating expenses, capital expenditures and budgeted operating results,

however provided or made available by the Grantor to the Concessionaire prior to the Execution Date.

(www) “**Grantor’s Advisors**” means the agents, advisors, consultants, engineers, auditors, legal counsel, contractors and subcontractors of the Grantor, but excludes the Concessionaire and the Concessionaire’s Advisors.

(xxx) “**Grantor’s Interest**” means the right, title and interest of the Grantor in and to the Project, the Project Agreements, the Concession Highway Lands and the Governing Documentation.

(yyy) “**Hazardous Substance**” means any solid, liquid, gas, odour, heat, sound, vibration, radiation or other substance, material or emission (a “**Substance**”) the creation, storage, use or release of which into the environment is prohibited, controlled or regulated under any Environmental Laws, including without limitation:

- (i) oil, flammable substances, explosives, radioactive materials, hazardous wastes or substances, toxic wastes or toxic substances or any other wastes, contaminates or pollutants;
- (ii) any Substance which may or could pose a hazard to any real or personal property, or to persons on or about any real property, or causes any real property to be in violation of any Environmental Laws, including without limitation any mixing or combination of any Substance with any other Substance that would cause a breach of any applicable Environmental Laws;
- (iii) asbestos in any form which is or could become friable, radon gas, urea formaldehyde foam insulation, transformers or other equipment which contain dielectric fluid containing levels of polychlorinated biphenyls in excess of limits prescribed by any Environmental Laws; and
- (iv) any Substance defined as or included in the definitions of “dangerous goods”, “deleterious substance”, “hazardous substances”, “hazardous wastes”, “hazardous materials”, “extremely hazardous wastes”, “restricted hazardous waste”, “toxic substances”, “special waste”, “waste” or words of similar import under any applicable Environmental Laws, including without limitation the *Canadian Environmental Protection Act* (Canada), the *Fisheries Act* (Canada), the *Transportation of Dangerous Goods Act* (Canada), the *Canada Water Act* (Canada) and the *Waste Management Act* (British Columbia), including the Special Waste Regulation promulgated thereunder,

and for the purposes of this Agreement, references to a “release” or “releasing” or “released” of Hazardous Substances include spilling, leaking, placing, depositing, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, disposing, dumping or other form of release, or permitting any of the foregoing to occur.

- (zzz) “**Highway**” has the meaning ascribed to it in the *Highway Act*.
- (aaaa) “**Highway Act**” means the *Highway Act* (British Columbia).
- (bbbb) “**Highway Purposes**” means utilization of the Industrial Concession Highway for transportation purposes by means of Motor Vehicles or any mode of transportation then in general use on a Highway.
- (cccc) “**Incremental Amount**” means that component of the Maintenance Fee based on the number of Drilling Rigs Moved, as more particularly described in Section 9.2.
- (dddd) “**Independent Engineering Consultant**” means a firm of professional engineers duly registered and licensed to do business in British Columbia and such other qualified professional consultant or consultants, to be appointed by the Grantor from a list of acceptable firms provided by the Concessionaire.
- (eeee) “**Industrial Concession Highway**” or “**SYD Road**” means the concession highway which is subject to the grant of the Concession hereunder and is situated on the Concession Highway Lands, including, for greater certainty, the Fort Nelson River Bridge.
- (ffff) “**Insurance Cost**” means that annual insurance cost incurred by the Concessionaire in maintaining the required level of insurance under this Agreement for the OMM Work, at the specified numerical levels described in Schedule 3.6 or such other amounts as are specified by the Grantor under Section 3.6.
- (gggg) “**Interim Maintenance Contract**” means that maintenance contract between Her Majesty the Queen in Right of Canada as represented by the Minister of Public Works and Government Services and P.S. Sidhu Trucking Ltd. dated November 5, 2003.
- (hhhh) “**Laws and Regulations**” means any and all requirements under or prescribed by the common law and any federal, provincial, local government or municipal Enactments, statutes, regulations, laws, court orders or judgments, orders-in-council, by-laws, codes, orders, rules, policies, interpretations, directives or requests (whether or not having the force of law) affecting, applicable to or otherwise relating to, the Concessionaire, the Project or the use thereof and includes, for greater certainty, all Enactments and all Environmental Laws.
- (iiii) “**Lenders Direct Agreement**” means the agreement among the Grantor, CIT Group Securities (Canada) Inc., as Mortgagee, and the Concessionaire dated as of June 16, 2004, and any other agreement among the Grantor, a Mortgagee and the Concessionaire or its successors or permitted assigns, in substantially the same form and on substantially the same terms.

- (jjjj) “**Maintenance Fee**” means that fee described in Section 9.1.
- (kkkk) “**Maintenance Requirements**” means the requirements of the Grantor set out in Schedule 7.2 as of the Effective Date, and as the same may be amended, supplemented or replaced from time to time after the Effective Date in accordance with this Agreement.
- (llll) “**Minister**” means, at any time, the member of the Executive Council of the Province of British Columbia who is charged with the administration of the *Ministry of Energy and Mines Act*.
- (mmmm) “**Ministry**” means, at any time, the ministry headed by the Minister.
- (nnnn) “**Mortgage**” means any charge, mortgage, pledge, grant of a security interest in, assignment or sublease as security for any indebtedness, liability or obligation, including, without limitation, bonds or debentures issued under a trust indenture.
- (oooo) “**Mortgagee**” has the meaning ascribed thereto in Article 29.
- (pppp) “**Motor Vehicle**” or “**vehicle**” has the meaning ascribed to motor vehicles in the *Motor Vehicle Act*.
- (qqqq) “**Motor Vehicle Act**” means the *Motor Vehicle Act* (British Columbia).
- (rrrr) “**Non-Capital Change**” means an amendment or change to Laws and Regulations, or to safety standards described in Article 5, which amendment or change does not have a material impact on the capital costs (as defined by Canadian Generally Accepted Accounting Principles) to the Industrial Concession Highway incurred by the Concessionaire in carrying out the OMM Work.
- (ssss) “**Non-Excusable Event**” means, with respect to a Force Majeure or a Delay Event:
- (i) any negligent act or wilful misconduct of the affected party or those for whom it is in law responsible;
  - (ii) any act or omission by the affected party, or contractors, subcontractors, employees or agents of the affected party, in breach of the provisions of this Agreement;
  - (iii) lack or insufficiency of funds or failure to make payment of monies or provide required security on the part of the affected party;
  - (iv) any weather conditions affecting the Industrial Concession Highway (including without limitation any resulting damage from ice flows, flooding, avalanche, or washouts), provided such weather conditions are comparable to weather conditions that have been ordinarily or customarily encountered or experienced in the area of the Concession Highway Lands prior to the Effective Date;



- (v) the development, construction or operation of any mode of transportation, including without limitation a highway, that may result in the reduction of the number of vehicles using the Industrial Concession Highway;
- (vi) the existence of the Governing Requirements, any changes to any existing Governing Requirements in accordance with this Agreement, or the exercise by the Minister of a power under an Enactment; or
- (vii) any Discriminatory Action.

(tttt) “**Notice of Discriminatory Action**” has the meaning ascribed thereto in Section 26.3.

(uuuu) “**Notice of Dispute**” has the meaning ascribed thereto in Section 26.3.

(vvvv) “**OMM Commencement Date**” means August 1, 2004.

(wwww) “**OMM Work**” or “**Maintenance Work**” means:

- (i) the operation, management, repair, maintenance and rehabilitation of the Project in accordance with the Maintenance Requirements, including, without limitation,
  - (A) road structure maintenance;
  - (B) drainage maintenance;
  - (C) roadside maintenance;
  - (D) bridge structure maintenance;
  - (E) winter maintenance;
  - (F) traffic maintenance;
  - (G) emergency maintenance;
  - (H) inspection maintenance; and
- (ii) all other Work other than DDB Work.

(xxxx) “**Other Authorizations**” has the meaning ascribed thereto in Section 3.9.

(yyyy) “**Outstanding Debt**” at any time means all amounts of principal, interest (including accrued interest and prepayment interest) and Breakage Costs outstanding on Bona Fide Debt, plus any reasonable costs and expenses relating thereto at that time.

(zzzz) “**Peace Template**” means the Ministry of Transportation standard road design cross-section, attached as Schedule 1.1 (zzzz), and all modifications of such design.

(aaaaa) **“Permits”** means all approvals, certificates of approval, registrations, licences, permits, exemption orders, or declaratory orders conferred under applicable Laws and Regulations, by agreement or otherwise that apply to the Project, including without limitation those possessed by or in favour of the Grantor as of the Execution Date as listed in Schedule 2.10.

(bbbbb) **“Permitted Encumbrances”** means:

- (i) inchoate or statutory liens for Taxes or utility rates or charges not at the time overdue;
- (ii) inchoate or statutory liens for overdue Taxes or utility rates or charges the validity or amount of which a Provincial Entity is contesting in good faith, but only for so long as such contestation effectively postpones enforcement of any such liens;
- (iii) statutory liens (including without limitation any deposits to secure same) incurred or deposits made in the ordinary course of the operation of the Project in connection with workers compensation, employment insurance and similar Laws and Regulations;
- (iv) liens and privileges arising out of any judgments with respect to which a Provincial Entity intends to prosecute appeals or proceedings for review, but only for so long as there is a stay of execution pending the determination of such appeals or proceedings for review;
- (v) security given by a Provincial Entity to a public or private utility or common carrier or any Governmental Authority when required by such utility, carrier or authority in the ordinary course of operating the Project, which singularly or in the aggregate do not materially detract from the value of the asset concerned or materially impair its use in the operation of the business of a Provincial Entity;
- (vi) construction, builders, repair or storage liens arising in the ordinary course of a Provincial Entity’s business for sums which are not overdue or the validity or amount of which is being contested in good faith, but only for so long as such contestation effectively postpones enforcement of any such liens;
- (vii) easements, statutory rights of way, rights of way and any registered restrictions or covenants that run with the Project Lands provided they have been complied with and that, with respect to the Concession Highway Lands, they do not in the aggregate materially and adversely affect the use of the Industrial Concession Highway for Highway Purposes and do not otherwise in the aggregate materially and adversely affect the use of any of the Project Lands for their intended purposes;

- (viii) easements, statutory rights of way or rights of way for, or reservations or rights of others relating to, sewers, water lines, gas lines, pipelines, electric lines, cable television, telegraph and telephone lines, telecommunications services and other similar products or services, provided that they have been complied with and that, with respect to the Concession Highway Lands, they do not in the aggregate materially and adversely affect the use of the Industrial Concession Highway for Highway Purposes and do not otherwise in the aggregate materially and adversely affect the use of any of the Project Lands for their intended purposes;
- (ix) zoning by-laws, official community plans, agricultural land reserve designations, ordinances or restrictions as to the use of real property, and agreements with other persons registered against title to the Project Lands provided they have been complied with and that, with respect to the Concession Highway Lands, they do not materially and adversely affect the use of the Industrial Concession Highway for Highway Purposes and do not otherwise in the aggregate materially and adversely affect the use of any of the Project Lands for their intended purposes;
- (x) any discrepancies or encroachments that up-to-date surveys of the Project Lands might reveal, provided that, with respect to the Concession Highway Lands, they do not materially and adversely affect the use of the Industrial Concession Highway for Highway Purposes and do not otherwise in the aggregate materially and adversely affect the use of any of the Project Lands for their intended purposes;
- (xi) the rights reserved to or vested in any Governmental Authority by any statutory provision;
- (xii) agreements contemplated by this Agreement;
- (xiii) any reservations, limitations, provisos and conditions contained in any transfer from a Provincial Entity to any other person and statutory exceptions, qualifications or limitations to the title;
- (xiv) those interests, rights, privileges and titles excepted and reserved in dispositions of Crown land under Sections 50 and 51 of the *Land Act* (British Columbia);
- (xv) any other Encumbrance expressly permitted hereunder; and
- (xvi) any amendment, extension, renewal or replacement of any of the foregoing.

(cccc) “**person**” means 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, legal representatives or administrators of an individual.

(dddd) “**Phase**” means either of the Bypass or the SYD Upgrade.

(eeee) “**Police Constable**” means:

- (i) an officer or member of the Royal Canadian Mounted Police;
- (ii) an “officer” as defined in the *Police Act* (British Columbia); and
- (iii) a “chief constable” as defined in the *Police Act* or any other ranking officer of the provincial police force or a municipal police department, both as defined in the *Police Act*.

(ffff) “**Police Services Agreements**” means the Provincial Police Service Agreement for the Province of British Columbia, the Municipal Policing Agreement, and the Municipal Police Unit Agreements for the City of Fort Nelson, as such agreements may be amended, supplemented or replaced from time to time.

(gggg) “**Preparatory Work**” has the meaning ascribed to that term in Section 8.1(a).

(hhhh) “**Project**” means, as at any date:

- (i) the Industrial Concession Highway;
- (ii) the Concession and all of the Concessionaire’s Interest;
- (iii) those Existing Improvements still remaining in connection with the Industrial Concession Highway as of such date, together with:
  - (A) all improvements (including without limitation paving and sub-base, but excluding any fee simple interest), signage (including without limitation all road entry and exit signage), chattels, vehicles, machinery, equipment, materials, supplies, tools, appurtenances and fixtures forming a part of and used in connection with the Industrial Concession Highway or the Project Lands from time to time after the Effective Date;
  - (B) all buildings and structures, whether temporary or permanent, erected or located in, on, under or upon the Project Lands from time to time after the Effective Date, including the Construction Work;
  - (C) all other facilities, fixtures, appurtenances and tangible and intangible personal property, including without limitation inventories of any nature whatsoever contained on or attaching to the Project Lands from time to time after the Effective Date or used in connection with the Project Lands after the Effective Date; and

(D) all mechanical, electrical and other systems installed or used in connection with any of the foregoing after the Effective Date; and

(iv) all existing Concessionaire Information,

but specifically excluding cash and insurance proceeds.

(iiii) “**Project Agreements**” means all or any of the material agreements relating to the Project from time to time to which both the Grantor and the Concessionaire are parties, including without limitation this Agreement, and including the Gravel Licences, but excludes any Mortgage and related financing documents and any Lenders Direct Agreement.

(jjjj) “**Project Lands**” means, at any time, the Concession Highway Lands and any other lands to which this Agreement becomes applicable after the Effective Date.

(kkkk) “**Proposed Work**” has the meaning ascribed thereto in Section 11.1.

(llll) “**Provincial Entities**” means Her Majesty the Queen in Right of the Province of British Columbia and any or all departments, ministries, agencies, boards, commissions, corporations or other entities thereof, and for greater certainty includes the Grantor, the Minister, the Ministry and the BC Transportation Financing Authority, any one of which is a “**Provincial Entity**”.

(mmmm) “**Related Person**” or “**persons related to each other**” and similar expressions have the meaning ascribed to related persons in the *Income Tax Act* (Canada).

(nnnn) “**Request for Proposals**” has the meaning ascribed thereto in Section 11.2.

(oooo) “**Required Condition**” has the meaning ascribed thereto in Section 2.9(a).

(pppp) “**Reversion Date**” means the day immediately following the End Date.

(qqqq) “**Reversion Security**” means that form of financial security to be provided to the Grantor by the Concessionaire in the form and the amount required by the Grantor pursuant to Section 2.9(b).

(rrrr) “**Safety Default**” means a failure by the Concessionaire to perform or observe any of its material obligations or covenants under this Agreement which compromises the safety of the public or of the Industrial Concession Highway.

(ssss) “**Season**” means either Summer Season or Winter Season.

(tttt) “**Secondary Incremental Amount**” has the meaning ascribed thereto in Section 9.3.

(uuuu) “**Subcontractor Losses**” means all amounts payable by the Concessionaire to any subcontractor, including, without limitation, payments to subcontractors on termination of their particular subcontract with the Concessionaire as a direct result of the termination of this Agreement, provided that in the case of any subcontractor which is related to the

Concessionaire, such amounts payable by the Concessionaire to such subcontractor represent actual out-of-pocket costs or expenses incurred by such subcontractor which are not paid to a person related to the subcontractor, and which do not include penalties or breakage costs payable by the subcontractor to the Concessionaire or to any person related to the subcontractor.

(vvvvv) “**Substantial Completion**”, “**Substantially Completed**” and similar terms mean that the Construction Work or Phase thereof has been completed in compliance with the provisions of this Agreement and to the same extent as is or may be required for a contract to be deemed to be completed as provided in the *Builders Lien Act* (British Columbia).

(wwwww) “**Summer Season**” means the period from April 1 to November 30 for each Fiscal Year.

(xxxxx) “**SYD Upgrade Availability Fee**” means the amount described in Section 9.10, which, for greater certainty, includes the \$2,750,000 lump sum payment and \$250,000 option fee referred to therein, if paid.

(yyyyy) “**SYD Upgrade**” means the upgrade of that portion of the Industrial Concession Highway from km 30.5 to km 188 and more particularly described in the Construction Requirements.

(zzzzz) “**Taxes**” means any and all present or future taxes, levies, imposts, rates, duties, fees, deductions, withholdings and similar impositions payable, levied, collected, rated, charged, withheld or assessed by virtue of any Laws and Regulations, and any other payments which are imposed in lieu of any of the foregoing, including without limitation real property taxes, local improvement taxes, goods and services taxes, sales taxes, social service taxes, value added taxes, multi-stage taxes, business transfer taxes, property transfer taxes, stamp taxes, capital taxes and income taxes.

(aaaaa) “**Term**” has the meaning ascribed thereto in Section 2.1.

(bbbbb) “**Termination Damages**” has the meaning ascribed thereto in Section 30.1.

(ccccc) “**Third Party Agreements**” has the meaning ascribed thereto in Section 31.1.

(dddddd) “**Totally Completed**” and “**Total Completion**” mean that the Construction Work or, if specifically provided when such term is used, Phase thereof has been totally completed in compliance with the provisions of this Agreement and the Concessionaire has rectified all deficiencies in accordance with Article 20.

(eeeee) “**Transfer**” has the meaning ascribed thereto in Section 28.1.

(ffffff) “*Transportation Investment Act*” means the *Transportation Investment Act* (British Columbia).

(gggggg) “**Travelled Portion**” means the portion of the Industrial Concession Highway that is primarily intended for the linear movement of vehicles.

(hhhhhh) “**Utility Suppliers**” has the meaning ascribed thereto in Section 2.17.

(iiiiii) “**Valuator**” means a fully qualified member of the Canadian Institute of Chartered Business Valuators.

(jjjjjj) “**Variable Interest Rate**” means interest at a variable rate per annum equal on each day to the prime lending rate charged by the Canadian Imperial Bank of Commerce for Canadian dollar loans to commercial borrowers in Canada.

(kkkkkk) “**Winter Season**” means the period from December 1 to March 31 for each Fiscal Year.

(llllll) “**Work**” means:

- (i) the DDB Work and the OMM Work; and
- (ii) all other work relating to the Project to be performed by or on behalf of the Concessionaire as described in this Agreement.

## **1.2 Number and Gender**

In this Agreement words in the singular include the plural and vice-versa and words in one gender include all genders.

## **1.3 Headings**

The division of this Agreement into articles, sections and other subdivisions are for convenience of reference only and shall not affect the construction or interpretation of this Agreement. The headings in this Agreement are not intended to be full or precise descriptions of the text to which they refer and shall not be considered part of this Agreement.

## **1.4 References to any Agreement**

Unless specified otherwise, a reference in this Agreement to an agreement, document, protocol, specification or standard (including without limitation to this Agreement) at any time refers (subject to all relevant approvals) to that agreement, document, protocol, specification or standard as amended, supplemented, restated, substituted, replaced, novated or assigned at such time as permitted under this Agreement or as agreed by the parties.

## **1.5 Meaning of Including**

In this Agreement, whether or not expressly stated, the words “include”, “includes” or “including” mean “include without limitation”, “includes without limitation” and “including without limitation” respectively, and the words following “include”, “includes” or “including” shall not be considered to set forth an exhaustive list.

## **1.6 Trade Meanings**

Unless otherwise defined herein, words or abbreviations which have well-known trade meanings are used herein in accordance with those meanings.

## **1.7 Enactments**

Unless specified otherwise, a reference in this Agreement to an Enactment refers to that Enactment in force at the date hereof and as the same may be amended, re-enacted, consolidated or replaced from time to time, and any successor thereto.

## **1.8 Generally Accepted Accounting Principles**

All accounting and financial terms used herein, unless specifically provided to the contrary, shall be interpreted and applied in accordance with Canadian generally accepted accounting principles and generally accepted accounting practice, consistently applied unless otherwise noted herein.

## **1.9 Calculation of Time**

For purposes of this Agreement, a period of days shall be deemed to begin on the first day after the event which began the period and to end at 5:00 p.m. (Pacific Standard time or Pacific Daylight Saving time, as the case may be) on the last day of the period.

## **1.10 Entire Agreement and Disclaimer**

This Agreement and any agreement contemplated hereby constitute the entire agreement between the parties and supersede all prior agreements, negotiations, discussions and understandings, written or oral, between the parties hereto. There are no representations, warranties, conditions or other agreements, whether direct or collateral, or express or implied that form part of or affect this Agreement, or which induced either party hereto to enter into this Agreement or on which reliance is placed by either party hereto, except as specifically set out in this Agreement. For greater certainty, the Concessionaire acknowledges and agrees that the Grantor Information is not guaranteed, represented or warranted by the Provincial Entities to be accurate, complete, appropriate, comprehensive, exhaustive or reliable in whole or in part, except as set out in Section 16.1(d) and Section 23.3(b), and shall not be considered or treated as such by the Concessionaire. Neither the Provincial Entities nor their servants, agents, representatives, contractors or employees, including without limitation the Grantor's Advisors, shall have any responsibility or incur any liability whatsoever to the Concessionaire as a result of or in relation to the Grantor Information being inaccurate, incomplete, inappropriate, incomprehensive, inexhaustive or unreliable in whole or in part, except as set out in Section 16.1(d) and Section 23.3(b).

## **1.11 Amendment**

This Agreement may only be amended, changed or supplemented by a written agreement signed by the parties provided that, if and to the extent that, after the date hereof, there is an amendment of the text of any provision of any Enactment which is expressly recited herein, then



this Agreement shall be deemed to be amended without further act of the parties to comply with such amendment to the Enactment, provided, however, nothing set out in this Section 1.11 shall restrict the Concessionaire's rights under this Agreement, including Article 8 or Article 26.

### **1.12 Waiver of Rights**

Any waiver of, or consent to depart from, the requirements of any provision of this Agreement shall be effective only if it is in writing and signed by the party giving it, and only in the specific instance and for the specific purpose for which it has been given. No failure on the part of any party to exercise, and no delay in exercising, any right under this Agreement shall operate as a waiver of such right. No single or partial exercise of any such right shall preclude any other or further exercise of such right or the exercise of any other right.

### **1.13 Severability**

Each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law. If any provision of this Agreement or the application thereof to any person or circumstances is determined to be invalid or unenforceable to any extent, (i) the remainder of this Agreement or the application of such provision to any other person or circumstance shall not be affected thereby, and (ii) the parties hereto shall negotiate in good faith to amend this Agreement to implement its provisions and the intent of the parties. If the parties cannot agree on an appropriate amendment, either party may refer the matter for determination pursuant to the dispute resolution procedure in Article 32. If by means of the dispute resolution procedure the parties are unable, as a result of Laws and Regulations, to resolve the matter in a manner which effectively entitles the Grantor and the Concessionaire to have the same rights after the determination of invalidity or unenforceability as before, the Provincial Entities shall have the right to either enact and cause to come into force an Enactment to provide for the same or substantially the same rights as were determined to be invalid or unenforceable, or the Grantor shall have the right to terminate this Agreement, provided that in the event the determination of invalidity or unenforceability has a material effect on the rights of the Concessionaire, either the Provincial Entities shall enact or cause to come into force such an Enactment or the Grantor shall terminate this Agreement. In the event of termination by the Grantor under this Section 1.13, the provisions of Article 30 shall apply.

### **1.14 Governing Law**

This Agreement shall be governed by and interpreted and enforced in accordance with, the laws of British Columbia and the laws of Canada applicable therein (excluding any conflict of laws rule or principle which might refer such interpretation to the laws of another jurisdiction). Subject to Article 32, each party irrevocably submits to the exclusive jurisdiction of the courts of British Columbia.

### **1.15 Schedules**

The schedules attached hereto shall form part of this Agreement.

## **1.16 Procedure for Obtaining Approvals from the Grantor**

If this Agreement requires or provides for a permit, approval or consent (each, an “**Approval**”) from or by the Grantor of or to any action, person, document, budget, list, plan or other matter contemplated by this Agreement, the following provisions shall apply:

- (a) the request for Approval must be in writing and:
  - (i) contain or be accompanied by any documentation or information required for such Approval in reasonably sufficient detail, as determined by the Grantor;
  - (ii) clearly describe the matter in respect of which such Approval is being sought;
  - (iii) form the sole subject matter of the correspondence containing such request for Approval; and
  - (iv) state clearly that such Approval is being sought;
- (b) the Approval must be in writing;
- (c) the Approval shall not be unreasonably or arbitrarily withheld or delayed;
- (d) the Grantor, after the giving of a notice by the Concessionaire requesting an Approval, shall advise the Concessionaire by notice either that it grants the Approval or that it withholds the Approval and the Grantor, if it withholds the Approval, shall set forth in reasonable detail its reasons for withholding the Approval, which reasons may include the insufficiency, as determined by the Grantor, of the information or documentation provided;
- (e) if the responding notice of the Grantor referred to in paragraph (d) above states that the Grantor does not grant the Approval, the Concessionaire may take whatever steps may be necessary to satisfy the objections of the Grantor set out in such responding notice and, thereupon, may resubmit such request for Approval from time to time, and the provisions of this Section 1.16 shall again apply until such time as the Approval is finally obtained;
- (f) if the withholding of an Approval referred to in paragraph (e) above is subsequently overruled, such Approval shall be deemed to have been given on the date of the final determination of such overruling; and
- (g) any dispute as to whether or not an Approval has been unreasonably withheld or delayed shall be resolved in accordance with the provisions of Article 32,

provided that:

- (h) if it is expressly stated herein that such Approval may be unreasonably or arbitrarily withheld or is subject to the sole and absolute discretion of the Grantor, then the provisions of Article 32 and of paragraphs (c) to (g), inclusive, above shall not apply.

### **1.17 Approved Documents Not to be Amended**

Subject to the other provisions hereof, wherever in this Agreement an Approval is required with respect to any document, proposal, certificate, plan, drawing, specification, contract, agreement, budget, schedule, report or other written instrument whatsoever (a “**Document**”), following the Approval, the Document shall not be amended, supplemented, replaced, revised, modified, altered or changed in any manner whatsoever without obtaining a further Approval in accordance with the provisions of Section 1.16.

### **1.18 Conflict Between Agreements and Documents**

- (a) If there is any conflict between the provisions of the documents mentioned below the following order of precedence shall apply for interpretation purposes:
  - (i) the provisions of applicable Laws and Regulations shall take precedence over the provisions of this Agreement and of the other Governing Documentation;
  - (ii) the provisions of Permits, Governmental Authorizations and Other Authorizations shall take precedence over the provisions of this Agreement;
  - (iii) the provisions of the Governing Requirements shall take precedence over the provisions of this Agreement, subject to Section 5.1 of this Agreement;
  - (iv) the provisions of this Agreement (excluding the Schedules) shall take precedence over the Schedules (other than those Schedules containing Governing Requirements) to this Agreement unless otherwise expressly stated in any Schedule; and
  - (v) the provisions of this Agreement shall take precedence over any other Project Agreement, unless otherwise expressly stated in this Agreement or such other Project Agreement.
- (b) In the event of a conflict between the provisions of any of the Schedules to this Agreement, the Concessionaire shall comply with the provisions that require the more stringent compliance by the Concessionaire.
- (c) If the Governing Documentation contains both general and more specific provisions applicable in respect of the same matter, the more specific provisions shall take precedence.

### **1.19 Accuracy of Concessionaire**

The notices, plans, statements, certificates, proposals, schedules and reports required to be furnished by or on behalf of the Concessionaire in connection with this Agreement shall be submitted to the Grantor in a format prescribed by this Agreement or as otherwise Approved by the Grantor, and the Concessionaire shall ensure, and shall conduct an Audit as required to ensure, that the information contained therein is presented fairly and is true, accurate and complete in every material respect as at the dates and for the periods indicated and omits no material fact necessary to make such information or statements or any of them not misleading.

### **1.20 Scope of Concession**

With the exception of any expansion or extension of the Industrial Concession Highway expressly required or permitted pursuant to Article 11 of this Agreement, the scope of this Agreement is limited to the obligations, duties and agreements set out in this Agreement.

### **1.21 No Fettering of the Provincial Entities**

The Concessionaire acknowledges that nothing in this Agreement shall fetter or otherwise interfere with the right and authority of the Provincial Entities to enact any Enactment within their constitutional authority or to administer, apply and enforce applicable Laws and Regulations. Except as specifically provided in this Agreement, or unless compensation or other relief is otherwise available or provided for pursuant to applicable Laws and Regulations, the Concessionaire shall not be entitled to claim or receive any compensation or other relief whatsoever under this Agreement or otherwise against the Provincial Entities as a result of the enactment of any Enactment within their constitutional authority, or the administration, application or enforcement of Laws and Regulations, by the Provincial Entities.

### **1.22 Set-Off**

Without limiting any other right of the Grantor under this Agreement, the Grantor may, in its sole discretion at any time during the Term of this Agreement, set off any and all moneys payable by the Grantor to the Concessionaire pursuant to this Agreement against any and all moneys then owed to the Grantor by the Concessionaire pursuant to this Agreement, except that:

- (a) the Grantor shall not be entitled to set off or withhold any amount payable to the Concessionaire (other than the Maintenance Fee), including the Availability Fee, unless a Concessionaire Default has occurred and it persists and all cure periods granted to the Concessionaire have expired without the default being cured and each Mortgagee has either not exercised its rights in accordance with any Lenders Direct Agreement to attempt to cure the default or the Mortgagee has ceased attempting to cure the default or the period for such curing by the Mortgagee has expired without the default being cured; and

- (b) the Grantor shall not be entitled to set off or withhold any amounts payable on termination of this Agreement (other than as specifically provided in Schedule 27.2(a)), except for amounts thereof in excess of the Outstanding Debt.

The Grantor will not take any steps to cause a set-off or withholding under the *Financial Administration Act* that would be contrary to the provisions of (a) or (b) above, unless legally obligated to do so, whether relating to monies owed to the Grantor by the Concessionaire pursuant to this Agreement or otherwise.

### **1.23 Commercially Reasonable Manner/No Unreasonable Delay**

Whenever this Agreement requires or provides for the approval (including Approval), consent, determination, opinion, discretion or satisfaction of the Provincial Entities or the Concessionaire or similar acts of the Provincial Entities or the Concessionaire or refers to a matter being required by the Provincial Entities or the Concessionaire, requested by the Provincial Entities or the Concessionaire, acceptable to the Provincial Entities or the Concessionaire or considered by the Provincial Entities or the Concessionaire, or uses similar wording, the Provincial Entities or the Concessionaire, as the case may be, must act without unreasonable delay and, unless it is specifically provided that the Provincial Entities or the Concessionaire may act in its sole and absolute discretion, must act in a commercially reasonable manner in connection therewith.

### **1.24 Meaning of “Related”**

Whenever used in this Agreement, the term “related” shall have the meaning given to that term in the *Income Tax Act* (Canada), as amended from time to time, and in relation to any partnership, a person will be regarded as related to the partnership if such person is related to any of the partners of that partnership.

## **ARTICLE 2 CONCESSION, GROUND LEASE AND TRANSFER OF ASSETS**

### **2.1 Grant of Concession**

As of and with effect on the Execution Date, the Grantor hereby grants to the Concessionaire, during the period (the “**Term**”) commencing on the Execution Date and expiring on the 16<sup>th</sup> anniversary of the Execution Date or until sooner terminated in accordance with the provisions of this Agreement, the exclusive concession (the “**Concession**”) to operate, manage, maintain, upgrade, repair, rehabilitate, construct and reconstruct the Industrial Concession Highway for the use by vehicles of the Industrial Concession Highway for Highway Purposes in accordance with the provisions of this Agreement, or for any other purpose Approved, at the request of the Concessionaire, by the Grantor from time to time, which Approval may be withheld in the Grantor’s sole and absolute discretion or for any other purpose selected by the Grantor provided such purpose does not interfere with the Project or the Concessionaire’s rights under this Agreement.

## **2.2 Ground Lease**

In order to permit the Concessionaire to effectively carry out the Concession granted to it under Section 2.1, the Grantor hereby demises and leases to the Concessionaire the Concession Highway Lands as of the Execution Date and the Concessionaire leases the Concession Highway Lands from the Grantor, as of and with effect on the Execution Date and in accordance with the provisions of this Agreement, to have and to hold for the Term. Notwithstanding the foregoing, the lease of the 15.5 km section of the Industrial Concession Highway from the end of the Clark Lake Road to approximately km 30.5 will be surrendered to the Grantor, without any further act of the parties, upon the Bypass being Commissioned and Opened. Other than as expressly set out in this Agreement, all lands leased to the Concessionaire under or pursuant to this Agreement are and shall be leased in an “as is” condition and the Grantor makes no representations or warranties with respect to such lands. The Concessionaire acknowledges that the owner of the Concession Highway Lands is BC Transportation Financing Authority, which has leased such lands to the Grantor.

## **2.3 Consideration**

The Concessionaire shall pay to the Grantor for the grant of the Concession under this Agreement the sum of \$10 payable on the Execution Date of this Agreement, plus applicable goods and services taxes.

## **2.4 Rent**

The Concessionaire shall pay to the Grantor for the lease of the Concession Highway Lands during the Term, without any deduction, abatement, set-off or compensation whatsoever and in addition to all other payments to be made by the Concessionaire under this Agreement, prepaid rent in the amount of \$10 due upon the Execution Date.

## **2.5 Quiet Enjoyment**

Subject to the provisions of this Agreement and to applicable Laws and Regulations, the Concessionaire shall have and may peaceably enjoy and possess the Concession Highway Lands during the Term, without any interruption or disturbance whatsoever from the Grantor or any person lawfully claiming from or under the Grantor.

## **2.6 Use**

- (a) The Concession Highway Lands may only be used by the Concessionaire for the purpose of the operation, management, repair, maintenance, upgrade, rehabilitation, construction and reconstruction for use by vehicles of the Industrial Concession Highway for Highway Purposes in compliance with the provisions of this Agreement, including without limitation any expansion or extension of the Industrial Concession Highway under Article 11, and any other purpose Approved by the Grantor from time to time in accordance with Section 2.1.

- (b) Subject to the terms of this Agreement and to applicable Laws and Regulations, the Concessionaire shall, at all times during the Term:
- (i) permit and provide barrier free access to the Industrial Concession Highway by all persons and vehicles which are authorized to have access to Highways; and
  - (ii) cause the Industrial Concession Highway to be continuously open and operational for use by all members of the public for Highway Purposes as a Highway 24 hours a day, seven days a week, during the Term;

subject only to:

- (A) closures expressly permitted under this Agreement, the *Highway Act*, the *Ministry of Transportation and Highways Act* (British Columbia) or any other applicable Laws and Regulations;
- (B) closures resulting from the exercise of any traffic control, inspection or safety measures or the exercise of any other police powers or authority by one or more Police Constables or the RCMP, a provincial police force or a municipal police department; and
- (C) any and all applicable restrictions affecting specific traffic, vehicles or transported goods, including without limitation overheight and overweight vehicles, under Laws and Regulations, including without limitation the *Highway Act*, the *Motor Vehicle Act*, the *Motor Carrier Act* (British Columbia), the *Commercial Transport Act* (British Columbia) and the *Transportation of Dangerous Goods Act* (Canada),

in all cases without requiring any user of the Industrial Concession Highway to (a) provide any pre-notification of such user's intended use, (b) provide any post-notification of such user's actual use, (c) obtain any pre-approval to use the Industrial Concession Highway or (d) make any payment to the Concessionaire therefor.

## **2.7 Transfer of Existing Improvements and Assets "As Is Where Is"**

As of and with effect on the Execution Date, in consideration of the payment of \$10 by the Concessionaire to the Grantor, the receipt and sufficiency of which is hereby acknowledged, the Grantor hereby transfers, conveys and assigns or shall cause to be transferred, conveyed and assigned to the Concessionaire all of the right, title and interest of the Grantor in and to the Existing Improvements (but not, for greater certainty, any fee simple interest in the Concession Highway Lands in, on, under or upon which the Existing Improvements are located) in an "as is, where is" condition without representation or warranty, subject to the provisions of this Agreement. From and after such transfer of the Existing Improvements to and including the End Date, all Existing Improvements shall be owned by the Concessionaire as contemplated by

Section 2.8. All goods and services taxes and provincial social services (sales taxes) payable on such transfer shall be payable on the Execution Date in accordance with Section 2.15.

## **2.8 Ownership of Improvements**

As between the Grantor and the Concessionaire, during the Term, the Existing Improvements and the Project (excluding the Project Lands and the fee simple in any other real property) shall be the separate property of the Concessionaire and not of the Grantor subject to the provisions of this Agreement. All buildings, structures, improvements, appurtenances and fixtures constructed, erected or situated upon the Project Lands subsequent to the Effective Date and prior to the Grantor becoming the owner of the Project pursuant to the reversion set out in Section 31.1(a) shall be owned by the Concessionaire and not by the Grantor. As of the Reversion Date, in consideration of the Grantor assuming full responsibility for the operation, management, repair, upgrade, maintenance, rehabilitation, construction and reconstruction of the Project as provided in Section 31.1(a), but subject to Section 2.9, all improvements on the Project Lands and all improvements comprising the Project (other than any vehicles, non-fixed equipment or inventories owned by the Concessionaire, which shall remain the property of, and may be removed by, the Concessionaire) shall become the absolute property of the Grantor without any payment therefor to the Concessionaire (except as set out in Article 25, Article 26, Article 27 and Article 30), and, subject to any Lenders Direct Agreement, shall be free and clear of all Encumbrances other than Permitted Encumbrances (all of which, including any Concessionaire Permitted Encumbrances, but excluding any Permitted Encumbrances, the Concessionaire shall satisfy and discharge by the Reversion Date) and without any action whatsoever being necessary on the part of the Grantor. Any other interest in the Project that may now or hereafter be created by the Concessionaire and all dealings by the Concessionaire with the Project and any other improvements on the Project Lands that in any way affect title thereto shall be subject to this right of the Grantor.

## **2.9 Surrender of Project in Required Condition**

In addition and without prejudice to the other rights of the Grantor upon the expiration or other termination of this Agreement, the following shall apply unless the termination is pursuant to Section 27.4 or Article 30:

- (a) Subject to paragraph (b) below, the Concessionaire shall surrender the Project in the condition that the Project is required by the provisions of this Agreement to be operated, managed, repaired, maintained, upgraded, rehabilitated, constructed and reconstructed, normal wear and tear, and any environmental matters in existence at the Execution Date (except those environmental matters coming into existence between the Effective Date and the Execution Date as a result of anything done by the Concessionaire or those for whom it is responsible) excepted (the “**Required Condition**”) and the Concessionaire shall do and perform all such things as may be necessary to ensure that the Project is in the Required Condition on the Reversion Date. The Grantor may amend the Required Condition from time to time to take into account any changes, improvements or upgrades to the Project resulting from a Change Order or the completion by the Concessionaire or a person related to the Concessionaire, of any Proposed Work under Article 11, or



to take into account changes to the required OMM Work to be performed by the Concessionaire in respect of any Proposed Work under Article 11 completed by any person not related to the Concessionaire.

- (b) An Independent Engineering Consultant shall, not later than 13 months prior to the Reversion Date, conduct comprehensive inspections of the Project, at the Concessionaire's sole cost, and advise the Grantor and the Concessionaire by written report as to the condition of the Project and all of its components, the functioning of the Project and all of its components and as to any work required to be undertaken and completed in order that the Project will be in the Required Condition by the Reversion Date and for that purpose the Independent Engineering Consultant shall prepare a statement of required work (the "**Statement of Required Work**") setting out the work to be performed by the Concessionaire in order for the Project to be in the Required Condition by no later than the Reversion Date and the Concessionaire shall commence such work and diligently prosecute the same to completion. If either party disagrees with the Independent Engineering Consultant's Statement of Required Work, such party may deliver a notice of dispute to the other party within 30 days of receipt of the Statement of Required Work and, in such event, the matter shall be resolved in accordance with Article 32. The Concessionaire shall deliver to the Grantor, within 15 days of receipt of the Statement of Required Work, the Reversion Security in an amount equal to the value of the work to be performed to satisfy the Statement of Required Work, as determined by the Independent Engineering Consultant. If the Concessionaire disputes the Statement of Required Work, the Concessionaire shall still be required to deliver the Reversion Security but the amount of the Reversion Security will be adjusted once the value of the Statement of Required Work has been resolved in accordance with this Agreement.
- (c) If at any time during the 12 months prior to the Reversion Date, the Concessionaire, in the opinion of the Grantor, has not completed all the work required under the Statement of Required Work, is not diligently proceeding to complete the work under the Statement of Required Work so that, in the opinion of the Grantor, there is a risk that the Project will not be surrendered on the Reversion Date in the Required Condition, or fails to deliver the Reversion Security as and when due, the Grantor may, in addition to any other remedies available to it under this Agreement, do, or cause to be done, at the Concessionaire's expense, the work required under the Statement of Required Work (and any other work that may be required to put the Project in the Required Condition on the Reversion Date).
- (d) If the Grantor elects to do or causes to be done the work under paragraph (c) above, the Concessionaire shall pay all reasonable costs therefor upon the demand of the Grantor and the Grantor may set off any portion of the Maintenance Fee payable to the Concessionaire in order to reimburse the Grantor in respect of or pay for the work required under paragraph (c).

- (e) For the purposes of determining whether the Concessionaire has complied with the Statement of Required Work or is diligently proceeding to complete the work under the Statement of Required Work under paragraph (c) above, the Grantor may rely on the advice of the Independent Engineering Consultant.
- (f) On the Reversion Date or as soon thereafter as the Independent Engineering Consultant is able to do so, it shall advise the Grantor whether the Project is in the Required Condition.
- (g) The Concessionaire shall do all such things as the Grantor may reasonably request to effect an orderly transition of control, operation and ownership of the Project from the Concessionaire to the Grantor on the Reversion Date, including without limitation the following:
  - (i) at the request of the Grantor, the Concessionaire shall enter into a formal agreement on or about the Reversion Date for the purpose of better setting out the duties and responsibilities of the Concessionaire, which agreement shall be on terms and conditions satisfactory to the Grantor and the Concessionaire, each acting reasonably. If either party is unable to agree upon such terms and conditions, that party may refer the matters in dispute for resolution in accordance with Article 32;
  - (ii) except as otherwise directed or Approved by the Grantor, terminate the employment of all employees employed in any aspect of the Project and ensure that all amounts owing or otherwise relating (including without limitation benefits) to such employees in accordance with applicable Laws and Regulations are paid in full or proper provision is made therefor;
  - (iii) provide representatives of the Grantor commencing at least 12 months prior to the Reversion Date, with access to and the assistance of such knowledgeable personnel of the Concessionaire as the Grantor may deem necessary in order to allow the Grantor to familiarize itself with the operation, management, maintenance, upgrade, rehabilitation, construction and reconstruction of the Project;
  - (iv) take or cause to be taken all such actions as are necessary to permit the orderly and timely transfer to the Grantor of all assets comprising the Project as of the Reversion Date, including without limitation all Permits, Governmental Authorizations and Other Authorizations;
  - (v) remove from the Project Lands all plant, material and debris that are designated in writing by the Grantor to be so removed; and
  - (vi) assist the Grantor in such other manner as the Grantor may require to ensure the orderly transition of control, operation and ownership of the Project.

- (h) The parties acknowledge that the above procedure including time limits in Section 2.9(b) and 2.9(c) are designed for the expiration of this Agreement as opposed to other termination of this Agreement. In the case of any other termination of this Agreement, appropriate changes will be made to the procedures including time limits herein as agreed by the parties or determined in accordance with Article 32.

## **2.10 Transfer of Permits and Authorizations**

- (a) As of and with effect from the Execution Date, the Grantor transfers and assigns, or will cause to be transferred and assigned, to the Concessionaire all of the right, title and interest of the Grantor in, to and under all Permits as of the Execution Date, to the extent such Permits apply to the Industrial Concession Highway, without representation or warranty. Where the consent of any Governmental Authority or any other person is required for any such transfer or assignment, such transfer and assignment shall be subject to obtaining such consent. The Grantor shall use commercially reasonable efforts to seek such consent and the Concessionaire shall co-operate with the Grantor in that regard.
- (b) Subject to paragraph (a) above, the Concessionaire shall assume and stand liable for all of the responsibilities, obligations, liabilities, duties, powers, benefits and advantages under all Permits transferred and assigned pursuant to paragraph (a) above in respect of periods on and after the Execution Date.
- (c) As of and with effect from the Execution Date, the Grantor transfers and assigns, or will cause to be transferred and assigned, to the Concessionaire all Governmental Authorizations and Other Authorizations that were possessed by the Grantor as of the Execution Date, to the extent such Governmental Authorizations and Other Authorizations apply to the Industrial Concession Highway. Where the consent of any Governmental Authority or any other person is required for any such transfer or assignment, such transfer and assignment shall be subject to obtaining such consent. The Grantor shall use commercially reasonable efforts to seek the required consent and the Concessionaire shall co-operate with the Grantor in that regard.
- (d) Subject to obtaining consents under paragraph (c) above, the Concessionaire shall assume and stand liable for all of the responsibilities, obligations, liabilities, duties, powers, benefits and advantages under the Governmental Authorizations and Other Authorizations assigned or conferred upon it pursuant to paragraph (c) above in respect of periods from and after the Execution Date.
- (e) Notwithstanding the provisions of this Section 2.10, to the extent the Permits, Governmental Authorizations and Other Authorizations are not assignable or are not assignable without consent, the Grantor, at the request of the Concessionaire, shall extend or make available to the Concessionaire, such Permits, Governmental Authorizations and Other Authorizations to the extent permitted or feasible in the circumstances, provided that the covenants, obligations and liabilities thereunder

shall be observed and performed by the Concessionaire and all benefits and obligations shall be for the account of the Concessionaire.

## **2.11 No Encumbrances**

The Concessionaire shall not do or fail to do any act or thing that will result in any Encumbrance (other than a Concessionaire Permitted Encumbrance or a Permitted Encumbrance) affecting the Project Lands or the Project and shall promptly remove any Encumbrance (other than a Concessionaire Permitted Encumbrance or Permitted Encumbrance) against the Project Lands or the Project, unless the Encumbrance came into existence as a result of an act of or omission by a Provincial Entity which in turn was not caused by an act or omission of the Concessionaire. The Concessionaire, if requested, shall use commercially reasonable efforts, at the sole cost and expense of the Grantor, to assist the Grantor in attempting to remove any Encumbrance which has come into existence as a result of an act of or omission by a Provincial Entity or its agents.

## **2.12 Observance of Governing Documentation, Laws and Regulations**

During the Term, the Concessionaire shall comply with, and shall cause the Project and the operation, management, repair, maintenance, rehabilitation, upgrade, construction and reconstruction to be in compliance with, all Governing Documentation, and Laws and Regulations. For greater certainty, nothing in this Agreement shall abrogate or diminish any responsibilities or obligations of the Concessionaire under any Laws and Regulations.

## **2.13 Reservation of Rights in Favour of Grantor**

Notwithstanding the grant of the Concession and the lease of the Concession Highway Lands to the Concessionaire, and the use by the Concessionaire of the Concession Highway Lands for Highway Purposes, but without derogating from the right of the Concessionaire to use the Concession Highway Lands in accordance with this Agreement, the Grantor shall continue to be able to use the Concession Highway Lands and the Industrial Concession Highway for the following purposes and hereby reserves itself and the Provincial Entities, as applicable, all rights and powers which may be necessary to achieve such purposes at its sole cost and expense:

- (a) **Inspection Stations.** In addition to any existing vehicle inspection and weigh stations in connection with the Industrial Concession Highway, the Provincial Entities may design, construct, operate, manage, maintain, repair, rehabilitate and reconstruct other vehicle inspection and weigh stations on the Concession Highway Lands and enter upon the Concession Highway Lands to construct linking and access roads or lanes allowing trucks and other vehicles to travel from the Industrial Concession Highway to such existing and new stations and to return to the Industrial Concession Highway without any charge, provided that the Grantor will use commercially reasonable efforts to ensure that the Provincial Entities minimize or cause to be minimized any physical disruption to the operation of the Industrial Concession Highway or physical damage or physical disruption to the Project. The Grantor shall compensate the Concessionaire only for Concessionaire Losses resulting from any such physical disruption or physical

damage. The Grantor shall remedy any physical disruption or physical damage caused by a Provincial Entity's actions under this Section 2.13(a). The Concessionaire's entitlement to Fees otherwise payable under this Agreement shall not be affected by any physical disruption or physical damage resulting from a Provincial Entity's actions under this Section 2.13(a) and the Grantor will not be permitted to make any set off from the Fees with respect to these actions. No liquidated damages will be payable under Article 14 as a result of such physical disruption or physical damage. The Concessionaire shall not be entitled to make and hereby waives any Claim against the Provincial Entities in respect of such physical disruption or physical damage except as provided in this Section 2.13(a).

- (b) **Pipelines/Utilities.** The Concessionaire acknowledges that the Provincial Entities may install, or authorize the installation of new pipelines and utilities, including without limitation oil and gas pipelines, water and sewer lines, fibre optic cable and other electronic communications, in, along, under, across or through the Concession Highway Lands, provided that the Grantor will use commercially reasonable efforts to ensure that the Provincial Entities minimize or cause to be minimized any physical disruption to the operation of the Industrial Concession Highway or physical damage or physical disruption to the Project. The Grantor shall compensate the Concessionaire only for Concessionaire Losses resulting from any such physical disruption or physical damage. The Grantor shall remedy any physical disruption or physical damage caused by a Provincial Entity's actions under this Section 2.13(b). The Concessionaire's entitlement to Fees otherwise payable under this Agreement shall not be affected by any physical disruption or physical damage resulting from a Provincial Entity's actions under this Section 2.13(b) and the Grantor will not be permitted to make any set off from the Fees with respect to these actions. No liquidated damages will be payable under Article 14 as a result of such physical disruption or physical damage. The Concessionaire shall not have the right to install such utilities, except to the extent that such utilities are necessary for the operation and maintenance of the Industrial Concession Highway. No such utilities shall be built in such a manner as to prevent or impede the operation of the Industrial Concession Highway. The Concessionaire shall not be entitled to make and hereby waives any Claim against the Provincial Entities in respect of such physical disruption or physical damage except as provided in this Section 2.13(b).
- (c) **Road Tie-Ins.** The Provincial Entities may design and construct or cause to be designed and constructed connections between the Industrial Concession Highway and linking or access roads, provided that the Grantor will use commercially reasonable efforts to ensure that the Provincial Entities minimize or cause to be minimized any physical disruption to the operation of the Industrial Concession Highway or physical damage or physical disruption to the Project. The Grantor shall compensate the Concessionaire only for Concessionaire Losses resulting from any such physical disruption or physical damage. The Grantor shall remedy any physical disruption or physical damage caused by a Provincial Entity's actions under this Section 2.13(c). The Concessionaire's entitlement to Fees otherwise payable under this Agreement shall not be affected by any

physical disruption or physical damage resulting from the a Provincial Entity's actions under this Section 2.13(c) and the Grantor will not be permitted to make any set off from the Fees with respect to these actions. No liquidated damages will be payable under Article 14 as a result of such physical disruption or physical damage. The Concessionaire shall not be entitled to make and hereby waives any Claim against the Provincial Entities in respect of such physical disruption or physical damage except as provided in this Section 2.13(c).

The Concessionaire is hereby deemed to have granted to the Provincial Entities such easements for access, support, repair and maintenance as may be necessary for the aforesaid purposes, which exercise of such easements shall not constitute an impairment of the Concessionaire's quiet enjoyment of the Industrial Concession Highway.

#### **2.14 Assignment of Plans, Specifications and Software**

The Grantor will or will cause other parties to assign, sublicense or provide copies to the Concessionaire to the extent it is able to do so and subject to such consent or approval as may be required, of the Grantor Information consisting of the books, records, plans, specifications and software set out in Schedule 2.14 (collectively, the "**Books and Records**") for the Term. If consent or approval is required to assign, sublicense or provide copies of any of the Books and Records, the Grantor will use reasonable commercial efforts to seek such consent or approval and the Concessionaire shall co-operate with the Grantor in that regard.

#### **2.15 Payment of Taxes**

The Concessionaire shall pay when due all Taxes which are payable in respect of (i) the operations at, occupancy of, or conduct of business in or from the Project and (ii) fixtures or personal property included in the Project, except that the Grantor shall pay any real property taxes payable by the Concessionaire in relation to the Project.

#### **2.16 Right to Contest**

The Concessionaire shall have the right to contest in good faith the validity or amount of any Taxes which it is responsible to pay under Section 2.15 provided that (i) the Concessionaire has given prior notice to the Grantor of each such contest, (ii) no contest by the Concessionaire may involve the possibility of forfeiture or sale of all or any part of the Project, and (iii) upon the final determination of any contest by the Concessionaire, if the Concessionaire has not already done so, the Concessionaire shall pay the amount found to be due, together with any costs, liquidated damages and interest.

#### **2.17 Utility Expenses**

The Concessionaire will be responsible for dealing directly with British Columbia Hydro and Power Authority and any other supplier of utilities and services (collectively, the "**Utility Suppliers**") for all utilities and services used in or supplied to the Project, including without limitation gas, electricity, light, heat, power, telephone and water, and shall make payment for such utilities directly to the Utility Suppliers.

## **2.18 Net Agreement**

Except as otherwise expressly provided in this Agreement, this Agreement shall be a completely carefree net agreement for the Grantor. All charges, expenses, payments and costs of every nature and kind incurred in respect of the Project or for any matter or thing affecting the Project shall, except as otherwise expressly provided in this Agreement, be borne by the Concessionaire. The Grantor shall not be responsible for and the Concessionaire shall pay all charges, expenses, payments, costs, claims and liabilities in connection with the Project or the use of or occupancy of the Project Lands, except as otherwise expressly provided in this Agreement. Except as otherwise expressly provided in this Agreement, the Grantor shall be responsible for all employee and administrative costs incurred in respect of the performance of its obligations under this Agreement.

## **2.19 No Re-Entry**

Unless expressly so stated in writing by the Grantor, any entry by the Grantor onto the Project Lands required or permitted under this Agreement shall not constitute a re-entry, trespass or a breach of the covenant for quiet enjoyment contained in this Agreement.

## **2.20 Gravel Pits**

- (a) The Grantor shall use its commercially reasonable efforts to ensure that the Concessionaire shall be entitled to extract gravel from the gravel pits identified in Schedule 2.20(a) (the “**Gravel Pits**”) without payment of any fee or charge for use by the Concessionaire or its contractors in order to fulfil its obligations and perform under this Agreement, but for no other purpose. For greater certainty, the Concessionaire shall not be entitled to sell or otherwise licence or dispose of material from the Gravel Pits to any third party except its contractors in fulfilling the Concessionaire’s obligations and performing under this Agreement, or to otherwise use the Gravel Pits for any purpose other than the performance of the Concessionaire’s obligations hereunder.
- (b) As a condition of exercising its right in paragraph (a) above, the Concessionaire shall execute a non-exclusive Gravel Licence substantially in the form set out in Schedule 2.20(b) (the “**Gravel Licence**”) incorporating the terms set out in this Section 2.20, which shall terminate on the date of termination of this Agreement. The Grantor will cause the Gravel Licence to be assignable by or on behalf of the Concessionaire provided such assignment is concurrently with and to the same person as this Agreement.
- (c) The Grantor does not make any warranty or representation as to the quantity, quality or fitness for purpose of the material in or comprising the Gravel Pits.
- (d) Notwithstanding the grant of the Gravel Licence to the Concessionaire in accordance with the foregoing, the Concessionaire acknowledges that the rights and powers of the Provincial Entities under applicable Laws and Regulations to access and use the Gravel Pits for their own purposes and to grant to other persons the right to access and use the Gravel Pits shall continue without limitation.

## **2.21 Appointment of Representatives**

The Concessionaire and the Grantor shall each appoint a person whose specific duty is to act as a liaison person for communications on all issues arising out of this Agreement, or any other matters agreed by the parties. Each party shall advise the other in writing of the name, address, telephone and facsimile number of their respective liaison persons. The liaison persons must be available during all business hours and available upon 12 hours' notice at all times in cases of emergency.

## **2.22 Community Relations and Communications Plan**

The Concessionaire shall maintain good community relations in connection with the Project and shall liaise with persons residing or doing business in proximity to the Concession Highway Lands for the purpose of minimizing inconveniences resulting from the Work. The Concessionaire shall establish by the Execution Date a radio communications system for reporting of accidents and conditions on the Industrial Concession Highway. The frequency of the radio communication system shall be prominently displayed on the twelve (12) information signs that will be installed by the Concessionaire on the Industrial Concession Highway. The Concessionaire will implement the communications plan set out in Schedule 2.22 to maintain good relations with the industrial road users of the Industrial Concession Highway, First Nations, and others with an interest in the Industrial Concession Highway.

# **ARTICLE 3 GENERAL DUTIES OF CONCESSIONAIRE**

## **3.1 Compliance with Laws**

Without limiting the obligations, liabilities, duties and standards of care of the Concessionaire set out elsewhere in this Agreement or in any Enactment, the Concessionaire shall carry out its duties and obligations under this Agreement in accordance and compliance with, and so as to implement, the Governing Documentation and all Laws and Regulations.

## **3.2 Standard of Care**

Without limiting the obligations, liabilities, duties and standards of care of the Concessionaire set out elsewhere in this Agreement or in any Enactment, the Concessionaire shall carry out its duties diligently and expeditiously, in good faith, in a safe, reasonable and prudent manner and in accordance with good highway operation and maintenance, business practices and management techniques.

## **3.3 Status of Concessionaire**

- (a) **Maintain Existence.** The Concessionaire shall maintain in full force and effect its existence and all qualifications necessary to carry on its business pertaining to this Agreement, including without limitation all rights, franchises, licences, privileges and qualifications required in that connection.



- (b) **Conduct of Business.** The Concessionaire shall conduct its business in a proper and prudent manner so as not to adversely affect its ability to perform and observe its obligations and covenants under this Agreement.

### **3.4 Payment of Costs Necessary to Prosecute this Agreement**

Subject to the provisions of this Agreement, the Concessionaire shall pay or cause to be paid all costs, expenses and monies (including legal fees) relating to this Agreement for which the Concessionaire is liable pursuant to this Agreement as and when the same are due and payable.

### **3.5 Notices of Default by Concessionaire**

- (a) **Notice of Concessionaire Default.** The Concessionaire shall promptly give notice to the Grantor if a Concessionaire Default occurs under this Agreement.
- (b) **Notice of Claim.** The Concessionaire shall promptly give notice to the Grantor of all material claims, proceedings, disputes (including without limitation labour disputes) or litigation in respect of the Grantor, the Concessionaire or the Project (whether or not such claim, proceeding or litigation is covered by insurance) of which the Concessionaire is aware. The Concessionaire shall provide the Grantor with all reasonable information requested by it from time to time concerning the status of such claims, proceedings or litigation.

### **3.6 Insurance**

- (a) Unless otherwise notified by the Grantor, the Concessionaire shall negotiate, obtain and maintain or caused to be negotiated, obtained and maintained all required insurance at the levels and on the terms specified in Schedule 3.6 subject to availability on commercially reasonable terms. The trustee managing the insurance fund account shall be named as a loss payee of such insurance. The Concessionaire may obtain any other property, liability or other insurance coverages in addition to those set out in Schedule 3.6, or obtain coverages with increased limits. The Grantor makes no representation as to the adequacy of the insurance coverages required under Schedule 3.6. The liabilities and obligations of the Concessionaire shall not be restricted to any sums mentioned in any of the insurance clauses contained in Schedule 3.6 and such insurance amounts provided for therein shall not be construed so as to relieve or limit the liability of the Concessionaire in excess of such coverage and shall not preclude the Grantor from taking such other actions as are available to it under any provision of the Agreement or otherwise at law or in equity. In the event the insurance required to be obtained by the Concessionaire is unavailable to the Concessionaire, the Concessionaire and/or insurer shall give written notice thereof to the Grantor and the Grantor may, but is not obliged to, obtain and maintain such insurance or maintain such other equivalent risk financing in place of the Concessionaire.
- (b) In the event the insurance required to be obtained by the Concessionaire under Section 3.6(a) is unavailable to the Concessionaire and is unavailable to any other

person with similar experience and financial ability as the Concessionaire carrying on a project in British Columbia similar to the Project and within 30 days after written notice thereof from the Concessionaire, a Mortgagee or the insurers, or the Grantor otherwise becoming aware thereof, the Grantor does not obtain or maintain such insurance or equivalent other risk financing in place of the Concessionaire, either party may terminate this Agreement by giving 30 days written notice to the other party, in which event the Grantor shall pay to the Concessionaire Termination Damages in accordance with Article 30 within 30 days following the date of determination of the Termination Damages.

### **3.7 Construction Lien Matters**

- (a) **Liens.** The Concessionaire shall promptly give notice to the Grantor of any and all liens under the *Builders Lien Act* (British Columbia) or other liens (collectively, “**Builders Liens**”) for labour, services or materials in connection with the Project in respect of which notice may have been given to the Concessionaire or which may be registered against or otherwise affect the Project Lands or the Grantor, or which may impose or create a liability on the Grantor.
- (b) **Vacate Liens.** The Concessionaire shall cause any and all Builders Liens for labour, services and materials alleged to have been supplied to or for the Concessionaire or any of the Concessionaire’s Advisors, or for the cost of which the Concessionaire or any of the Concessionaire’s Advisors may be in any way liable, which may be registered against or otherwise affect the Project Lands, the Grantor, or which may impose or create a liability on the Grantor, to be vacated and, if registered, to be removed from title within 30 days following the date on which the Concessionaire becomes aware of such lien or receives notice from the Grantor of any claim for any such lien. If the Concessionaire fails to so vacate or, if applicable, remove a Builders Lien from title within such 30-day period, the Grantor may, but will be under no obligation to, so vacate or remove the Builders Lien by paying monies into a court of competent jurisdiction or posting security with the court. Any amount so paid or any amount attributable to or drawn under the security so posted and all costs and expenses in connection therewith incurred by the Grantor, shall be reimbursed to the Grantor by the Concessionaire on demand, without any days of grace.
- (c) **Holdbacks.** Notwithstanding the exemption contained in Section 1.1(a) of the *Builders Lien Act*, the Concessionaire shall strictly comply with the holdback requirements of the *Builders Lien Act* (including without limitation establishing a holdback account) with respect to any work done on the Project and, at the request of the Grantor, shall provide evidence of such compliance to the Grantor.
- (d) **Notice of Interest.** The Concessionaire acknowledges that the Grantor and the Provincial Entities may file a “notice of interest” under the *Builders Lien Act* (British Columbia) in the appropriate Land Title Office against all or any of the Project Lands for which the title of the Grantor and the Provincial Entities, as the case may be, has been raised in such Land Title Office.

### **3.8 Obtaining All Necessary Governmental Authorizations**

The Concessionaire shall take or cause to be taken, at its sole expense, all such actions as are necessary despite Section 2.10 to obtain, comply with, promptly renew and maintain in good standing all Governmental Authorizations as are necessary in connection with the Project.

### **3.9 Obtaining All Other Authorizations and Permits**

In addition to Governmental Authorizations, and despite Section 2.10, the Concessionaire shall take or cause to be taken, at its sole expense, all such actions as are necessary to obtain, comply with, promptly renew and maintain in good standing:

- (a) all other approvals, authorizations, consents, waivers and licences (“**Other Authorizations**”); and
- (b) all Permits,

as are necessary in connection with the Project and to perform its obligations hereunder.

### **3.10 Relocation of Utilities/Pipelines**

- (a) The Concessionaire shall be responsible for locating pipelines, transmission lines and other equipment, cables, systems and other apparatus in, on, under or over the Project Lands and coordinating or ensuring the coordination with applicable persons the temporary or permanent relocation of any lines, equipment, cables, systems and other apparatus affected by any Work and shall secure or cause to be secured any necessary Governmental Authorizations, Other Authorizations and, subject to Section 3.11, the required construction and maintenance agreements, service contracts, indentures and easements relating thereto.
- (b) The Concessionaire shall cause provision to be made for the removal or temporary or permanent relocation and restoration of utilities and other services which intersect, interfere, interface with or otherwise affect any Work and shall arrange for temporary rights of entry and access to utilities and other services to be made available, as may be necessary for the performance of the Work and as may be required pursuant to any applicable Governing Documentation and Laws and Regulations.

### **3.11 Government Agreements**

Notwithstanding Section 3.10, the Concessionaire acknowledges that if a Provincial Entity, in its sole and absolute discretion, determines that it is appropriate in the circumstances for such Provincial Entity to be a party to any agreements, contracts, indentures, easements, maintenance agreements or service contracts referred to in Section 3.10 and it is reasonably possible for the Provincial Entity to be such a party (the “**Government Agreements**”), in the place and stead of, or in addition to, the Concessionaire, the Concessionaire shall assist the Provincial Entities in entering into such Government Agreements; provided, however, that in providing such assistance, the Concessionaire shall in no way be relieved of any of its

responsibilities set out in Section 3.10 and the form and substance of such Government Agreements shall be subject to the prior approval of the Provincial Entities (which approval may not be unreasonably or arbitrarily withheld, conditioned or delayed).

### **3.12 Performance Security**

- (a) The Concessionaire shall, within five business days of the Execution Date and each anniversary thereof up to the period ending June 15, 2018, purchase and deliver to the Grantor performance security in the form of an irrevocable letter of credit or a project specific performance bond (in a form acceptable to the Grantor) in an amount at least equal to \$300,000 for a term of one year.
- (b) The Concessionaire shall, on or before June 16, 2018, purchase and deliver to the Grantor an irrevocable letter of credit at least equal to \$1,000,000 for the period June 16, 2018 to June 15, 2020 or, at the option of the Concessionaire, an irrevocable letter of credit in such amount for the period June 16, 2018 to June 15, 2019 which provides that it can be drawn upon and the cash stand as performance security if a new letter of credit in such amount for the period June 16, 2019 to June 15, 2020 is not delivered by June 15, 2019.

## **ARTICLE 4 DUTY OF CARE**

### **4.1 Duty of Care Equivalent to Provincial Entities**

Without limiting the obligations, liabilities, duties and standards of care of the Concessionaire set out elsewhere in this Agreement, the Governing Documentation, and all applicable Laws and Regulations, the Concessionaire has in relation to the Industrial Concession Highway the same duty of care that the Provincial Entities would have if the Industrial Concession Highway were a Highway.

### **4.2 No Implied Delegation**

The Concessionaire acknowledges that except as expressly provided herein, no powers of the Minister, the minister of transportation, or any other minister of a Provincial Entity are delegated to the Concessionaire.

### **4.3 Liability of Concessionaire Under Occupiers Liability Act**

The Concessionaire acknowledges that it is an occupier of the Concession Highway Lands and has the same liability, if any, under the *Occupiers Liability Act* (British Columbia) as the Grantor would have if it were the occupier.

## **ARTICLE 5 SAFETY**

### **5.1 General Standard of Safety**

- (a) The Concessionaire must operate, manage, repair, upgrade, maintain, rehabilitate, construct and reconstruct the Industrial Concession Highway in a manner that is safe and in accordance in all material respects with the generally accepted highway practices with respect to safety in effect from time to time.
- (b) The obligations of the Concessionaire under paragraph (a) above shall include, but in no way be limited to, compliance with the provisions of this Article 5 and of Article 7, which provisions are not exhaustive and the Concessionaire must perform all those activities and do all such things which, in the ordinary and usual course of the operation, management, repair, maintenance, rehabilitation, construction and reconstruction in a safe manner, reasonably would be recognized, employed and implemented by the Provincial Entities, including, without limitation, in the interests of public safety, close all or any portion of the Industrial Concession Highway.
- (c) The Grantor agrees that in no event will the addition of a sidewalk or any similar structure as part of the Project be considered a matter in any way relating to an issue of safety.

### **5.2 Permitted Equivalent Safety Standards**

Notwithstanding anything to the contrary in this Agreement, with the Approval of the Grantor, the Concessionaire, at its sole cost and expense (including without limitation any costs or expenses of the Grantor in reviewing any request for such Approval), may implement and comply with safety standards other than or in addition to those contained in the Governing Requirements with respect to the Industrial Concession Highway if, in the opinion of the Grantor, the proposed safety standards provide equivalent or increased safety protection to that which would have been provided by the applicable Governing Requirements. The Approval of the Grantor referred to above may be withheld in the sole and absolute discretion of the Grantor and, unless and until the Grantor provides its express Approval for the implementation of the Concessionaire's proposed safety standards, the Concessionaire shall not implement the proposed safety standards and shall implement and comply with the Governing Requirements.

### **5.3 Failure to Comply with Safety Requirements**

- (a) Subject to paragraph (c) below, if, at any time:
  - (i) the Concessionaire fails to comply with any safety standard contained in the Governing Requirements;
  - (ii) the Grantor and the Concessionaire cannot reach an agreement regarding the interpretation or application of any safety standard contained in the

Governing Requirements within a period of time acceptable to the Grantor; or

- (iii) the Concessionaire fails to comply with any of its obligations under Section 3.8 or Section 3.9 in connection with any matter compromising the safety of the public or the Industrial Concession Highway,

the Grantor shall have the absolute right and entitlement to undertake, or cause to be undertaken, or to direct the Concessionaire to undertake, any work required to ensure implementation of and compliance with the Governing Requirements as interpreted or applied by the Grantor or to comply with Section 3.8 or Section 3.9. Such right and entitlement of the Grantor and any exercise thereof by the Grantor does not in any way detract from the Concessionaire's duties and obligations under Section 5.1.

- (b) To the extent that any work done pursuant to paragraph (a) above is undertaken by, or on behalf of, the Grantor, the reasonable cost of such work plus an administration fee equal to 15% of such cost of such work, shall be paid by the Concessionaire to the Grantor on demand, without any days of grace, and, whether the Grantor undertakes, or causes to be undertaken, the work or has directed the Concessionaire to undertake the work, the Concessionaire shall not be entitled to make and hereby waives any Claim against the Grantor in respect of such work. Failure of the Concessionaire to make the payment to the Grantor will, without limiting any other rights of the Grantor under this Agreement, entitle the Grantor to set off any Maintenance Fees to satisfy the monies owing to the Grantor.
- (c) Notwithstanding anything to the contrary contained in this Agreement, if in the reasonable judgement of the Grantor the failure of the Concessionaire to comply with any Governing Requirements, Section 3.8 or Section 3.9 results in an emergency or danger to persons or property, and if the Concessionaire is not then diligently taking all necessary steps to rectify or deal with the emergency or danger, the Grantor may, in addition and without prejudice to its other remedies (but without obligation to do so), (i) immediately take such steps as may be reasonably necessary to rectify such emergency or danger, and a failure to pay will entitle the Grantor to set off any Maintenance Fees to satisfy the monies owing to the Grantor, or (ii) if and to the extent reasonably necessary to protect persons or property, close or cause to be closed any and all portions of the Industrial Concession Highway affected by the emergency or danger, and the Concessionaire shall not be entitled to make and hereby waives any Claim against the Grantor as a result, provided that immediately following rectification of the emergency or danger, as determined by the Grantor, the Grantor allows the portions of the Industrial Concession Highway to be reopened.

#### **5.4 Power of Provincial Entities in Interests of Public Safety**

The Concessionaire acknowledges that a Provincial Entity may, where such Provincial Entity considers, in such Provincial Entity's sole and absolute discretion, in the interests of public safety, close all or any portion of the Industrial Concession Highway for such period of time as the Provincial Entity considers necessary, and the Concessionaire shall not be entitled to make and hereby waives any Claim against the Grantor and the Provincial Entities in respect of such action, but without limiting any other rights and remedies of the Concessionaire under this Agreement in respect of such closure, delay or diversion including under Section 5.7(b).

#### **5.5 Police Closure of Industrial Concession Highway**

If one or more Police Constables or the RCMP, the provincial police force or a municipal police department:

- (a) closes all or any portion of the Industrial Concession Highway in the interests of public safety or for any other reason, whether or not authorized by any Law or Regulation; or
- (b) exercises a police power or authority on or over all or any portion of the Industrial Concession Highway which causes a closure, delay or diversion of traffic,

the Concessionaire shall not be entitled to make and hereby waives any Claim against Provincial Entities, the Grantor and any Police Constable, the RCMP, any municipal police department or any municipal police board in respect of such action, but without limiting any other rights and remedies of the Concessionaire under this Agreement in respect of such closure, delay or diversion including under Section 5.7(b).

#### **5.6 Closure or Delay By Any Governmental Authority**

If all or any portion of the Industrial Concession Highway is closed or traffic is delayed or diverted by the action of any Governmental Authority under the authority of any Laws or Regulations, the Concessionaire shall not be entitled to make and hereby waives any Claim against the Provincial Entities, the Grantor and any Governmental Authority taking such action, but without limiting any other rights and remedies of the Concessionaire under this Agreement in respect of such closure, delay or diversion, including under Section 5.7(b).

#### **5.7 No Discriminatory Action and No Forfeiture of Fees**

- (a) None of the events or actions set out in Sections 5.2 5.3, 5.4, 5.5, and 5.6 taken by or attributable to the Provincial Entities, a Governmental Authority, a Police Constable, the RCMP, the provincial police force, a municipal police department or a municipal police board is a Discriminatory Action.
- (b) Where neither the Concessionaire's nor the Concessionaire's Advisors' acts or omissions are the cause of a closure referred to in Sections 5.4, 5.5, 5.6 or 21.1, such closure shall not affect the Concessionaire's entitlement to Fees otherwise payable to the Concessionaire under this Agreement and will not give the Grantor

any corresponding right to set off Fees with respect to such closure. No liquidated damages will be payable under Article 14 as a result of such closure.

## **ARTICLE 6 ENVIRONMENTAL MATTERS**

### **6.1 Environmental Protection**

The Concessionaire shall ensure that all Environmental Laws are fully observed in the performance of its obligations under this Agreement at all times during the Term. Without limiting the foregoing, the Concessionaire shall use commercially reasonable efforts to ensure that all persons employed or engaged by the Concessionaire fully comply with all Environmental Laws and the Concessionaire shall be liable for all breaches thereof, whether voluntary or involuntary, howsoever caused. The Grantor shall be solely responsible for and shall indemnify the Concessionaire for any Claim resulting from the existence of any Hazardous Substances or environmental hazards on the Concession Highway Lands at the Execution Date, or on any other Project Lands at the date such lands become "Project Lands", except those Hazardous Substances or environmental hazards coming into existence as a result of anything done by the Concessionaire or those for whom it is responsible between the Effective Date and the Execution Date. If there is any dispute between the parties on whether or not a Hazardous Substance or environmental hazard is the responsibility of the Grantor under the previous sentence, it will be the Grantor's responsibility to establish that the Hazardous Substance or environmental hazard came into existence after the Execution Date, or for any Project Lands other than the Concession Highway Lands, after the date such lands become "Project Lands", or resulted from anything done by the Concessionaire or any person for whom the Concessionaire is responsible between the Effective Date and the Execution Date. If the Grantor is successful in doing so, the Concessionaire shall reimburse the Grantor for any reasonable amounts paid by the Grantor in respect of such Hazardous Substance or environmental hazard and any reasonable costs incurred by the Grantor in establishing that it was not the Grantor's responsibility.

### **6.2 Disposal of Hazardous Substances**

The Concessionaire shall identify Hazardous Substances affecting any portion of the Project and shall store, remove, transport and dispose of Hazardous Substances in compliance with all applicable Governing Documentation and Laws and Regulations.

### **6.3 Release of Hazardous Substances**

- (a) The Concessionaire shall, at all times during the Term with respect to the Bypass and at all times on or after August 1, 2004 with respect to the balance of the Industrial Concession Highway, report immediately any release of Hazardous Substances affecting or relating to any portion of the Project to the applicable Governmental Authority with a copy to the Grantor.
- (b) For purposes of this Section 6.3, "**Third Party Incident**" means the release of a Hazardous Substance(s) caused in whole or in part by the act or omission of someone other than the Concessionaire, or any of the Concessionaire's Advisors, Designated Consultants, employees, agents, contractors, servants, successors or assigns, or a party for



whom the Concessionaire is in law responsible. The parties acknowledge that Third Party Incident includes the release of a Hazardous Substance caused in whole or in part by the act or omission of an arm's length road user of the Industrial Concession Highway where such road user is not one of the Concessionaire's Advisors, Designated Consultants, employees, agents, contractors, servants, successors or assigns.

- (c) The Concessionaire, at its cost and expense, shall remediate the release of Hazardous Substances in each case regardless of how such Hazardous Substance was released, in accordance with all applicable Governing Documentation and Laws and Regulations, subject to the following sentence. Where a Third Party Incident occurs, the Grantor has the right, at its cost and expense, to cause the remediation of the Third Party Incident to be undertaken by a person other than the Concessionaire, by giving written notice to the Concessionaire of the exercise of such right within 5 days of the receipt of the report referred to in Section 6.3(a) provided such report clearly evidences a Third Party Incident. If the Grantor exercises its right to cause the remediation to be undertaken by a person other than the Concessionaire, the Concessionaire shall not be responsible or liable for actions or omissions of the Grantor in carrying out such remediation.
- (d) The Grantor shall indemnify and save harmless the Concessionaire from and against all Claims made against or incurred, suffered or sustained by the Concessionaire in respect of any and all Third Party Incidents, but only for such portion of the Claims which is not a result of the acts or omissions of the Concessionaire, the Concessionaire's Advisors, Designated Consultants, employees, agents, contractors, servants, successors or assigns. The Concessionaire shall not be entitled to any payment under the terms of the indemnity contained in this Section 6.3(d) until such time as reasonable evidence has been adduced that the release of the particular Hazardous Substance is a Third Party Incident and that the Concessionaire has used reasonable efforts to mitigate the amount of the particular Claim, whether by pursuing claims under its insurance policy, seeking reimbursement from third parties responsible (in whole or in part) for the Third Party Incident, or otherwise. For greater certainty, the Concessionaire will be entitled to payment under this Section 6.3(d) prior to the Concessionaire's exhausting all recourse against responsible third parties provided the Concessionaire has commenced actions or initiated steps to enforce its rights against such third parties. Where payment is made by the Grantor to the Concessionaire under this Section 6.3(d) prior to the conclusion of actions against responsible third parties, the Concessionaire will pay to the Grantor any amounts recovered from such third parties, net of costs incurred by the Concessionaire for which the Concessionaire has not otherwise been reimbursed under this Section 6.3(d). The Grantor will have the unfettered right in its sole discretion to take conduct of any actions against responsible third parties and if the Grantor exercises such right then the Concessionaire shall co-operate and assist the Grantor in the pursuit of such actions as reasonably requested by the Grantor, but the Concessionaire shall not have any right to participate in such actions or to claim any amounts from such third parties or the Grantor following payment of the amount to which the Concessionaire is entitled under this Section 6.3(d). In addition, following the payment by the Grantor to the Concessionaire under this Section 6.3(d), the Grantor will have the right to pursue or conclude claims under any insurance policy to the extent such claims remain outstanding, and if the

Grantor exercises such right, the Concessionaire shall co-operate and assist the Grantor in the pursuit of such claims as reasonably requested by the Grantor.

- (e) To the extent there is a determination by a court or arbitrator of the apportionment of responsibility or liability for a Third Party Incident other than as assumed or agreed by the parties for purposes of this Section 6.3, there shall be an adjustment of the amounts paid under the indemnity in Section 6.3(d) to reflect the final determination of apportionment of responsibility or liability including, without limitation, an additional payment or a repayment of all or a portion of the amounts paid thereunder, as required.
- (f) It is the parties' intention that no Provincial Entity shall bring an action or seek recourse against the Concessionaire in respect of matters covered by any pollution liability insurance. In the event a Provincial Entity does bring such an action or seek recourse against the Concessionaire, the Grantor shall indemnify and save harmless the Concessionaire from and against all Claims made against or incurred, suffered or sustained by the Concessionaire in respect of such action or seeking recourse to the extent that such action or seeking recourse invalidates the insurance policy. If the Concessionaire is in breach of any federal or provincial statutes or regulations pertaining to the environment, then the indemnity contained in this Section 6.3(f) will only cover the amounts that otherwise would have been payable under the insurance policy, but in no event shall the indemnity extend to fines, penalties or similar amounts.

#### **6.4 No Cutting of Trees or Logging**

The Concessionaire shall not, without the prior express written consent of the Grantor, or a Provincial Entity, if required, cut, log or remove any material number of trees from the Concession Highway Lands except where the Concessionaire, acting reasonably, determines that certain trees must be removed for *bona fide* safety reasons or in order to comply with any applicable Laws and Regulations or any obligation hereunder.

#### **6.5 Environmental Management Plan**

The Concessionaire shall develop, implement and comply in all respects with the Environmental Management Plan.

### **ARTICLE 7 WORK**

#### **7.1 Work Obligations**

The Concessionaire shall carry out the Work in accordance with the Governing Requirements and the provisions of this Article 7. The Concessionaire will commence the OMM Work on the OMM Commencement Date and will commence the DDB Work on the dates set out in Schedule 7.12.

## **7.2 Compliance with Maintenance Requirements**

The Concessionaire must comply with the Maintenance Requirements at all times throughout the Term. The Concessionaire acknowledges that the Maintenance Requirements may change from time to time during the Term to the extent permitted in this Agreement (including Article 8) or to comply with a Non-Capital Change. The Concessionaire, at its cost and expense, must comply with all changes resulting from Non-Capital Changes, but will be compensated for all other changes in accordance with Article 8.

Subject to Article 25, in no event shall the Concessionaire be excused from compliance with the Maintenance Requirements in accordance with the provisions of this Article 7. Without limiting the foregoing and for greater certainty, in no event shall the Concessionaire be entitled to claim that an event of Force Majeure, a Delay Event or a Discriminatory Action has resulted from the existence of or change to any of the Maintenance Requirements in accordance with this Agreement or, in the absence of any agreement to the contrary, claim that the existence of or change to any of the Maintenance Requirements relieves the Concessionaire from compliance with any of the Maintenance Requirements in accordance with the provisions of this Article 7.

## **7.3 Interim Maintenance Contract**

The Grantor will cause the Interim Maintenance Contract to be terminated effective July 31, 2004.

## **7.4 General Industrial Concession Highway Corridor Management**

The Concessionaire shall comply with and implement the requirements of the specifications for corridor management attached as Schedule 7.2 and 7.12, which Corridor Management Requirements set out the responsibilities of the Grantor and the Concessionaire with respect to the administration and implementation of the management of the Concession Highway Lands in connection with, without limitation:

- (a) electrical maintenance;
- (b) service and complaints process;
- (c) media and public relations;
- (d) highway signs and traffic services;
- (e) public information requirements;
- (f) wildlife fencing; and
- (g) habitat loss,

and as such specifications may be amended, supplemented or replaced from time to time in accordance with this Agreement.

#### **7.5 [Intentionally Deleted]**

#### **7.6 Worker Safety Management Program**

The Concessionaire must establish to the satisfaction of the Grantor no later than the Execution Date and thereafter maintain and, if necessary, upgrade a safety management program that complies with Laws and Regulations, including without limitation applicable standards in the *Workers Compensation Act* (British Columbia) and the *Occupational Health and Safety Regulation* promulgated pursuant thereto.

#### **7.7 Quality Management System**

The Concessionaire will establish as at the Execution Date and maintain at all times during the Term a quality management system that meets or exceeds the minimum requirements set out in Schedule 7.7.

#### **7.8 Service and Attraction Signs**

The Concessionaire shall install, at the expense of the persons requesting, signs in respect of services, attractions and facilities connected with or served by the Industrial Concession Highway when requested by persons qualified under and in accordance with the *Motor Vehicle Act* (British Columbia) and in accordance with applicable Laws and Regulations.

#### **7.9 Direction of OMM Work**

The Concessionaire shall undertake all OMM Work as may be directed by the Grantor from time to time, notwithstanding any dispute as to the entitlement of the Grantor to require such OMM Work.

#### **7.10 Name of Industrial Concession Highway**

The Concessionaire shall only use such name for the Industrial Concession Highway as is designated by the Grantor.

#### **7.11 Designation and Number of Industrial Concession Highway**

The Grantor will cause the Industrial Concession Highway to continue to be designated or numbered during the Term in accordance and consistent with the policies and regulations of the Provincial Entities applicable to the Industrial Concession Highway, as such policy and regulations may be amended or replaced from time to time.

#### **7.12 Compliance with Construction Requirements**

The Concessionaire must comply with the Construction Requirements. The Concessionaire acknowledges that the Construction Requirements applicable to a particular Phase may change from time to time prior to Total Completion of the particular Phase to the extent permitted in this Agreement (including Article 8) or to comply with a change to Laws and Regulations or as a result of a change to safety standards under Article 5. The Concessionaire at

its cost and expense must comply with all such changes up to the date of Total Completion of such Phase.

Subject to Article 25, in no event shall the Concessionaire be excused from compliance with the Construction Requirements in accordance with the provisions of this Article 7. Without limiting the foregoing and for greater certainty, in no event shall the Concessionaire be entitled to claim that an event of Force Majeure, a Delay Event or a Discriminatory Action has resulted from the existence of or change to any of the Construction Requirements or, in the absence of any agreement to the contrary, claim that the existence of or change to any of the Construction Requirements relieves the Concessionaire from compliance with any of the Construction Requirements in accordance with the provisions of this Article 7.

### **7.13 Duties Not Exhaustive**

The description of work set out in this Article 7 is not exhaustive and the Concessionaire is responsible for all aspects of the Work.

### **7.14 Use of Designated Consultants**

- (a) Designated Consultants. The Concessionaire shall retain, employ and utilize the engineers, engineering firms, consultants, contractors, subcontractors or personnel in respect of the performance and completion of any portion of the Work who or which are specifically listed in Schedule 7.14 (each such contractor, subcontractor and individual retained, employed or utilized being herein referred to as a “**Designated Consultant**”).
- (b) Engage Other Consultants. The Concessionaire shall not change or substitute any Designated Consultant in connection with the performance of any portion of the Work except in each case with written notice to the Grantor.
- (c) Acknowledgement by Concessionaire. The Concessionaire shall be fully responsible for the performance by the Designated Consultants of the Concessionaire’s duties hereunder, and all acts by or omissions of any of the Designated Consultants shall be deemed to be those of the Concessionaire.

### **7.15 Approvals Required Before Construction Work May Proceed**

The Concessionaire shall not permit any portion of the Construction Work to be carried out without first having obtained all necessary Approvals for such portion of the Construction Work, which pursuant to the terms hereof are to be obtained prior to commencement of such portion of the Construction Work, and without complying with all requirements of this Agreement, which pursuant to the terms hereof are to be complied with prior to commencement of such portion of the Construction Work.

### **7.16 Archaeological/Historical Finds**

The Concessionaire shall cause to be documented any property which appears to be of archaeological or historical significance located in, under or on the Project Lands. The

Concessionaire shall give, or make available, to the Provincial Entities without compensation to the Concessionaire, any such property exposed or recovered as a result of excavation of the Project Lands and such property shall be dealt with as the Provincial Entities may direct in writing. The Grantor shall be responsible for all costs associated with the audit, review, excavation and recovery of any purported archaeological or historically significant finds.

#### **7.17 Notice to Grantor of Damage**

The Concessionaire shall give notice to the Grantor of any material damage to or destruction of any property, real or personal, which forms a part of any Construction Work.

#### **7.18 Commencement of Design Work and Construction Work**

The Concessionaire shall cause the commencement of the Design Work and Construction Work to occur on or before the date set out therefor in the Delivery Plan and in compliance with the Governing Documentation.

#### **7.19 Completion**

- (a) The Construction Work or each Phase thereof in the Delivery Plan shall be Totally Completed in accordance with the Delivery Plan. In particular, the Bypass shall be Commissioned and Opened by November 30, 2004 and the SYD Upgrade shall be Commissioned and Opened by November 30, 2005.
- (b) The Concessionaire shall give written notice to the Grantor when each particular Phase has been Substantially Completed.
- (c) Within 5 days of receipt of the notice referred to in Section 7.19(b), the Grantor shall provide the Concessionaire with a list of deficiencies in respect of the particular Phase, including details of the manner in which the particular deficiency does not comply with the Governing Requirements. Such list shall constitute a notice under Section 20.1 and shall be dealt with in accordance with the provisions of Article 20.
- (d) The Grantor shall provide written notice to the Concessionaire when, in the Grantor's determination, the particular Phase is available for safe use as a Highway (and therefore "Commissioned and Opened").
- (e) Upon satisfaction that the Concessionaire has rectified all deficiencies referred to in Section 7.19(c), the Grantor will provide written notice of such determination to the Concessionaire.

#### **7.20 Fort Nelson River Bridge**

- (a) The Fort Nelson River Bridge will have a design life of 50 years and a service life of 25 years. For purposes of this Section, design life shall mean the period of time during which the Fort Nelson River Bridge is intended to remain in service, and service life shall mean the actual period of time during which the Fort Nelson

River Bridge performs its design function without unforeseen costs for maintenance and repair, as more specifically set out in the Construction Requirements.

- (b) Without in any way limiting the Concessionaire's obligations under Article 20, the Concessionaire shall correct promptly, at the Concessionaire's expense, all defects or deficiencies in the Fort Nelson River Bridge which appear during the Complete Term and shall maintain the Fort Nelson River Bridge in accordance with the Maintenance Requirements throughout the Complete Term.
- (c) The Concessionaire will be liable to repair within a reasonable time any damage or loss to the Fort Nelson River Bridge or its approach embankments resulting from any flood of a magnitude that is equal to or less than a 100 year flood event (including replacing such bridge if required). For greater certainty, such event will not be a Force Majeure with respect to such loss or damage. Where the Concessionaire is required to close the Fort Nelson River Bridge to carry out such repairs, the Concessionaire will not be considered to be in breach of its obligations under Section 2.6(b) or Section 21.1, provided such closure is only for the time reasonably required to carry out the repairs. No liquidated damages will be payable under Article 14 as a result of repairs being carried out under this Section.
- (d) If, prior to the date the Bypass is Commissioned and Opened, any flood of a magnitude that is equal to or less than a 100 year flood event occurs that damages or destroys the Fort Nelson River Bridge or its respective approach embankments, such event will not be a Force Majeure with respect to damage or loss. However, the Commissioned and Opened date for the Bypass specified in Section 7.19(a) and the corresponding date in section 6.3.1.1 of Schedule 7.12 will be extended by the amount of time reasonably required to repair such damage or loss. If, after the date the Bypass is Commissioned and Opened but before the Bypass is Totally Completed any flood of a magnitude that is equal to or less than a 100 year flood event occurs that damages or destroys the Fort Nelson River Bridge or its respective approach embankments, such event will not be a Force Majeure with respect to damage or loss. However, the Totally Completed date for the Bypass specified in section 6.3.1.3 of Schedule 7.12 will be extended by the amount of time reasonably required to repair such damage or loss.
- (e) The Grantor will be liable to repair any damage or loss to the Fort Nelson River Bridge or its approach embankments from any flood of a magnitude in excess of a 100 year flood event (including replacing such bridge if required), provided the damage or loss is not caused by the Concessionaire's failure to comply with the Governing Requirements.

## **7.21 Other Bridges**

The Grantor will be liable to repair within a reasonable time any damage or loss to any bridge other than the Fort Nelson River Bridge, including the Snake River Bridge, the

PetroCan 1 Bridge and the PetroCan 2 Bridge, or their approach embankments, resulting from any flood of a magnitude in excess of a 100 year flood event (including replacing such bridge if required), provided the damage or loss is not caused by the Concessionaire's failure to comply with the Governing Requirements. The Concessionaire shall be liable to repair all other damage or loss to such bridges and, if necessary, to close such bridges to carry out the repairs. Such closure will not constitute a breach of the Concessionaire's obligations under Section 2.6(b) or Section 21.1, provided such closure is only for the time reasonably required to carry out the repairs. No liquidated damages will be payable under Article 14 as a result of repairs being carried out under this Section.

## **ARTICLE 8 MODIFICATIONS**

### **8.1 Change Orders**

The Grantor may at any time or times during the Complete Term issue a Change Order to the Concessionaire. The Grantor must issue a Change Order to the Concessionaire if the Governing Requirements change or are required to be changed other than as a result of a Non-Capital Change.

Prior to implementation of such Change Order the Grantor and the Concessionaire shall jointly determine:

- (a) whether the Change Order will require a material expenditure of time and/or money by the Concessionaire in order to perform the work reasonably necessary in connection with the evaluation and costing of the implementation of the Change Order (the "**Preparatory Work**") and, if so, the Grantor will reimburse the Concessionaire for the reasonable costs incurred by the Concessionaire in connection with the Preparatory Work;
- (b) whether the Change Order will impact the timing of performance and obligations under this Agreement, and, if so, the parties will determine the manner and extent to which the timing of performance and obligations under this Agreement should be adjusted or otherwise altered, if at all;
- (c) the amount required to be paid by the Grantor to implement the Change Order and to compensate the Concessionaire for all Concessionaire Losses in relation thereto and the timing of payment therefor; and
- (d) any other material terms of the Change Order.



## **8.2 Determination**

If the parties cannot agree on whether a Change Order is required under the second sentence of Section 8.1, this will be resolved in the manner set out in Article 32. If the parties cannot agree:

- (a) as to whether the Preparatory Work will require a material expenditure of time and/or money;
- (b) as to whether the Change Order will impact the timing of performance and obligations under this Agreement;
- (c) as to the amount required to implement the Change Order and/or to compensate the Concessionaire for all Concessionaire Losses in relation thereto and the timing of payment therefor; or
- (d) as to any other material terms of the Change Order,

and the Grantor determines that the Change Order is required to be proceeded with, the Grantor in the first instance, shall determine the cost of the Preparatory Work, the impact on the timing of performance and obligations under this Agreement, the amount required to implement the Change Order and/or to compensate the Concessionaire for all Concessionaire Losses in relation thereto and the timing of payment therefor and such other material terms subject to final resolution in the manner set out in Article 32 and the Concessionaire shall, pending such resolution, but subject to being saved harmless in respect thereof by the Grantor, nonetheless proceed to implement and perform the Change Order. Notwithstanding the foregoing, but subject to Section 32.12(b), if the Concessionaire determines that the amount in dispute required to implement the Change Order and/or to compensate the Concessionaire for all Concessionaire Losses in relation thereto exceeds five hundred thousand dollars (\$500,000), the Concessionaire shall not be obligated to proceed with the implementation and performance of the Change Order until the matters set out in this Section 8.2 relating to such Change Order have been resolved.

## **8.3 Change Requests**

The Concessionaire may, at any time, submit a Change Request to the Grantor for Approval by the Grantor. No Change Request shall be implemented or incorporated as part of the Work unless and until such Change Request has been Approved by the Grantor in a timely manner so as to not adversely impact the schedule of work for which the said Change Request was submitted.

## **8.4 Performance of Changes**

Subject to the other provisions of this Article 8, the Concessionaire shall take steps to ensure that Change Orders and Approved Change Requests are diligently complied with and implemented in such manner that the costs and delays relating thereto are minimized.

## **8.5 Payment for Change Orders**

The Grantor shall pay the amount required to implement the Change Order and/or to compensate the Concessionaire for all Concessionaire Losses in relation thereto as set out in Sections 8.1 and 8.2. Notwithstanding the foregoing, the amount required to implement the Change Order and to compensate the Concessionaire for Concessionaire Losses may be financed through the Mortgagee as agreed by the Grantor, the Concessionaire and the Mortgagee.

## **8.6 Other Changes to Construction Requirements**

Where any change to the Construction Requirements is necessary as a result of a change to Laws and Regulations or to safety standards, such change shall not require the issuance of a Change Order or Change Request. However, if as a result of such change any of the minimum design and construction criteria in Section 2.3 of Schedule 7.12 must be modified to comply with any of the design and construction criteria of the Peace Template as referred to in item 19 of Schedule 2.14 or any modifications to the Peace Template that are not already included within the minimum design and construction criteria in Section 2.3 of Schedule 7.12, the Grantee must issue a Change Order to the Concessionaire. The party that first becomes aware of the need to change the Construction Requirements because of a change to Laws and Regulations or safety standards, other than in relation to the Peace Template, shall notify the other party forthwith of the required change and shall provide details of such change.

**ARTICLE 9  
FEES**

- 9.1 **Maintenance Fee**
- 9.2 **Determination of Incremental Amount**
- 9.3 **Secondary Incremental Amount**
- 9.4 **Adjustment to Incremental Amount in Conjunction with Additional Moves**
- 9.5 **Other Payments**
- 9.6 **Insurance Cost Payment**
- 9.7 **Inflation Adjusted Annual Increase**
- 9.8 **Additional Performance Payment**
- 9.9 **Bypass Availability Fee**
- 9.10 **SYD Upgrade Availability Fee**
- 9.11 **Withholding Fees**
- 9.12 **Delivery of Reports and Documents**

**ARTICLE 10  
PERSONAL INFORMATION**

**10.1 Definitions**

In this Article, “**law enforcement**” has the meaning set out in Section 25 of the *Transportation Investment Act*, which is to say, means:

- (a) policing, including without limitation criminal intelligence operations;
- (b) investigations that lead or could lead to a penalty or sanction being imposed; or
- (c) proceedings that lead or could lead to a minimum liquidated damage or sanction being imposed,

and “**personal information**” means recorded information about an identifiable individual.

## **10.2 Privacy Code**

The Concessionaire shall develop and implement prior to the Execution Date a privacy code consistent with the CSA *Model Code for the Protection of Personal Information* (Q830), to be Approved by the Grantor prior to implementation.

## **10.3 Restrictions on Disclosure of Personal Information**

- (a) The Concessionaire must not, through the exercise of any rights or powers provided to the Concessionaire under this Agreement or any other agreement respecting the Project or through any activity conducted, or any device used, in conjunction with the operation of the Industrial Concession Highway, collect personal information in relation to individuals who are or are to be users of the Industrial Concession Highway unless the personal information:
  - (i) is collected directly from, and with the express consent of, the individuals to whom the information relates; or
  - (ii) is collected for a purpose permitted under applicable laws relating to the protection of privacy, including, without limitation, the *Personal Information Protection Act*.
- (b) The Concessionaire must not use or disclose personal information unless:
  - (i) in the case of personal information collected under paragraph (a)(i) above, the use or disclosure is that for which the consent was given; or
  - (ii) in the case of personal information collected under paragraph (a)(ii) above, the use or disclosure is permitted under applicable laws relating to the protection of privacy, including, without limitation, the *Personal Information Protection Act*.

## **ARTICLE 11 ADDITIONAL UPGRADE OR IMPROVEMENTS**

### **11.1 Upgrade or Improvement of Industrial Concession Highway**

Any upgrades or improvements to the Industrial Concession Highway prior to Total Completion not contemplated in the Construction Requirements will be done by the Concessionaire in accordance with Article 8. If at any time after Total Completion, the Grantor determines that upgrades or improvements to the Industrial Concession Highway (other than as contemplated in Section 2.13) are desired and which are not otherwise contemplated by this Agreement, the Grantor shall give written notice of such proposed improvement (the “**Proposed Work**”) to the Concessionaire, providing sufficient details to allow the Concessionaire to evaluate the Proposed Work. Within 30 days of receipt of such notice, or such longer period as the Concessionaire and Grantor may agree, the Concessionaire shall either provide written notice to the Grantor that the Concessionaire is not interested in completing the Proposed Work, or submit a written proposal to the Grantor setting out the terms, including payment terms, upon

which the Concessionaire is willing to complete the Proposed Work. The Grantor shall notify the Concessionaire within a reasonable time thereafter of whether the Grantor accepts the Concessionaire's proposal. Until such notification is given by the Grantor to the Concessionaire, the Grantor shall not solicit proposals from any other party for the Proposed Work.

### **11.2 Request for Proposals**

If the Grantor rejects the Concessionaire's proposal provided for under Section 11.1, the Grantor may make a public request for proposals for the Proposed Work ("**Request for Proposals**"). The Concessionaire may participate in the Request for Proposals and the Concessionaire's submission shall be evaluated using the same criteria as the Grantor uses for the other proposals.

### **11.3 Third Party Bidder**

If the Grantor awards the Proposed Work to someone other than the Concessionaire, then:

- (a) the Grantor shall assume all obligations and liabilities in connection with the Proposed Work and shall pay to the Concessionaire any additional Actual Cost of the Concessionaire resulting solely from the Proposed Work;
- (b) the Concessionaire will co-operate with the successful bidder to allow reasonable access to the Industrial Concession Highway and to permit the Proposed Work to be carried out without unreasonable interruption; and
- (c) the Concessionaire shall carry out OMM Work on the improvement or upgrade resulting from the Proposed Work and such additional OMM Work shall constitute a Change Order for purposes of Article 8.

### **11.4 Standards**

Any building or construction implemented pursuant to the provisions of this Article 11 by the Concessionaire shall comply with the safety standards set out in Article 5 and all applicable Laws and Regulations.

## **ARTICLE 12 REPORTING AND RECORD KEEPING BY CONCESSIONAIRE**

### **12.1 Record Keeping and Reports**

All records to be maintained by the Concessionaire pursuant to this Agreement, and all reports required to be provided by the Concessionaire to the Grantor in accordance with this Article 12 or otherwise pursuant to this Agreement, shall be maintained or provided, as the case may be, at the sole cost and expense of the Concessionaire, in the manner and format and for the time period requested by the Grantor.

## **12.2 Quality Management Reports**

The Concessionaire shall provide to the Grantor, in accordance with Schedule 7.7:

- (a) all reports required in connection with the quality management system set out in Schedule 7.7; and
- (b) any and all other reports requested by the Grantor as reasonably necessary for the effective operation of such quality management system.

## **12.3 Traffic Characteristics Reports**

The Concessionaire shall provide, at the request of the Grantor, any and all reports which the Concessionaire has prepared regarding traffic characteristics and traffic volume. For greater certainty, this Section 12.3 does not create any obligation of the Concessionaire to prepare reports on traffic characteristics or traffic volume.

## **12.4 Incident Management Report**

The Concessionaire, subject where applicable to the *Freedom of Information and Protection of Privacy Act*, and without limiting any other more frequent reporting requirements under this Agreement or under any applicable Laws and Regulations, including without limitation the immediate reporting of any major accidents or deaths, shall report to the Grantor on a quarterly basis, within 30 days following the end of each quarter of each Fiscal Year, details of emergencies, accidents and incidents occurring on or at the Project. The specific details to be provided include the following:

- (a) type of incident – bodily injury, death, property damage;
- (b) classification of incident – road related, barrier hit, right of way, weather related or not, other;
- (c) number of incidents by type and classification;
- (d) number of claims and revenue received by type and classification;
- (e) costs to correct incidents by type and classification; and
- (f) such other matters as the Grantor determines.

Notwithstanding the provision of reports to the Grantor under this Section, the Grantor shall have no liability or responsibility in respect of the contents of such reports and shall have no obligation to take any actions based on the contents of such reports.

## **12.5 Environmental Incident Report**

The Concessionaire shall report, on a per occurrence basis, within seven days following the occurrence of each incident or such shorter time period as may be required pursuant to Laws and Regulations, the release (accidental or otherwise) of any Hazardous Substances and the

location at which the incident has occurred, the time, the agencies involved, the damage which has occurred and the remedial action taken.

## **ARTICLE 13**

### **ACCESS, TESTING, INSPECTION, REVIEW AND AUDIT RIGHTS**

#### **13.1 Audits, Assistance, Inspections and Approvals – Retention of Concessionaire Liability**

Wherever in this Agreement reference is made to the Grantor or the Grantor's Advisors providing assistance, services, Approvals or consents to or on behalf of the Concessionaire or the Concessionaire's Advisors, or to the Grantor or the Grantor's Advisors performing an Audit or inspecting, testing, reviewing or examining the Project, or any part thereof or the books, records, documents, budgets, proposals, requests, procedures, certificates, plans, drawings, specifications, contracts, agreements, schedules, reports, lists or other instruments of the Concessionaire or the Concessionaire's Advisors, such undertaking by the Grantor or the Grantor's Advisors shall not relieve or exempt the Concessionaire from, or represent a waiver of, any requirement, liability, Concessionaire Default, covenant, agreement or obligation under this Agreement or at law or in equity and shall not create or impose any requirement, liability, covenant, agreement or obligation (including without limitation an obligation to provide other assistance, services or Approvals) on the Grantor or Grantor's Advisors not otherwise created or imposed pursuant to the express provisions of this Agreement. Notwithstanding the foregoing, once a Phase is Totally Completed, the Grantor will not be entitled to require any change to the plans, drawings or specifications applicable to the construction of such Phase.

#### **13.2 Retention of Concessionaire Information**

The Concessionaire shall retain all Concessionaire Information for a period of no less than seven years after the End Date, provided that:

- (a) all as built drawings shall be retained indefinitely;
- (b) any Concessionaire Information which is the subject of a dispute shall be retained until the final resolution of such dispute, including the expiry of any appeal period; and
- (c) any Concessionaire Information which is required to be retained for a longer period under any applicable Laws and Regulations shall be retained for such longer period.

#### **13.3 Furnishing of Concessionaire Information**

At the request of the Grantor and subject to the *Freedom of Information and Protection of Privacy Act* and the *Personal Information Protection Act*, the Concessionaire shall, at the Concessionaire's cost and expense and at any and all reasonable times:

- (a) in addition to all reports required in accordance with Article 12 or otherwise pursuant to this Agreement, make available or cause to be made available (and, if requested by the Grantor, furnish or cause to be furnished) to the Grantor all

Concessionaire Information as may be specified in such request and as shall be in the possession or control of the Concessionaire or any of the Concessionaire's Advisors; and

- (b) permit the Grantor or Grantor's Advisors to discuss the obligations of the Concessionaire under this Agreement, with any of the directors, officers, employees or managers of the Concessionaire or the Concessionaire's Advisors,

for the purpose of enabling the Grantor to determine whether the Concessionaire is in compliance with the Governing Documentation and Laws and Regulations, but not for any other purpose including the prosecution or defence of any Claim or with respect to Article 32.

#### **13.4 Inspection, Audit and Review Rights of the Grantor**

In addition to the rights set out in Section 13.3, the Grantor may, at all reasonable times, upon two business days prior notice, cause a Grantor's Advisor designated by it to carry out an Audit of the Concessionaire Information required to be maintained or delivered by the Concessionaire under this Agreement for the purpose of verifying the information contained therein and shall be entitled to make copies and to take extracts at the Concessionaire's expense. The Concessionaire, at the cost and expense of the Concessionaire, shall make available or cause to be made available to the Grantor or the designated Grantor's Advisor such reasonable information and material as may be required by the Grantor or the designated Grantor's Advisor for such purposes and otherwise provide such co-operation as may be reasonably required by the Grantor or the designated Grantor's Advisor.

#### **13.5 Inspection of Project, Construction Work and OMM Work**

The Grantor and the Grantor's Advisors shall, at all times, have full and complete access to the Project and all its constituent parts and the Concessionaire, at the cost and expense of the Concessionaire, shall, and shall cause all of the Concessionaire's Advisors to, furnish the Grantor and the Grantor's Advisors with every reasonable assistance for inspecting the Project and Work for the purpose of Auditing the Concessionaire Information and ascertaining compliance with the Governing Documentation and Laws and Regulations.

#### **13.6 Performance of Tests to Determine Concessionaire's Compliance**

The Grantor shall be entitled, at the sole cost and expense of the Grantor, and at any time and from time to time, to perform or cause to be performed any test, study or investigation in connection with the Project or the Work as the Grantor may determine to be reasonably necessary or advisable in the circumstances and the Concessionaire, at the cost and expense of the Concessionaire, shall, and shall cause each of the Concessionaire's Advisors, to furnish the Grantor or the Grantor's Advisors with every reasonable assistance in connection with the carrying out of such tests, procedures, studies and investigations. For greater certainty in connection with the foregoing, the Grantor and the Grantor's Advisors shall be entitled to install or cause to be installed machines, equipment, systems, monitors, counters and other devices in, on, under, over or adjacent to the Project Lands to permit and facilitate any test, study, monitor, review or investigation of or relating to the Project or the Work.



### **13.7 Inspection and Audit Not Waiver of Grantor's Rights**

Failure by the Grantor or the Grantor's Advisors to inspect, review, test or Audit the Project or the Work or any part thereof or the Concessionaire Information, shall not constitute a waiver of any of the rights of the Grantor hereunder or any of the obligations or liabilities of the Concessionaire hereunder. Inspection, review, testing or Audit not followed by a notice of Concessionaire Default shall not constitute a waiver of any Concessionaire Default or constitute an acknowledgement that there has been or will be compliance with the Governing Documentation or Laws and Regulations.

### **13.8 No Undue Interference**

In the course of performing its inspections, reviews, tests and audits hereunder, the Grantor shall use commercially reasonable efforts to minimize the effect, duration and cost of any disruption to the Concessionaire having regard to the nature of the inspections, reviews, tests and audits being performed.

## **ARTICLE 14 PERFORMANCE MANAGEMENT**

### **14.1 Provisions in Addition to Other Remedies**

Subject to Section 14.2(e), the provisions of this Article are in addition to and in no way limit the remedies of the Grantor under the other provisions of this Agreement or any of the other Governing Documentation or otherwise at law or in equity and the Concessionaire shall not be entitled to make and hereby waives any Claim against the Grantor in respect of the exercise by the Grantor of any remedy under this Agreement, any of the other Governing Documentation or otherwise at law or in equity.

### **14.2 Liquidated Damages**

- (a) If the Concessionaire fails to meet the requirements of and its duties, obligations and standards in respect of those items indicated in Schedule 14.2 (other than as a result of anything done by the Provincial Entities or any one for whom they are responsible), then the Concessionaire shall pay to the Grantor within 60 days of the end of each Fiscal Year the amounts of money set out in Schedule 14.2 for each such failure which represents the agreed liquidated damages the Grantor will suffer as a result of the failure. Where any particular failure falls within more than one of the categories set out in Schedule 14.2, the payment for such failure shall be the aggregate of the corresponding amounts.
- (b) The agreed liquidated damages set out in Schedule 14.2 shall only be recovered from the Maintenance Fees by way of a set off of the Maintenance Fees until all amounts owing in respect of liquidated damages have been recovered in full.
- (c) If the Concessionaire is required to pay liquidated damages which aggregate \$30,000 or more in any particular six-month period, then any applicable liquidated damages subsequent to such six-month period shall be twice the

applicable amounts set out in Schedule 14.2 until the Concessionaire has completed a three-month period during which applicable liquidated damages are \$15,000 or less, based on the amounts set out in Schedule 14.2 (prior to doubling such amounts as required under this paragraph).

- (d) The Concessionaire shall be required to report to the Grantor on the occurrence, endurance and method of response of all items listed in Schedule 14.2 within 60 days of the end of each Fiscal Year. Failure to accurately report an incident in such manner shall result in the corresponding liquidated damage amount for such item being double the amount set out in Schedule 14.2. The Grantor shall be entitled to audit such report and the Concessionaire shall provide all information and assistance as the Grantor reasonably requires for such audit.
- (e) The agreed liquidated damages are the only amounts payable by the Concessionaire to the Grantor with respect to each such failure and the only remedy of the Grantor subject to the right of the Grantor to terminate this Agreement under Section 27.2 if there is a Concessionaire Default.

## **ARTICLE 15 THIRD PARTY TENURES**

### **15.1 Province Third Party Tenures**

The Concessionaire acknowledges that the Concession granted and the ground lease demised under this Agreement is subject to any permits, easements, rights of way, licences, rights of entry, occupancy permits, authorizations, crossing agreements, approvals, consents and other instruments:

- (a) granted by a Provincial Entity or any Governmental Authority prior to June 2, 2004, as set out in Schedule 15.1; and
- (b) granted by a Provincial Entity or any Governmental Authority (including without limitation those granted by the Grantor in connection with pipelines or utilities installed in accordance with Section 2.13(b) of this Agreement) at any time during the Term,

(collectively, the “**Province Third Party Tenures**”),

and that the Concessionaire will abide by, comply with and honour the respective interests and rights granted in the Province Third Party Tenures.

## **15.2 Grant of New Third Party Tenures by Concessionaire**

The Concessionaire, in accordance with the provisions of this Article, with respect to the Concession Highway Lands, and access to or from lands adjoining the Concession Highway Lands, may grant or issue licences, rights of entry, occupancy permits, authorizations, approvals, consents and other agreements creating *in personam* rights (“**Concessionaire Third Party Tenures**”) in favour or in respect of, *inter alia*:

- (a) the Provincial Entities or Governmental Authorities;
- (b) local governments;
- (c) British Columbia Hydro and Power Authority;
- (d) public utilities (as defined in the *Utilities Commission Act* and otherwise);
- (e) mining, ranching, forestry or other primary products entities;
- (f) recreational entities;
- (g) commercial tenures; and
- (h) railways.

## **15.3 General Rules for Granting Concessionaire Third Party Tenures**

The following provisions shall apply to the granting of Concessionaire Third Party Tenures by the Concessionaire:

- (a) where applicable, the grant shall be in accordance with the Ministry of Transportation Utility Policy Manual, as amended from time to time;
- (b) except where a policy of the Grantor, as amended from time to time, provides otherwise or where the grant is a renewal and the instrument evidencing the grant or any Laws or Regulations relating to the grant provide otherwise, the granting of a Concessionaire Third Party Tenure must not be unreasonably refused by the Concessionaire;
- (c) no fee, payment or consideration of any kind or nature may be levied for the grant of a Concessionaire Third Party Tenure without the express prior written Approval of the Grantor, unless such fee, payment or consideration is in accordance with any fee structure established by the Grantor for the granting of third party tenures applicable at the time of the granting of such Concessionaire Third Party Tenure; and
- (d) the Concessionaire shall not enter into any Concessionaire Third Party Tenure with a term extending beyond the expiry of the Term without the express prior written Approval of the Grantor, the conditions of which Approval may include

the Grantor becoming a party to such Concessionaire Third Party Tenure together with the Concessionaire.

#### **15.4 Other Governmental Authorizations**

The Concessionaire must assume the full and sole responsibility for obtaining all Governmental Authorizations and any agreements, instruments, consents, approvals or authorizations that may be necessary or desirable in connection with any Concessionaire Third Party Tenures.

### **ARTICLE 16 REPRESENTATIONS, WARRANTIES AND COVENANTS**

#### **16.1 Representations and Warranties of the Grantor**

The Grantor represents and warrants to the Concessionaire, and acknowledges that the Concessionaire is relying upon such representations and warranties in entering into this Agreement, that:

- (a) it has the power, capacity and authority to enter into this Agreement and to do all acts and things and execute and deliver all other documents or instruments as are required hereunder to be done, observed or performed by it in accordance with the terms hereof;
- (b) the Grantor has the right under its lease from BC Transportation Financing Authority to enter into this Agreement without consent. No consents are needed from BC Transportation Financing Authority for the Concessionaire to grant a Bona Fide Mortgage or for the Mortgagee to exercise its security thereunder;
- (c) this Agreement constitutes a valid and legally binding obligation of it, enforceable against it in accordance with the terms hereof, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally, the general principles of equity and the exception that equitable remedies such as specific performance are not available against it;
- (d) subject to Article 19, the Provincial Entities have good freehold title to the Concession Highway Lands, subject only to the Permitted Encumbrances. Schedule 16.1(d) is a complete list of the Permitted Encumbrances described in Sections 1.1(bbbbbb)(vii), (viii), (xi), (xii) and (xiv) known by the Grantor to be in existence at June 2, 2004;
- (e) the Provincial Entities own and possess and have good title to the Existing Improvements, free and clear of all Encumbrances other than Permitted Encumbrances and Concessionaire Permitted Encumbrances;
- (f) there is no litigation or administrative or governmental proceeding or inquiry pending, or to the knowledge of the Grantor, without independent investigation, threatened with respect to Treaty 8 (as referred to in Section 19.2) that has, or

might reasonably be expected to have, an adverse impact on the Project, nor does the Grantor know of any reasonable basis for any such action, proceeding or inquiry, other than as disclosed in writing to the Concessionaire at the Execution Date; to the knowledge of the Grantor, without independent investigation, there is no current exercise of treaty rights that is incompatible with the ability of the Concessionaire to carry out the terms of this Agreement or inconsistent with the rights granted under this Agreement; the Grantor has not received notice of any allegation, other than as disclosed in writing to the Concessionaire at the Execution Date, that there has been an unjustifiable infringement of treaty rights by the Grantor in connection with the taking up in the context of this Agreement of the Concession Highway Lands; and, other than as disclosed in writing to the Concessionaire at the Execution Date, the Grantor has not received notice of any allegation that there has been a treaty right that may be exercised on the Concession Highway Lands in a manner not contemplated by taking up under this Agreement and which is incompatible with the Concessionaire's rights under this Agreement and the Grantor does not know of any reasonable basis therefor;

- (g) the information in the Grantor Information described in Schedule 1.10 does not, to the best of the Grantor's knowledge, without independent investigation, contain any inaccuracies;
- (h) to the best of the Grantor's knowledge, without independent investigation, there are no Hazardous Substances or environmental hazards on the Concession Highway Lands, other than those reported to or on file with the Ministry of Water, Land and Air Protection;
- (i) the Concession Highway Lands are not registered in the land title system;
- (j) the Grantor has obtained all necessary approvals, statutory or otherwise, that are required to give the indemnities required to be given by the Grantor in accordance with Sections 6.1, 6.3(d), 6.3(f), 19.2(c), 23.3, 26.2, 27.4(c) and 30.1, including, without limitation, under the *Financial Administration Act* and the Guarantees and Indemnities Regulation made thereunder;
- (k) Schedule 2.10 is a complete list of Permits obtained or held by the Grantor for the Project as of June 11, 2004; and
- (l) there are no property taxes assessed by a Provincial Entity or any municipal or local government with respect to the Concession Highway Lands.

## **16.2 Representations and Warranties of the Concessionaire**

The Concessionaire represents and warrants to the Grantor and acknowledges that the Grantor is relying upon such representations and warranties in entering into this Agreement, that:

- (a) it has the power, capacity and authority to enter into this Agreement and to do all acts and things and execute and deliver all other documents or instruments as are

required hereunder to be done, observed or performed by it in accordance with the terms hereof; and

- (b) this Agreement constitutes a valid and legally binding obligation of it, enforceable against it in accordance with the terms hereof, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally, and to the extent that equitable remedies such as specific performance and injunctions are only available in the discretion of the court from which they are sought.

### **16.3 Survival**

All representations and warranties set forth in this Agreement or in any certificate or other document delivered by or on behalf of either party pursuant hereto shall survive the execution of this Agreement and any investigation at any time with respect thereto and continue for a period ending two years after the End Date.

### **16.4 Covenants of the Grantor**

The Grantor covenants to the Concessionaire that:

- (a) the Grantor shall not encumber any portion of the Concession Highway Lands except for the Concessionaire Permitted Encumbrances in existence on the Execution Date and Permitted Encumbrances;
- (b) the Concession Highway Lands will not be registered in the land title system under the *Land Title Act* (British Columbia); and
- (c) the Grantor will perform all obligations required to be performed by the Grantor under the Government Agreements.

## **ARTICLE 17 FINANCE OBLIGATIONS**

### **17.1 Concessionaire's Obligations to Obtain Financing**

The Concessionaire shall be responsible for obtaining any financing for the performance of its obligations under this Agreement.

### **17.2 Grantor's Obligations**

The Grantor shall not have any responsibility to meet debt service or repayment obligations on any financing incurred by the Concessionaire in connection with the performance by the Concessionaire of its obligations under this Agreement. The Grantor, shall, to the extent consistent with Laws and Regulations and at the sole cost and expense of the Concessionaire, co-operate with the Concessionaire with respect to documentation reasonably necessary to obtain, maintain and replace financing for the performance of the obligations of the Concessionaire hereunder.

**ARTICLE 18**  
**POLICE SERVICES AND ENFORCEMENT SERVICES**

**18.1 Engagement of Police**

- (a) The Concessionaire must permit the RCMP to maintain traffic patrol, enforcement and provide other services which the RCMP is required or authorized to perform pursuant to Laws and Regulations and under the Police Services Agreements in respect of the Industrial Concession Highway.
- (b) The Concessionaire acknowledges that the RCMP is empowered to enforce, *inter alia*, Laws and Regulations on the Industrial Concession Highway, including without limitation the *Motor Vehicle Act*.
- (c) The parties acknowledge and agree that traffic patrol, enforcement and other services provided by the RCMP in respect of the Industrial Concession Highway, at the levels provided as of the Execution Date, shall continue to be provided during the Term at no cost to the Concessionaire.

**18.2 No Private Traffic Law Enforcement Activities**

The Concessionaire shall not engage private policing security services or its own personnel to provide private traffic policing or traffic law enforcement services on the Industrial Concession Highway for any purpose.

**18.3 Enforcement Services by Provincial Entities**

The Concessionaire shall permit the Provincial Entities to exercise their jurisdiction under Laws and Regulations for the Industrial Concession Highway.

**18.4 Other Jurisdiction over Industrial Concession Highway**

- (a) The Concessionaire must permit the Office of the Superintendent of Motor Vehicles, the Motor Carrier Commission and the Insurance Corporation of British Columbia to exercise their respective mandates, rights, duties and obligations on the Industrial Concession Highway.
- (b) The Concessionaire acknowledges that the Provincial Entities will continue to exercise jurisdiction, or will cause the applicable Governmental Authority, to issue permits and regulate on the Industrial Concession Highway and all collector or feeder roads serving the Industrial Concession Highway in accordance with applicable Laws and Regulations with respect to:
  - (i) overweight vehicle restrictions, including without limitation during spring break-up; and
  - (ii) oversize vehicle restrictions.

## **ARTICLE 19 FIRST NATIONS**

### **19.1 Consultation**

The Grantor and Concessionaire will, to the extent required by law and in accordance with any policy established from time to time by the Provincial Entities, consult with First Nations on issues with respect to the Project.

### **19.2 Aboriginal Claims and Title**

- (a) The parties acknowledge that the Project and the Concession Highway Lands are within the geographic scope of Treaty 8.
- (b) The Concessionaire and the Grantor agree to work with First Nations to try to address the exercise of treaty rights on the Concession Highway Lands, to the extent the exercise of treaty 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.
- (c) Subject to paragraph (e) below, the Grantor retains its liability, to the extent that any such liability exists, for the acts or omissions of the Grantor that occurred prior to the Concessionaire's possession of the Concession Highway Lands and, to that extent, the Grantor will reimburse the Concessionaire for damages which the Concessionaire suffers and for payments which the Concessionaire may be required to make to any First Nation as a result of a determination by a Canadian court of competent jurisdiction, on final appeal, that there has been an unjustifiable infringement of treaty rights by the Grantor in connection with the taking up in the context of this Agreement of the Concession Highway Lands and such court provides a remedy that derogates the rights of the Concessionaire under this Agreement.
- (d) Subject to paragraph (e) below, the Grantor will be liable for damages which the Concessionaire suffers if:
  - (i) a treaty settlement results in a breach of the Grantor's covenant for quiet enjoyment described in Section 2.5; or
  - (ii) a Canadian court of competent jurisdiction, on final appeal, determines that a First Nation has a treaty right that may be exercised on the Concession Highway Lands in a manner not contemplated by taking up under this Agreement and the exercise of the right is incompatible with the Concessionaire's rights under this Agreement (the determination of incompatibility to be resolved by agreement or, failing agreement, under Article 32).
- (e) The Grantor's agreement in paragraphs (c) or (d) above does not in any way extend to any damages or payments whatsoever, where such damages or



payments result or otherwise arise, in whole or in part, from a breach of this Agreement by or the acts or omissions of the Concessionaire, its employees, agents, contractors, successors, assigns or parties for whom the Concessionaire is by law responsible, other than acts or omissions reasonably required for the Concessionaire to perform its obligations under this Agreement.

- (f) Notwithstanding paragraphs (c) or (d) above, or any other term of this Agreement:
  - (i) the Concessionaire has a duty to mitigate any and all damages or payments which the Concessionaire may claim are payable in respect of a matter contemplated under paragraphs (c) or (d) above; and
  - (ii) the Grantor expressly reserves its rights to defend against any claim that the Concessionaire may make in respect of a matter contemplated in paragraphs (c) or (d) above.
- (g) The Concessionaire will within 15 days of becoming aware of any claim in respect of a matter contemplated in paragraphs (c) or (d) above, provide written notice to the Grantor of such claim along with full written particulars of any such claim.
- (h) The Concessionaire will, in good faith and at all times, co-operate with the Grantor and its counsel in any and all investigations, settlements and judicial determinations of any claims made in respect of matters contemplated in paragraphs (c) or (d) above and will not take any actions or seek any remedies against any First Nation or member of a First Nation in respect of such claims without the prior approval of the Grantor.

## **ARTICLE 20 DEFICIENCIES**

### **20.1 Deficiency Notice**

If the Concessionaire should fail to carry out or complete the Construction Work properly or in substantial compliance with the Governing Requirements, the Grantor may, without prejudice to any other right or remedy the Grantor may have, notify the Concessionaire in writing that the Concessionaire is in default of the Concessionaire's contractual obligations and that a deficiency exists, and instruct the Concessionaire to correct the deficiency within 10 business days of receipt of such notice.

### **20.2 Schedule for Correction**

If the default referred to in Section 20.1 cannot be corrected in the 10 business days specified, the Concessionaire shall be in compliance with the Grantor's instructions if the Concessionaire:

- (a) commences the correction of the default within the specified time;

- (b) provides the Grantor with a schedule for such correction which is acceptable to the Grantor acting reasonably; and
- (c) completes the correction of the default in accordance with such schedule.

## **ARTICLE 21 CLOSURE OF CONCESSION HIGHWAY**

### **21.1 Concessionaire Must Not Close Industrial Concession Highway**

The Concessionaire must operate the Industrial Concession Highway continuously, 24 hours a day, seven days a week, during the Term subject only to:

- (a) closures under this Agreement, by a Governmental Authority or a Police Constable, the RCMP, the provincial police force or a municipal police department;
- (b) closure by the Concessionaire if in the Concessionaire's opinion, reasonably exercised and taking into consideration the standard of care and safety imposed on the Concessionaire under this Agreement, an event has occurred which would endanger the public using the Industrial Concession Highway. The provisions of Section 5.7(b) shall apply; and
- (c) closure by the Concessionaire of a lane or portions of the Industrial Concession Highway, but not (except with the express prior written consent of the Grantor in each specific case) so as to restrict completely traffic flow in either or both directions, for the purposes of the Work, or any other repair, maintenance, upgrade, rehabilitation, construction or reconstruction work on the Industrial Concession Highway.

### **21.2 Restricted Access to Feeder or Collector Highways**

The Concessionaire must not block or restrict, partially or wholly, access to any collector, feeder or other highway connecting with the Industrial Concession Highway without the prior express written consent of the Grantor, and only then on terms and conditions specified by the Grantor, subject only to:

- (a) blockages or restrictions contemplated in this Agreement, by a Governmental Authority or a Police Constable, the RCMP, or a municipal police department;
- (b) blockages or restrictions by the Concessionaire if in the Concessionaire's opinion, reasonably exercised and taking into consideration the standard of care and safety imposed on the Concessionaire under this Agreement, an event has occurred which would endanger the public using such collector, feeder or other highways or the Industrial Concession Highway; and
- (c) blockages or restrictions by the Concessionaire of a lane or portions of such collector, feeder or other highways within one kilometre of the Industrial

Concession Highway, but not (except with the express prior written consent of the Grantor in each specific case) so as to restrict completely traffic flow in either or both directions, for the purposes of the Work, or any other repair, maintenance, upgrade, rehabilitation, construction or reconstruction work on such collector, feeder or other highways or the Industrial Concession Highway.

### **21.3 No Grantor Liability for Closure**

The Grantor shall have no obligation or liability and the Concessionaire shall not be entitled to make and hereby waives any Claim against the Grantor in respect of any full or partial closure, blockage or restriction under Section 21.1 or 21.2, except as specifically provided in this Agreement.

## **ARTICLE 22 [INTENTIONALLY DELETED]**

## **ARTICLE 23 INDEMNIFICATION**

### **23.1 Indemnification by Concessionaire**

The Concessionaire will, during and for two years after the expiration of this Agreement and the Term, indemnify and save harmless the Provincial Entities and the Grantor's Advisors from and against all Claims made against or incurred, suffered or sustained by the Provincial Entities or the Grantor's Advisors either before or after the expiration or sooner termination of this Agreement, where the same or any of them are based upon or arise out of or from:

- (a) any acts or omissions (including without limitation negligent or wilful acts or omissions) or any breach or non-performance of this Agreement or of any Project Agreement, including, without limitation, any breach of Environmental Laws, by the Concessionaire, or any of the Concessionaire's Advisors, Designated Consultants, employees, agents, contractors, servants, successors or assigns, or parties for whom the Concessionaire is by law responsible;
- (b) any material inaccuracy in any representation or warranty made by the Concessionaire in this Agreement or any Project Agreement or in any document or certificate given by the Concessionaire pursuant to this Agreement or any Project Agreement; and
- (c) any personal or bodily injury or death of any person or persons (including without limitation any member of the public) and any damage to real or personal property to the extent caused in any way or contributed to by the Concessionaire, or any of the Concessionaire's Advisors, Designated Consultants, employees, agents, contractors, servants, successors or assigns, or parties for whom the Concessionaire is by law responsible,

excepting always liability arising out of the independent acts or omissions of the Provincial Entities, the Grantor's Advisors or any of the Provincial Entities' employees, agents, contractors, servants, successors or assigns or parties for whom the Provincial Entities are in law responsible.

### **23.2 Grantor's Notice of Claim**

If the Grantor becomes aware of any Claim which could lead to the indemnity obligation of the Concessionaire under this section being called upon, the Grantor shall promptly give notice thereof to the Concessionaire, provided that the failure to give such notice promptly shall not adversely affect the Grantor's rights under this section, except to the extent that such failure materially and adversely affects the right of the Concessionaire to assert any reasonable defence to such Claim, or except if such notice is given more than two years after the End Date.

### **23.3 Indemnification by Grantor**

- (a) The Grantor will, during and for two years after the expiration of this Agreement and the Term, indemnify and save harmless the Concessionaire and the Concessionaire's Advisors from and against all Claims made against or incurred, suffered or sustained by the Concessionaire or the Concessionaire's Advisors either before or after the expiration or sooner termination of this Agreement, where the same or any of them are based upon or arise out of or from:
  - (i) any acts or omissions (including without limitation, negligent or wilful acts or omissions) or any breach or non-performance of this Agreement or of any Project Agreement, including without limitation, any breach of Environmental Laws, by the Provincial Entities or any of the Grantor's Advisors, employees, agents, contractors, servants, successors or assigns, or parties for whom the Grantor is by law responsible;
  - (ii) any material inaccuracy in any representation or warranty made by the Grantor in this Agreement or any Project Agreement or in any document or certificate given by the Grantor pursuant to this Agreement or any Project Agreement; and
  - (iii) any personal or bodily injury or death of any person or persons (including without limitation any member of the public) and any damage to real or personal property to the extent caused in any way or contributed to by a Provincial Entity, or any of the Grantor's Advisors, employees, agents, contractors, servants, successors or assigns, or parties for whom the Grantor is by law responsible,

excepting always liability arising out of the independent acts or omissions of the Concessionaire, the Concessionaire's Advisors or any of the Concessionaire's employees, agents, contractors, servants, successors or assigns, or parties for whom the Concessionaire is in law responsible.

- (b) If any Grantor Information from a third party is inaccurate, incomplete, inappropriate, incomprehensive, inexhaustive or unreliable in whole or in part, the Concessionaire suffers damage in reliance thereon, the Grantor has a right to

claim against such third party in respect thereof and there is a reasonable likelihood of success in the reasonable opinion of the Grantor, then the Grantor will, at the request of the Concessionaire, indemnify the Concessionaire for such damage suffered by the Concessionaire.

The Grantor will claim against the third party in respect thereof and pay to the Concessionaire all amounts recovered from the third party net of legal fees and expenses reasonably incurred by the Grantor. Such indemnity will be limited recourse and the Concessionaire will not have any other rights in respect of such indemnity.

The parties will cooperate in pursuing such claims against such third party.

#### **23.4 Concessionaire's Notice of Claim**

If the Concessionaire becomes aware of any Claim which could lead to the indemnity obligation of the Grantor under this section being called upon, the Concessionaire shall promptly give notice thereof to the Grantor, provided that the failure to give such notice promptly shall not adversely affect the Concessionaire's rights under this section, except to the extent that such failure materially and adversely affects the right of the Grantor to assert any reasonable defence to such Claim, or except if such notice is given more than two years after the End Date.

### **ARTICLE 24 DELEGATION BY CONCESSIONAIRE**

#### **24.1 Restrictions**

Subject to the restrictions herein contained respecting the Transfer by the Concessionaire of any or all of the Concessionaire's Interest and any other restriction contained within this Agreement, the Concessionaire may delegate to one or more of the Concessionaire's Advisors, the performance, on behalf of the Concessionaire, of specified duties and functions to be observed or performed by the Concessionaire as required or provided for under this Agreement.

#### **24.2 Fully Liable**

Notwithstanding any delegation by the Concessionaire of its duties or functions hereunder to one or more of the Concessionaire's Advisors, the Concessionaire shall be fully responsible for the performance of such duties and functions by each Concessionaire's Advisor and errors or omissions by any such Concessionaire's Advisor shall be deemed to be those of the Concessionaire hereunder.

**ARTICLE 25**  
**DELAY EVENTS AND CATASTROPHIC DAMAGE**

**25.1 Delay Events Defined**

For purposes of this Agreement, “**Delay Event**” means any of the following arising any time after the Effective Date:

- (a) an event of Force Majeure;
- (b) a failure to obtain or delay in obtaining any Governmental Authorization Approval, Permit, Other Authorization or agreement referred to in Sections 3.8 to 3.10, provided that such failure or delay could not have been reasonably prevented by technical and scheduling measures of the Concessionaire;
- (c) a change to Laws and Regulations arising after the Effective Date;
- (d) delay caused by the performance of works or the non-performance of obligations by a Provincial Entity, the Grantor or other Governmental Authority or any utility or cable television supplier or railway operator, any Province Third Party Tenure, Governmental Agreements, any matter under Section 2.13, or any work under Article 11 not done by the Concessionaire;
- (e) a failure by the unaffected party to perform or observe any of its covenants or obligations under this Agreement or any other Project Agreement, including without limitation a failure by the Grantor to comply with the provisions of Section 1.16;
- (f) delay caused by the presence in, on, under or around the Project Lands of Hazardous Substances other than those Hazardous Substances the presence or potential presence of which, as of the Execution Date, is disclosed in Schedule 25.1(f);
- (g) delay caused by the presence in, under or on the Project Lands of property of archaeological or historical significance or heritage resources, other than those the presence or potential presence of which, as of the Execution Date, is disclosed in Schedule 25.1(g);
- (h) the closure of the Industrial Concession Highway or any feeder or collector highway that services the Industrial Concession Highway or the exercise of any traffic control, inspection or safety measures or the exercise of any other police powers or authority on the Industrial Concession Highway or any feeder or collector highway that services the Industrial Concession Highway by a Provincial Entity, Governmental Authority, one or more Police Constables or the RCMP or a provincial police force or municipal police department;

- (i) delay as a result of a Permitted Encumbrance not listed on Schedule 16.1(d) or the existence of Permits possessed by or in favour of the Grantor as of the Effective Date not listed on Schedule 2.10; and
- (j) if the Grantor does not permit insurance proceeds to be made available to the Concessionaire for the purposes of repair or replacement,

which results in or would result in a delay or interruption in the performance of any obligation under this Agreement provided that such delay or the cause thereof is not specifically dealt with in this Agreement or does not arise by reason of a Non-Excusable Event.

## **25.2 Notice of Delay Event**

If either the Grantor or the Concessionaire is affected by a Delay Event it shall give notice within seven days following the date on which it first became aware of such Delay Event to the other unaffected party, provided, however, in the case of the same Delay Event being a continuing cause of delay, only one notice shall be necessary. Such notice must include:

- (a) a statement of which Delay Event the notice is based upon;
- (b) details of the circumstances from which the delay arises; and
- (c) an estimate of the delay in the performance of obligations under this Agreement attributable to such Delay Event and information in support thereof, if known at that time.

The unaffected party shall, after receipt of such notice, be entitled by notice to require the affected party to provide such further supporting particulars as the unaffected party may reasonably consider necessary.

## **25.3 Notice to Unaffected Party**

The affected party shall give notice to the other party within seven days following the date on which it first became aware that a Delay Event has ceased, which notice shall include a statement of which Delay Event the notice is based upon and the date the affected party became aware that the Delay Event has ceased.

## **25.4 Extension of Time for Completion by Reason of Delay Event**

Subject to the affected party giving the notice required in Section 25.2, a Delay Event shall excuse the affected party from whatever performance is prevented by the Delay Event referred to in such notice for such appropriate number of days as the Grantor and the Concessionaire jointly determine. Where the affected party is the Concessionaire, the Concessionaire shall continue to be entitled to Fees payable to the Concessionaire in accordance with this Agreement without any set off of Fees by the Grantor because of the Delay Event. No liquidated damages directly attributable to the Delay Event will be payable under Article 14 as a result of a Delay Event. The provisions of Sections 9.9 and 9.10 will also apply if a Delay Event or Delay Events exceed six months prior to Total Completion of the applicable Phase. If the

Grantor and the Concessionaire cannot agree upon the period of extension, then either party shall be entitled to refer the matter to the dispute resolution procedure in Article 32. This Section 25.4 shall not excuse the affected party from the performance and observance under this Agreement of all obligations and covenants not affected by the Delay Event. Notwithstanding the occurrence of a Delay Event, the affected party shall continue its performance and observance under this Agreement of all of its obligations and covenants to the extent that it is reasonably able to do so and shall use commercially reasonable efforts to minimize the effect and duration of the Delay Event. Nothing herein shall permit or excuse non-compliance with a change to Laws and Regulations.

#### **25.5 Termination for Catastrophic Damage**

If the cost to repair and restore the damage to or loss of sections of the Industrial Concession Highway (i) exceeds \$5,000,000 (or such other amount as the parties may agree), or (ii) will be a Delay Event which the parties contemplate will continue for more than one year, then the parties may, prior to and instead of the Concessionaire proceeding with the restoration and reconstruction of the damaged or destroyed section of the Industrial Concession Highway, agree to terminate this Agreement, in which event the Grantor shall pay the Delay Event Termination Value in accordance with Section 25.7.

#### **25.6 Termination for Delay Event Duration in Excess of One Year**

If a Delay Event occurs that is reasonably likely to have the effect of:

- (a) delaying the performance of any material obligation created by this Agreement beyond the time required for its performance under this Agreement; or
- (b) causing physical damage or destruction to the Industrial Concession Highway that results in the Industrial Concession Highway being substantially unavailable for Highway Purposes,

and such effect continues for a period in excess of one year, either party may terminate this Agreement by giving 30 days written notice to the other party, in which event the Grantor shall pay the Delay Event Termination Value to the Concessionaire (i) on the Reversion Date or (ii) if the Delay Event Termination Value is determined on a date subsequent to the Reversion Date, then not later than 30 days following the date of determination of the Delay Event Termination Value, together with interest at the Bona Fide Debt Interest Rate from the Reversion Date to the date on which payment is made. If this Agreement is not terminated in accordance with this Section 25.6, then the other provisions of this Article 25 shall apply to the event of Delay Event.



## **25.7 Compensation for Termination by Reason of Delay Event**

- (a) “**Delay Event Termination Value**” means:
- (i) the greater of:
    - (A) 95% of the Concession FMV in the case of Force Majeure, or 100% of the Concession FMV in the case of a Delay Event other than Force Majeure; and
    - (B) the Outstanding Debt as of the date of payment of the Delay Event Termination Value,
- plus
- (ii) the aggregate of:
    - (C) Employment Payments; and
    - (D) Subcontractor Losses,
- less
- (iii) the aggregate of:
    - (E) any amount which the Grantor is entitled to set off against Fees under this Agreement; and
    - (F) the fair market value of any equipment or other assets used in the operation of the Concession which are not transferred or assigned to the Grantor on the Reversion Date.

Notwithstanding anything else contained in this Section 25.7, the amount of the Delay Event Termination Value shall not be less than the Outstanding Debt as of the date of payment of the Delay Event Termination Value.

- (b) The parties will use commercially reasonable efforts to agree on the Delay Event Termination Value. If the parties cannot agree on the Delay Event Termination Value within 90 business days after the End Date, then the Delay Event Termination Value shall be determined by a Valuator in accordance with the following procedure:
- (i) The Grantor and the Concessionaire shall jointly appoint a Valuator (the “First Valuator”) to determine the Delay Event Termination Value. If the parties are unable to agree upon the First Valuator within 21 days, the Grantor and the Concessionaire shall jointly make application (provided that if a party does not participate in such application, the other party may make application alone) under the *Commercial Arbitration Act* to a judge

of the British Columbia Supreme Court to appoint a First Valuator, and the provisions of the *Commercial Arbitration Act* shall govern such appointment. The First Valuator shall determine the Delay Event Termination Value within 60 days following his or her appointment and shall deliver to each party a written report (the “First Valuation Report”) setting out its determination.

- (ii) Either party may within 30 days of its receipt of the First Valuation Report provide written notice to the other party advising that it wishes to have a second determination of the Delay Event Termination Value undertaken. If no such notice is given, the First Valuation Report shall be final and binding on the parties. If such notice is given, the parties shall forthwith meet for the purpose of identifying and retaining a second valuator (the “Second Valuator”) to prepare a second determination of the Delay Event Termination Value. In the event the parties do not agree upon a Second Valuator within 21 days after the delivery of the notice referred to in this paragraph, then the parties shall jointly make application (provided that if a party does not participate in such application, the other party may make application alone) under the *Commercial Arbitration Act* to a judge of the British Columbia Supreme Court to appoint a Second Valuator, and the provisions of the *Commercial Arbitration Act* shall govern such appointment.
- (iii) The Second Valuator shall prepare and deliver to each of the parties a written report (the “Second Valuation Report”) setting out its determination of the Delay Event Termination Value as soon as possible, and in any event within 45 days after being retained. Where a Second Valuation Report has been prepared, the Delay Event Termination Value shall be equal to the average of the determinations set out in the First Valuation Report and the Second Valuation Report.
- (iv) In order to facilitate the determination of the Delay Event Termination Value by a Valuator, each of the Grantor and the Concessionaire shall provide to the Valuator such information as may be requested by the Valuator, acting reasonably, and shall permit the Valuator and its representatives to have reasonable access during normal business hours to such information and to take extracts therefrom and to make copies thereof.
- (v) The Delay Event Termination Value as determined above shall be final and conclusive and not subject to any appeal and Article 32 will not apply.
- (vi) Subject to Section 31.1(g), payment of the Delay Event Termination Value by the Grantor to the Concessionaire shall constitute full and final satisfaction of all amounts that may be claimed by the Concessionaire for and in respect of the termination of this Agreement pursuant to Section 25.5 or 25.6 and upon such payment, each of the Grantor and the

Concessionaire shall be released and forever discharged by the other from any and all liability in respect of such termination hereunder.

- (vii) The parties jointly shall pay all fees and expenses charged by the Valuators for preparing the First Valuation Report and the Second Valuation Report equally, except that if the Grantor requested the second valuation and the determination by the Second Valuator is equal to or greater than the First Valuation Report, the Grantor shall be solely responsible for all fees and expenses charged by the Second Valuator, and if the Concessionaire requested the second valuation and the determination by the Second Valuator is equal to or less than the First Valuation Report, the Concessionaire shall be solely responsible for all fees and expenses charged by the Second Valuator.
- (viii) The First Valuator and the Second Valuator shall be entitled to apply such principles of valuation as each considers appropriate in the circumstances and to retain such qualified independent appraisers as each may deem appropriate to assist with its valuation.

## **25.8 Costs Resulting from Delay**

- (a) If the Concessionaire incurs additional out-of-pocket costs and expenses (the “**Delay Costs**”) in excess of \$25,000 per Delay Event in fulfilling its obligations under this Agreement solely as a result of a Delay Event, the Grantor shall reimburse the Concessionaire for the Delay Costs in excess of \$25,000 upon determination of the amount of the Delay Costs in accordance with Section 25.8(b).
- (b) The Concessionaire shall submit a request for reimbursement of Delay Costs in excess of \$25,000 per Delay Event within 12 months following the occurrence of the Delay Event giving rise to the Delay Costs. The Concessionaire shall provide to the Grantor all information reasonably required to verify the Delay Costs and the causal connection of the Delay Event to the Delay Costs. If the parties are unable to agree on the existence or amount of the Delay Costs, such determination shall be resolved by an Arbitrator in the manner set out in Article 32.

## **ARTICLE 26 DISCRIMINATORY ACTION**

### **26.1 Discriminatory Action by a Provincial Entity**

A “**Discriminatory Action**” shall occur if a Provincial Entity takes action of any nature whatsoever after the date hereof, including without limitation the bringing into force or application of any Enactment or policy or any change to Laws and Regulations, or fails to perform its obligations as prescribed by Laws and Regulations, if such action or failure materially and adversely affects the Concession FMV, except where such action is in response to any act or omission on the part of the Concessionaire which is illegal (other than an act or

omission rendered illegal by virtue of the Discriminatory Action), except that none of the following shall be a Discriminatory Action:

- (a) a change to Laws and Regulations of general application, including those relating to taxation, being one that is not limited to the Concessionaire and similar persons or the Project and similar projects or this transaction and similar transactions, but specifically excluding municipal or provincial Laws and Regulations which result in any real property taxes payable by the Concessionaire in relation to the Project;
- (b) the development, construction or operation of any mode of transportation, including without limitation a highway, that may result in the reduction of traffic activity and whether or not such development, construction or operation entitles the Concessionaire to compensation for Concessionaire Losses;
- (c) the amendment, interpretation, application or removal of any existing specification, or the introduction of any new specifications, contained in the Governing Requirements or any Laws and Regulations relating to the enforcement thereof;
- (d) any of the events or actions referred to in Section 5.7(a); or
- (e) an action that would otherwise constitute a Discriminatory Action in accordance with the foregoing, provided that such action is accompanied by the coming into force of any Law or Regulation to provide for the same or substantially the same level of compensation to the Concessionaire as contemplated hereunder or is dealt with by way of Change Order under Article 8.

## **26.2 Consequences of Discriminatory Action**

If a Discriminatory Action occurs, the Grantor will, subject to Sections 26.4 and 26.5, pay compensation to the Concessionaire equal to the decrease in Concession FMV resulting from the Discriminatory Action (the “**Discriminatory Action Compensation**”).

## **26.3 Notice of Discriminatory Action**

- (a) The Concessionaire shall give a notice (the “**Preliminary Notice**”) to the Grantor within 30 days following the date on which the Concessionaire first became aware of the Discriminatory Action stating that a Discriminatory Action has occurred. Within 180 days following the giving of the Preliminary Notice, the Concessionaire must give another notice (the “**Notice of Discriminatory Action**”), which Notice of Discriminatory Action must include:
  - (i) a statement of the Discriminatory Action which has occurred;
  - (ii) details of the effect of such occurrence which is borne by the Concessionaire;

- (iii) details of the material adverse effect of such occurrence on the economic position of the Concessionaire; and
  - (iv) the amount claimed as Discriminatory Action Compensation and details of the calculation thereof.
- (b) The Grantor shall, after receipt of the Notice of Discriminatory Action, be entitled by notice to require the Concessionaire to provide such further supporting particulars as the Grantor may consider necessary.
- (c) If the Grantor wishes to dispute the occurrence of a Discriminatory Action or the amount of Discriminatory Action Compensation claimed in the Notice of Discriminatory Action, or both, the Grantor shall give notice of dispute (the “**Notice of Dispute**”) to the Concessionaire within 30 days following the date of receipt of the Notice of Discriminatory Action stating the grounds for such dispute.
- (d) If neither the Notice of Discriminatory Action nor the Notice of Dispute has been withdrawn within 30 days following the date of receipt of the Notice of Dispute by the Concessionaire, the matter shall be submitted to the dispute resolution procedure in Article 32.
- (e) If the Grantor does not dispute the occurrence of a Discriminatory Action or the amount of Discriminatory Action Compensation claimed in the Notice of Discriminatory Action, the Grantor shall pay the amount of Discriminatory Action Compensation claimed to the Concessionaire within 60 days following the date of receipt of the Notice of Discriminatory Action together with interest at the Variable Interest Rate from the date of receipt of the Notice of Discriminatory Action to the date on which payment is made.
- (f) If a Notice of Dispute has been given, the Grantor shall pay the amount of Discriminatory Action Compensation as finally determined to the Concessionaire within 60 days following the date of determination of the Discriminatory Action Compensation, together with interest at the Variable Interest Rate from the date of receipt of the Notice of Discriminatory Action to the date on which payment is made.
- (g) The parties will use commercially reasonable efforts to agree on the Discriminatory Action Compensation. If the parties cannot agree on the Discriminatory Action Compensation within 90 business days after the date of the Discriminatory Action, then the Discriminatory Action Compensation shall be determined by a Valuator in accordance with the following procedure:
  - (i) The Grantor and the Concessionaire shall jointly appoint a Valuator (the “**First Valuator**”) to determine the Discriminatory Action Compensation. If the parties are unable to agree upon the First Valuator within 21 days, the Grantor and the Concessionaire shall jointly make application (provided that if a party does not participate in such application, the other

party may make application alone) under the *Commercial Arbitration Act* to a judge of the British Columbia Supreme Court to appoint a First Valuator, and the provisions of the *Commercial Arbitration Act* shall govern such appointment. The First Valuator shall determine the Discriminatory Action Compensation within 60 days following his or her appointment and shall deliver to each party a written report (the “First Valuation Report”) setting out its determination.

- (ii) Either party may within 30 days of its receipt of the First Valuation Report provide written notice to the other party advising that it wishes to have a second determination of the Discriminatory Action Compensation undertaken. If no such notice is given, the First Valuation Report shall be final and binding on the parties. If such notice is given, the parties shall forthwith meet for the purpose of identifying and retaining a second valuator (the “Second Valuator”) to prepare a second determination of the Discriminatory Action Compensation. In the event the parties do not agree upon a Second Valuator within 21 days after the delivery of the notice referred to in this paragraph, then the parties shall jointly make application (provided that if a party does not participate in such application, the other party may make application alone) under the *Commercial Arbitration Act* to a judge of the British Columbia Supreme Court to appoint a Second Valuator, and the provisions of the *Commercial Arbitration Act* shall govern such appointment.
- (iii) The Second Valuator shall prepare and deliver to each of the parties a written report (the “Second Valuation Report”) setting out its determination of the Discriminatory Action Compensation as soon as possible, and in any event within 45 days after being retained. Where a Second Valuation Report has been prepared, the Discriminatory Action Compensation shall be equal to the average of the determinations set out in the First Valuation Report and the Second Valuation Report.
- (iv) In order to facilitate the determination of the Discriminatory Action Compensation by a Valuator, each of the Grantor and the Concessionaire shall provide to the Valuator such information as may be requested by the Valuator, acting reasonably, and shall permit the Valuator and its representatives to have reasonable access during normal business hours to such information and to take extracts therefrom and to make copies thereof.
- (v) The Discriminatory Action Compensation as determined above shall be final and conclusive and not subject to any appeal and Article 32 will not apply.
- (vi) Subject to Section 31.1(g), payment of the Discriminatory Action Compensation by the Grantor to the Concessionaire shall constitute full and final satisfaction of all amounts that may be claimed by the

Concessionaire for and in respect of the occurrence of the Discriminatory Action and, upon such payment, each of the Grantor and the Concessionaire shall be released and forever discharged by the other from any and all liability in respect of such Discriminatory Action.

- (vii) The parties jointly shall pay all fees and expenses charged by the Valuators for preparing the First Valuation Report and the Second Valuation Report equally, except that if the Grantor requested the second valuation and the determination by the Second Valuator is equal to or greater than the First Valuation Report, the Grantor shall be solely responsible for all fees and expenses charged by the Second Valuator, and if the Concessionaire requested the second valuation and the determination by the Second Valuator is equal to or less than the First Valuation Report, the Concessionaire shall be solely responsible for all fees and expenses charged by the Second Valuator.
- (viii) The First Valuator and the Second Valuator shall be entitled to apply such principles of valuation as each considers appropriate in the circumstances and to retain such qualified independent appraisers as each may deem appropriate to assist with its valuation.

#### **26.4 Right of Grantor to Remedy Discriminatory Action**

If the Grantor wishes to remedy the occurrence of a Discriminatory Action, the Grantor shall give notice thereof to the Concessionaire within 30 days following the date of receipt of the Notice of Discriminatory Action. If the Grantor gives such notice it must remedy, or cause to be remedied, the Discriminatory Action within 180 days following the date of receipt of the Notice of Discriminatory Action or, if a Notice of Dispute has been given, within 180 days following the final award pursuant to Article 32 to the effect that a Discriminatory Action occurred. If the occurrence of a Discriminatory Action is remedied within the applicable period of time, the Discriminatory Action Compensation shall be adjusted accordingly.

#### **26.5 Duty of Concessionaire to Mitigate**

Notwithstanding Section 26.2, the Concessionaire has a duty to mitigate any and all damages in respect of any Discriminatory Action and any payment of Discriminatory Action Compensation which the Concessionaire may claim under this Article 26 in respect of a Discriminatory Action.

**ARTICLE 27**  
**DEFAULT**

**27.1 Default by Concessionaire**

The occurrence of any one or more of the following events shall constitute a Concessionaire Default under this Agreement:

- (a) if the Concessionaire fails to make any payment of any amount due to the Grantor under this Agreement or any other Project Agreement and such default continues unremedied for a period of 15 days following notice thereof from the Grantor to the Concessionaire;
  
- (b) if any material representation or warranty made by the Concessionaire in this Agreement or in any document or certificate given pursuant to this Agreement or, subject to any applicable limitation period set out therein, in any other Project Agreement or any document or certificate given pursuant to any other Project Agreement proves to have been incorrect in any material respect when made and such incorrect representation or warranty, if capable of being remedied, continues unremedied for a period of 30 days following notice thereof (giving particulars of the incorrect representation or warranty in reasonable detail) from the Grantor to the Concessionaire or for such longer period as may be reasonably necessary to cure such failure, provided, in the latter case, that the Concessionaire has demonstrated to the satisfaction of the Grantor that:
  - (i) it is proceeding, and will proceed, with all due diligence to cure or cause to be cured such failure; and
  - (ii) its proceeding can be reasonably expected to cure or cause to be cured such failure within a reasonable period of time acceptable to the Grantor; andsuch failure is in fact cured within such period of time;
  
- (c) if the Concessionaire fails to perform or observe any of its material obligations or covenants under this Agreement (other than as otherwise referred to in this Section 27.1) or any other Project Agreement, and such failure continues unremedied for a period of 20 days following notice thereof giving particulars of the failure in reasonable detail from the Grantor to the Concessionaire, or for such longer period as may be reasonably necessary to cure such failure, provided that, in the latter case, the Concessionaire has demonstrated to the satisfaction of the Grantor that:
  - (i) it is proceeding, and will proceed, with all due diligence to cure or cause to be cured such failure; and



- (ii) its proceeding can be reasonably expected to cure or cause to be cured such failure within a reasonable period of time acceptable to the Grantor; and

such failure is in fact cured within such period of time;

- (d) if there is a default by the Concessionaire under any Project Agreement (other than this Agreement) which is not cured prior to the expiry of the applicable notice and cure period, if any, relating thereto and which in the Grantor's opinion has a material and adverse effect on the ability of the Concessionaire to perform or cause the performance of the Work in accordance with the Governing Documentation and Laws and Regulations;
- (e) if the Concessionaire fails to comply with the requirements or directives of a final award in a matter arbitrated in accordance with Article 32 and such default continues unremedied for a period of 60 days following notice thereof from the Grantor to the Concessionaire;
- (f) if any resolution is passed for the dissolution, liquidation or winding-up of the Concessionaire or for the suspension of operations of the Concessionaire;
- (g) if a decree or order of a court having jurisdiction is issued or entered adjudging the Concessionaire bankrupt or insolvent, ordering the winding-up or liquidation of the Concessionaire or approving any reorganization, arrangement, compromise, composition, compounding, extension of time, moratorium or adjustment of liabilities of the Concessionaire under the *Companies' Creditors Arrangement Act* (Canada), the *Bankruptcy and Insolvency Act* (Canada) or the *Winding-up and Restructuring Act* (Canada) or any other bankruptcy, insolvency, moratorium, reorganization or analogous law of any applicable jurisdiction and such decree or order continues unstayed and in effect and is not withdrawn, dismissed, overturned or set aside within the period of 60 days following its issuance or entry;
- (h) if execution or any analogous process is issued or filed against the Concessionaire or against all or a substantial part of its property or assets and such execution or other process continues unstayed and in effect and is not withdrawn, dismissed, overturned or set aside within the period of 30 days following its issuance or filing and the same has a material and adverse effect on the Work;
- (i) if a trustee, receiver, receiver and manager, interim receiver, custodian, liquidator, provisional liquidator, agent for a secured creditor or other person with similar powers is appointed in any manner in respect of the Concessionaire or in respect of all or a substantial portion of its property or assets and such appointment continues unstayed and in effect and is not withdrawn, overturned, set aside or revoked within the period of 60 days following the appointment;
- (j) if the Concessionaire becomes insolvent, admits its inability to pay or fails to pay its debts generally as they become due, acknowledges its insolvency, makes an

assignment in bankruptcy or makes any other assignment for the benefit of creditors, or files any proposal, notice of intention or petition or otherwise commences or consents to or acquiesces in the commencement of any proceeding seeking any reorganization, arrangement, compromise, composition, compounding, extension of time, moratorium or adjustment of liabilities of the Concessionaire, under the *Companies' Creditors Arrangement Act* (Canada), the *Bankruptcy and Insolvency Act* (Canada) or the *Winding-up and Restructuring Act* (Canada) or any other bankruptcy, insolvency, moratorium, reorganization or analogous law of any applicable jurisdiction, or consents to or acquiesces in the appointment in any manner of a trustee, receiver, receiver and manager, interim receiver, custodian, liquidator, provisional liquidator, agent for a secured creditor or other person with similar powers in respect of the Concessionaire or in respect of all or a substantial portion of its property or assets;

- (k) if a Transfer occurs that is not permitted under Article 28 of this Agreement; or
- (l) if the Concessionaire fails to correct a deficiency in the Construction Work in accordance with Section 20.1 or 20.2, as applicable.

## **27.2 Remedies of the Grantor**

Upon the occurrence of a Concessionaire Default, the Grantor will by notice to the Concessionaire, with a copy to each Mortgagee with whom the Grantor has entered into a Lenders Direct Agreement, declare the Concessionaire to be in default and may, subject to the provisions of this Section 27.2 and Article 32, and any Lenders Direct Agreement, do any or all of the following as the Grantor, in its sole and absolute discretion, shall determine:

- (a) The Grantor may terminate this Agreement by giving 60 days' prior notice to the Concessionaire. Upon such termination, the Concessionaire shall be entitled to compensation as calculated in accordance with Schedule 27.2(a).
- (b) If the Concessionaire is in default under this Agreement by reason of the failure to pay any monies to any other person, the Grantor may (without obligation to do so) make payment on behalf of the Concessionaire of such monies. Any amount so paid by the Grantor shall be payable by the Concessionaire to the Grantor on demand, without any days of grace.
- (c) The Grantor may cure the Concessionaire Default (but this shall not obligate the Grantor to cure or attempt to cure a Concessionaire Default or, after having commenced to cure or attempted to cure a Concessionaire Default, to continue to do so) and all reasonable costs and expenses incurred by the Grantor in curing or attempting to cure the Concessionaire Default, together with an administrative fee equal to 15% of such costs and expenses shall be payable by the Concessionaire to the Grantor on demand, without any days of grace. No such action by the Grantor shall be deemed to be a termination of this Agreement. The Grantor shall not incur any liability to the Concessionaire for any act or omission of the Grantor

or any other person in the course of remedying or attempting to remedy any Concessionaire Default.

- (d) The Grantor may seek specific performance, injunction or other equitable remedies, it being acknowledged that damages may be an inadequate remedy for a Concessionaire Default.
- (e) The Grantor may seek to recover any amounts due and payable under this Agreement and its losses, damages, costs (including without limitation administrative costs), expenses, liabilities, judgments, awards, taxes, fines, penalties, charges and amounts paid in settlement and, in connection therewith, exercise any recourse available to any person who is owed damages or a debt.
- (f) The Grantor may exercise its set off rights in accordance with Section 1.22.
- (g) The Grantor may re-enter the Project Lands in the name of the whole and have again, repossess and enjoy the Project Lands as of the Grantor's former estate. No re-entry by the Grantor shall be construed as an election on its part to terminate this Agreement unless a notice of such intention is given to the Concessionaire. Despite a reletting without termination, the Grantor may at any time thereafter elect to terminate this Agreement for the previous breach. Any re-entry or termination of this Agreement made in accordance with this Agreement as against the Concessionaire shall be valid and effectual against the Concessionaire even though made subject to the rights of a Mortgagee to cure any default of the Concessionaire and continue as in the place of the Concessionaire under this Agreement or a new concession agreement and ground lease as provided herein.
- (h) The Grantor may, subject to Laws and Regulations, distrain against any of the Concessionaire's goods which are situate on the Project Lands and the Concessionaire waives any statutory protections and exemptions in connection therewith.
- (i) The Grantor may stop the progress of the Work and close any and all portions of the Industrial Concession Highway.
- (j) The Grantor may exercise any of its other rights and remedies provided for hereunder.

### **27.3 Default by the Grantor**

The occurrence of any one or more of the following events shall constitute a Grantor Default under this Agreement:

- (a) If the Grantor fails to make any payment of any amount due to the Concessionaire under this Agreement or any other Project Agreement and such default continues unremedied for a period of 15 days following notice thereof from the Concessionaire to the Grantor.

- (b) If any material representation or warranty made by the Grantor in this Agreement, any other Project Agreement or in any document or certificate required to be given pursuant to this Agreement or any other Project Agreement proves to have been incorrect in any material respect when made and such incorrect representation or warranty, if capable of being remedied, has not been remedied within a period of 30 days following notice thereof (giving particulars of the incorrect representation or warranty in reasonable detail) from the Concessionaire to the Grantor.
- (c) If the Grantor fails to perform or observe any of its material obligations or covenants under this Agreement (other than a Discriminatory Action) or any other Project Agreement and such failure continues unremedied for a period of 20 days following notice thereof (giving particulars of the failure in reasonable detail) from the Concessionaire to the Grantor or for such longer period as may be reasonably necessary to cure such failure, provided, in the latter case, that the Grantor has demonstrated to the satisfaction of the Concessionaire, acting reasonably, that:
  - (i) it is proceeding, and will proceed, with all due diligence to cure or cause to be cured such failure; and
  - (ii) its proceeding can be reasonably expected to cure or cause to be cured such failure within a reasonable period of time acceptable to the Concessionaire; andsuch failure is in fact cured within such period of time;
- (d) If the Grantor fails to comply with the requirements or directives of a final award in a matter arbitrated in accordance with Article 32 and such default continues unremedied for 60 days following notice thereof from the Concessionaire to the Grantor.

For greater certainty, the fact that an event constituted a Delay Event and the Concessionaire receives the benefits of Article 25 in respect thereof does not preclude it from constituting a Grantor Default.

#### **27.4 Remedies of Concessionaire**

Upon the occurrence of a Grantor Default by the Grantor under this Agreement, the Concessionaire may by notice to the Grantor declare the Grantor to be in default and may, subject to the provisions of Article 32, do any or all of the following as the Concessionaire, in its sole and absolute discretion, shall determine:

- (a) The Concessionaire may terminate this Agreement by giving 90 days' prior written notice to the Grantor.
- (b) The Concessionaire may seek such equitable remedies as are available to it.

- (c) The Concessionaire may require the Grantor to pay the greater of: (i) the Outstanding Debt at the date of payment under this provision, and (ii) Concessionaire Losses and any other amounts due and payable under this Agreement, and, in connection therewith, exercise any recourse available to any person who is owed damages or a debt (and the Grantor will pay such amounts on demand).
- (d) The Concessionaire may exercise any of its other rights and remedies provided for hereunder.

## **ARTICLE 28**

### **ASSIGNMENT AND RESTRICTION ON TRANSFERS**

#### **28.1 No Encumbrance or Transfer of Concessionaire's Interest**

Except as permitted in or pursuant to this Agreement, the Concessionaire shall not grant or permit to exist any Encumbrance other than a Concessionaire Permitted Encumbrance or a Permitted Encumbrance upon any or all of the Concessionaire's Interest to or in favour of any person. The Concessionaire shall not sell, convey, assign, sublease, transfer or otherwise dispose of less than all of the Concessionaire's Interest and shall only sell, convey, assign, sublease, transfer or otherwise dispose of all of the Concessionaire's Interest as permitted in this Section 28.1. Without the prior written Approval of the Grantor, the Concessionaire shall not sell, convey, assign, sublease, transfer to or otherwise dispose of (a "**Transfer**") all of the Concessionaire's Interest to or in favour of any person other than an Affiliate of the Concessionaire. Subject to any Lenders Direct Agreement, any Transfer to a person other than an Affiliate of the Concessionaire with the prior written Approval of the Grantor shall:

- (a) not take place until the expiration of the 3 year period that immediately follows Total Completion; and
- (b) only be to a transferee that has the experience and financial ability to deliver the Work in accordance with this Agreement.

The Transfer shall further be subject to the Concessionaire paying to the Grantor all reasonable costs and expenses including, without limitation, legal fees (on a solicitor and own client basis), incurred by the Grantor in connection with reviewing the Transfer, conducting due diligence of the proposed transferee, and the preparation, execution and delivery of all agreements and documents relating to the Transfer, including an assignment of this Agreement.

On the completion of any Transfer, the transferor shall cease to be liable for any obligations under this Agreement and shall cease to be entitled to any of the rights and benefits contained in this Agreement.

#### **28.2 Change of Control of Concessionaire**

Any consolidation, merger, amalgamation of the Concessionaire with any other person, or any sale or other disposition of the shares of the Concessionaire resulting, directly or

indirectly, in a change of Control of the Concessionaire shall be deemed to be a Transfer which shall be subject to this Article 28.

### **28.3 Rights and Obligations of Mortgagee of Concessionaire**

A Mortgagee shall be bound by all of the provisions of this Article 28 except as expressly excluded pursuant to any Lenders Direct Agreement.

### **28.4 Assignment by the Grantor**

The Grantor shall have the right to Transfer any or all of the Grantor's Interest, provided that it will be jointly and severally liable with the Transferee for the performance and observance of the obligations and covenants of the Grantor under this Agreement and any agreement entered into by the Grantor under this Agreement (including without limitation agreeing directly with any Mortgagee to be bound by any Lenders Direct Agreement).

## **ARTICLE 29 LENDER'S RIGHTS AND REMEDIES**

### **29.1 Bona Fide Mortgages**

Notwithstanding Article 28 but subject to Section 34.10, at any time and from time to time during the Term the Concessionaire shall have the right, at its sole cost and expense, to grant a Bona Fide Mortgage (the holder of any such Bona Fide Mortgage instrument being referred to herein as a "**Mortgagee**") and for greater certainty, in the case of a deed of trust or similar instrument securing bonds or debentures, only the trustee in respect thereof shall be the Mortgagee and the holder of any such bonds or debentures shall be deemed not to hold an interest in the Bona Fide Mortgage subject to the condition that the Grantor, the Mortgagee and the Concessionaire have entered into a Lenders Direct Agreement. The Grantor will enter into such Lenders Direct Agreement upon request of the Concessionaire. The Concessionaire shall indemnify the Grantor for all reasonable costs and fees incurred in negotiating and entering into such Lenders Direct Agreement.

### **29.2 Co-operation**

The Grantor shall consider any request jointly made by the Concessionaire and a Mortgagee or proposed Mortgagee to facilitate a provision of a Bona Fide Mortgage or proposed Bona Fide Mortgage that may require an amendment to this Agreement, provided that the rights of the Grantor are not adversely affected thereby and the consent of any other Mortgagee to such amendment has been obtained by the Concessionaire or the Mortgagee or proposed Mortgagee making the request for the amendment.

**ARTICLE 30**  
**DAMAGES PAYABLE TO CONCESSIONAIRE**  
**FOR TERMINATION BY GRANTOR OR IF AGREEMENT**  
**IS SET ASIDE BY A COURT**

**30.1 Termination by Grantor/Set Aside by Court**

The Grantor shall have the right to terminate this Agreement for any reason. If, the Grantor terminates this Agreement for any reason other than under Sections 25.5, 25.6 or 27.2, or if a court of competent jurisdiction orders that this Agreement be set aside as a remedy granted to a third party, the Grantor shall pay to the Concessionaire an amount equal to the aggregate of:

- (a) the greater of:
  - (i) the Concession FMV; and
  - (ii) the Outstanding Debt as of the date of payment of the Termination Damages,

plus

- (b) the aggregate of:
  - (iii) Employment Payments; and
  - (iv) Subcontractor Losses,

less

- (c) the aggregate of:
  - (v) any amount which the Grantor is entitled to set off against Fees under this Agreement;
  - (vi) the fair market value of any equipment or other assets used in the operation of the Concession which are not transferred or assigned to the Grantor on the Reversion Date;
  - (vii) expropriation proceeds received by the Concessionaire in respect of all or any portion of the Project as a result of the termination of this Agreement; and
  - (viii) if an event of Force Majeure has occurred at any time prior to the Reversion Date and the effects of such event of Force Majeure have not been remedied prior to the Reversion Date, the amounts received or receivable by the Concessionaire or any Mortgagee from any insurance policies described in Schedule 3.6 payable (or that should have been payable pursuant to such policies but for the breach of an obligation to

take out and maintain such insurance policy by the Concessionaire) as a result of such event of Force Majeure, except to the extent applied to repair the Project, or remedy such effects,

(collectively, the “**Termination Damages**”), (i) on the Reversion Date; or (ii) if the Termination Damages are determined on a date subsequent to the Reversion Date, then not later than 30 days following the date of determination of the Termination Damages, together with interest at the Bona Fide Debt Interest Rate from the Reversion Date to the date on which payment is made.

### **30.2 Termination Damages**

- (a) The Termination Damages shall be determined as if neither an event of Force Majeure entitling the Grantor to terminate this Agreement nor any Discriminatory Action had occurred. Notwithstanding anything else contained in this Article 30, the amount of the Termination Damages shall not be less than the Outstanding Debt as of the date of payment of the Termination Damages.
- (b) The parties will use commercially reasonable efforts to agree on the Termination Damages. If the parties cannot agree on the Termination Damages within 90 business days after the End Date, then the Termination Damages shall be determined by a Valuator in accordance with the following procedure:
  - (i) The Grantor and the Concessionaire shall jointly appoint a Valuator (the “First Valuator”) to determine the Termination Damages. If the parties are unable to agree upon the First Valuator within 21 days, the Grantor and the Concessionaire shall jointly make application (provided that if a party does not participate in such application, the other party may make application alone) under the *Commercial Arbitration Act* to a judge of the British Columbia Supreme Court to appoint a First Valuator, and the provisions of the *Commercial Arbitration Act* shall govern such appointment. The First Valuator shall determine the Termination Damages within 60 days following his or her appointment and shall deliver to each party a written report (the “First Valuation Report”) setting out its determination.
  - (ii) Either party may within 30 days of its receipt of the First Valuation Report provide written notice to the other party advising that it wishes to have a second determination of the Termination Damages undertaken. If no such notice is given, the First Valuation Report shall be final and binding on the parties. If such notice is given, the parties shall forthwith meet for the purpose of identifying and retaining a second valuator (the “Second Valuator”) to prepare a second determination of the Termination Damages. In the event the parties do not agree upon a Second Valuator within 21 days of the delivery of the notice referred to in this paragraph, then the parties shall jointly make application (provided that if a party does not participate in such application, the other party may make application alone) under the *Commercial Arbitration Act* to a judge of the



British Columbia Supreme Court to appoint a Second Valuator, and the provisions of the *Commercial Arbitration Act* shall govern such appointment.

- (iii) The Second Valuator shall prepare and deliver to each of the parties a written report (the “Second Valuation Report”) setting out its determination of the Termination Damages as soon as possible, and in any event within 45 days after being retained. Where a Second Valuation Report has been prepared, the Termination Damages shall be equal to the average of the determinations set out in the First Valuation Report and the Second Valuation Report.
- (iv) In order to facilitate the determination of the Termination Damages by a Valuator, each of the Grantor and the Concessionaire shall provide to the Valuator such information as may be requested by the Valuator, acting reasonably, and shall permit the Valuator and its representatives to have reasonable access during normal business hours to such information and to take extracts therefrom and to make copies thereof.
- (v) The Termination Damages as determined above shall be final and conclusive and not subject to any appeal and Article 32 will not apply.
- (vi) Subject to Section 31.1(g), payment of the Termination Damages by the Grantor to the Concessionaire shall constitute full and final satisfaction of all amounts that may be claimed by the Concessionaire for and in respect of the termination or setting aside of this Agreement and upon such payment, each of the Grantor and the Concessionaire shall be released and forever discharged by the other from any and all liability in respect of such termination hereunder.
- (vii) The parties jointly shall pay all fees and expenses charged by the Valuators for preparing the First Valuation Report and the Second Valuation Report equally, except that if the Grantor requested the second valuation and the determination by the Second Valuator is equal to or greater than the First Valuation Report, the Grantor shall be solely responsible for all fees and expenses charged by the Second Valuator, and if the Concessionaire requested the second valuation and the determination by the Second Valuator is equal to or less than the First Valuation Report, the Concessionaire shall be solely responsible for all fees and expenses charged by the Second Valuator.
- (viii) The First Valuator and the Second Valuator shall be entitled to apply such principles of valuation as each considers appropriate in the circumstances and to retain such qualified independent appraisers as each may deem appropriate to assist with its valuation.

**ARTICLE 31**  
**CONSEQUENCES OF TERMINATION OR REVERSION**

**31.1 General Provisions**

Upon the termination of this Agreement, notwithstanding any claims the parties may have against each other and subject to any Lenders Direct Agreement, the following shall apply:

- (a) Subject to paragraph (b) below, the Grantor shall, as of the Reversion Date, become the owner of the Project and all assets comprising the Project, and as consideration therefor, subject to Section 2.9, assume full responsibility for the operation, management, upgrade, maintenance, rehabilitation, construction and reconstruction of the Project. The Concessionaire shall satisfy or otherwise cause to be discharged all Encumbrances, except Permitted Encumbrances.
- (b) The Concessionaire shall be liable for all costs and expenses incurred in connection with the operation, management, maintenance, upgrade, rehabilitation, construction and reconstruction of the Project up to but not including the Reversion Date and the Grantor shall be liable for all such costs and expenses incurred in connection with such activities on and as of the Reversion Date and in connection with the transfer of the Project to the Grantor, including, without limitation, any Taxes applicable to such transfer.
- (c) The Grantor shall have the option of requiring that the Concessionaire assign all of its right, title and interest in, to and under all or any of the Permits, Governmental Authorizations, Other Authorizations and Project Agreements, and any other agreements with third parties in respect of the Project to which the Concessionaire is a party (the “**Third Party Agreements**”) to the Grantor or its nominee for the remainder of their respective terms. The Grantor may exercise such option by giving a notice to such effect to the Concessionaire. If the Grantor exercises such option then subject to the Grantor obtaining all necessary consents, the right, title and interest of the Concessionaire in, to and under such Permits, Governmental Authorizations, Other Authorizations, Project Agreements and Third Party Agreements shall be assigned to the Grantor or its nominee as of the Reversion Date and the Grantor shall assume the Concessionaire’s obligations under such Permits, Governmental Authorizations, Other Authorizations, Project Agreements and Third Party Agreements which arise in respect of, or relate to, any period of time falling on and after the Reversion Date. If the Grantor does not exercise such option, the Concessionaire shall, unless the Grantor has granted to a Mortgagee or its nominee, a new concession agreement and ground lease containing the same provisions as are contained in this Agreement, take such steps as may be necessary to terminate such Permits, Governmental Authorizations, Other Authorizations, Project Agreements and Third Party Agreements.
- (d) Subject only to the continuing rights of the other parties (other than the Concessionaire) to the Project Agreements and the Third Party Agreements, the

Concessionaire shall surrender the Project to the Grantor and shall cause all persons claiming under or through the Concessionaire to do likewise.

- (e) The Concessionaire, at its sole cost and expense, shall deliver to the Grantor all Concessionaire Information in such electronic or other format as the Grantor may request.
- (f) The Concessionaire shall assist the Grantor in such manner as the Grantor may require to ensure the orderly transition of control, operation, management, maintenance, rehabilitation, upgrade, construction, and reconstruction of the Project, and shall, if appropriate and if requested by the Grantor, take all steps as may be necessary to enforce the provisions of the Project Agreements and the Third Party Agreements pertaining to the surrender of the Project.
- (g) The Grantor and the Concessionaire shall make appropriate adjustments, including without limitation adjustments relating to any Project Agreements or Third Party Agreements assigned to the Grantor, Fees in respect of periods prior to the Reversion Date and utilities and other similar charges collected on and after the Reversion Date that are incurred prior to the Reversion Date. Any adjustments and payment therefor shall be made by the appropriate party on the Reversion Date, but shall be subject to readjustment if necessary because of error in matters such as information, calculation, payments and omissions that are identified within the period of 180 days following the Reversion Date. The Grantor and the Concessionaire acknowledge that certain adjustments or readjustments may have to be made when a third party provides to the Grantor or the Concessionaire a final adjustment amount in respect of a matter, and for such matters the adjustment and readjustment date shall each be correspondingly extended. Any amount payable by any Provincial Entity under any insurance or risk financing under Section 3.6(a) shall also remain payable.

## **ARTICLE 32 DISPUTE RESOLUTION**

### **32.1 Limitation**

The Concessionaire shall accept and shall have no recourse whatsoever to challenge the reasonableness or appropriateness of any of the Governing Requirements.

### **32.2 Amicable Negotiations**

- (a) Unless otherwise specifically provided herein, in the event of any dispute arising between the Grantor and the Concessionaire under or relating in any way to this Agreement, including without limitation a dispute with respect to the giving or withholding of an Approval, the obligations of the Concessionaire or the Grantor hereunder or the occurrence of a default hereunder (either a Concessionaire Default or a Grantor Default) and whether or not there is a specific reference to this Article 32, such dispute shall be referred, in the first instance, by notice from either party to the other requiring the dispute to be resolved, to the person

designated by notice from the Grantor from time to time, and the person designated by notice from the Concessionaire from time to time, for resolution.

- (b) If the dispute is not resolved to the mutual satisfaction of the parties within 14 days (or such longer period as the parties may agree) following the notice referred to in paragraph (a) above, the dispute shall, by notice from either party to the other requiring the dispute to be resolved at a higher level, be referred to the then the President of the General Partner of the Concessionaire and the Deputy Minister of Energy and Mines or the Grantor's designee. If the dispute is not resolved to the mutual satisfaction of the parties within 30 days following such notice, either party may by notice to the other require that the dispute be resolved by mediation as set out below.

### **32.3 Mediation**

The mediation shall be held within 30 days following the end of the 30-day negotiation period. Within seven days following the end of such 30-day negotiation period, the parties shall jointly select and appoint a skilled and experienced commercial mediator to assist the parties to reach an agreement through mediation. The mediation shall be conducted under such mediation rules as the mediator recommends and the cost of mediation shall be shared equally by the parties to the mediation. Any settlement reached by mediation shall be resolved in writing, shall be signed by the parties and shall be final and binding on them. If the parties fail to agree on a mediator within seven days or the dispute is not resolved to the mutual satisfaction of the parties within 30 days following the date of receipt of the notice of mediation, either party may by notice to the other require the dispute to be resolved by arbitration as set out below.

### **32.4 Initiation of Arbitration Proceedings**

If the procedures described above do not result in the resolution of the dispute, arbitration proceedings shall be commenced by the party desiring arbitration giving notice to the other party, which notice must request an arbitration and must state the nature of the dispute, the amount involved, if any, and the remedy sought. Within 14 days following receipt of such notice by the responding party, the initiating party and the responding party shall designate a single arbitrator acceptable to both of them. If the parties fail to appoint such a single arbitrator within such period of time, the initiating party shall, by notice to the responding party, appoint an arbitrator. The responding party shall, within 14 days following receipt of such notice, appoint an arbitrator by notice to the initiating party, and the two arbitrators so appointed shall select a third arbitrator acceptable to both arbitrators. If the responding party fails to appoint an arbitrator within such period of time (or such additional period of time as the parties may agree) the initiating party may appoint an arbitrator on behalf of the responding party and is hereby appointed the agent of the responding party for such purpose. If the two arbitrators so appointed are unable to agree upon the third arbitrator within 14 days following the appointment of the arbitrator by the responding party, either party shall be entitled to make application under the *Commercial Arbitration Act* to a judge of the British Columbia Supreme Court to appoint the third arbitrator, and the provisions of the *Commercial Arbitration Act* shall govern such appointment.

### **32.5 Qualifications of Arbitrator**

The single arbitrator or panel of arbitrators appointed in accordance with Section 32.4 to act hereunder (the “**Arbitrator**”) shall have appropriate qualifications by profession or occupation to decide the matter in dispute.

### **32.6 Submission of Written Argument**

- (a) Within 14 days following the completion of the appointment of the Arbitrator pursuant to Section 32.4, the initiating party shall send to the responding party and the Arbitrator a statement of claim stating in sufficient detail the facts and any contentions of law on which the initiating party relies and the relief that it claims.
- (b) Within 30 days following the receipt of a statement of claim pursuant to paragraph (a) above, the responding party shall send to the initiating party and the Arbitrator a statement of defence and, if applicable, counterclaim, stating in sufficient detail which of the facts and contentions of law in such statement of claim the responding party admits or denies, on what grounds, and any other facts and contentions of law on which it relies.
- (c) Within 14 days following receipt of a statement of defence pursuant to paragraph (b) above, the initiating party may send to the responding party and the Arbitrator a statement of reply and, if applicable, defence to counterclaim.
- (d) Within 14 days following receipt of a statement of reply pursuant to paragraph (c) above, the responding party may send to the initiating party a statement of reply to counterclaim.
- (e) Every statement of claim, defence, reply and reply to counterclaim delivered in accordance with the foregoing shall be accompanied by copies (or, if they are especially voluminous, lists) of all essential documents and other materials on which the party concerned relies.
- (f) After submission of the statements of claim, defence, reply and reply to counterclaim, if any, in accordance with the foregoing, the Arbitrator shall forthwith meet with and give directions to the parties for the further conduct of the arbitration.
- (g) There shall be no oral discovery unless ordered by the Arbitrator.

### **32.7 Meetings and Hearings of Arbitrator**

- (a) Meetings and hearings of the Arbitrator shall take place in Vancouver, British Columbia or in such other place as the parties agree upon and such meetings and hearings shall be conducted in the English language unless otherwise agreed by such parties and the Arbitrator. Subject to the foregoing, the Arbitrator may at any time fix the date, time and place of meetings and hearings in the arbitration, and shall give the parties adequate notice thereof.

- (b) All meetings and hearings shall be in private unless the parties otherwise agree.
- (c) Each party may be represented at any meetings or hearings by legal counsel.
- (d) Each party may examine and re-examine its witnesses and cross-examine those of the other parties at the arbitration.

### **32.8 Decision of Arbitrator**

- (a) Subject to the provisions of the *Commercial Arbitration Act*, the Arbitrator shall send a decision in writing to the parties within 30 days following the conclusion of all hearings referred to in Section 32.7 unless such period of time is extended for a fixed period by the Arbitrator on written notice to each party because of illness or other cause beyond the Arbitrator's control and, unless the parties otherwise agree, shall state the reasons for the decision.
- (b) If the Arbitrator is a panel, the decision of the majority of the panel shall be deemed to be the decision of the Arbitrator.
- (c) Subject to the provisions of the *Commercial Arbitration Act*, and with the exception of monetary awards in excess of \$10,000,000 or errors in law, the decision of the Arbitrator shall be final and binding on the parties and shall not be subject to any appeal or review procedure, provided that the Arbitrator has followed the rules and procedures herein in good faith and has proceeded in accordance with the principles of natural justice.
- (d) If the decision results in an award in excess of \$10,000,000, the decision of the Arbitrator may be appealed on a question of fact or on a question of mixed fact and law where permitted pursuant to the provisions of the *Commercial Arbitration Act*.
- (e) If the decision is alleged to have been based upon an error in law, a party may appeal the decision in that regard pursuant to the provisions of the *Commercial Arbitration Act*.

### **32.9 Jurisdiction and Powers of the Arbitrator**

- (a) The object of an arbitration hereunder shall be to ensure the just, expeditious, economical and final determination of any dispute.
- (b) Without limiting the jurisdiction of the Arbitrator under the *Commercial Arbitration Act*, a submission to arbitration hereunder shall confer on the Arbitrator the jurisdiction to:
  - (i) determine any question of law arising in the arbitration;
  - (ii) determine any question as to the Arbitrator's jurisdiction;

- (iii) determine any question of good faith or dishonesty arising in the dispute;
  - (iv) order any party to furnish further details of its case, in fact or in law to the other parties;
  - (v) proceed in the arbitration notwithstanding the failure or refusal of any party to comply with these provisions or with the Arbitrator's orders or directions or to attend any meeting or hearing, but only after giving such party notice that the Arbitrator intends to do so;
  - (vi) receive and take into account such written or oral evidence tendered by the parties as the Arbitrator determines is relevant, whether or not strictly admissible in law;
  - (vii) make one or more interim awards;
  - (viii) hold meetings and hearings and make a decision (including without limitation a final decision) in British Columbia or elsewhere with the concurrence of parties hereto;
  - (ix) order the parties to produce to the Arbitrator, and to each other for inspection, and to supply copies of, any books and records, documents, materials and other information in their possession or control which the Arbitrator determines to be relevant;
  - (x) order the preservation or storage of any property or thing relevant to the subject matter of the arbitration under the control of any of the parties;
  - (xi) make any order as to the payment of costs of the arbitration, including without limitation legal fees on a solicitor and own client basis; and
  - (xii) include, as part of any award, the payment of interest at the rate set out in this Agreement from an appropriate date as determined by the Arbitrator.
- (c) The jurisdiction and powers referred to in paragraph (b) above shall be exercised at the discretion of the Arbitrator subject to only to Laws and Regulations and the provisions of this Agreement.

### **32.10 Commercial Arbitration Act to Apply**

The *Commercial Arbitration Act* shall apply to any arbitration conducted hereunder except to the extent that its provisions are modified by the express provisions of this Article 32 or by agreement of the parties.

### **32.11 Provisional Remedies**

No party shall be precluded from initiating a proceeding in a court of competent jurisdiction for the purpose of obtaining any emergency or provisional remedy to protect its

rights that may be necessary and that is not otherwise available under this Agreement, including without limitation temporary and preliminary injunctive relief and restraining orders.

### **32.12 Continuing Performance**

- (a) At all times, notwithstanding the existence of any dispute, the Grantor and the Concessionaire shall continue to perform their respective obligations in accordance with the provisions of this Agreement without prejudice to the right to contest, dispute and challenge the relevant matter in accordance with the provisions of this Agreement. For example, in the event of a dispute with respect to the reasonableness of any Approval by the Grantor, the Concessionaire shall comply with such decision but shall have the right to submit the question of reasonableness to the Arbitrator pursuant to this Article 32.
- (b) Subject to the express provisions of this Agreement, where there is any dispute as to the amount of monies owing by any party to any other party hereunder, the portion of the amount owing that is not contested, disputed or challenged, if any, shall be paid when due hereunder, but without prejudice to the rights of the parties to contest, dispute or challenge the disposition of the remaining portion of the monies claimed hereunder.

### **32.13 Rights Pending the Final Resolution of Disputes**

If the party receiving a notice of termination of this Agreement disputes the right of the party giving such notice to terminate this Agreement by making application to the dispute resolution procedure in this Article 32, it must state in the notice of dispute if it elects to accept such termination without prejudice to its right to assert a claim for damages for the alleged wrongful termination of this Agreement or to any other rights to which it is entitled under this Agreement. Such election shall be irrevocable and the party making the election shall only be entitled to seek its damages, if any. If the disputing party does not so elect, subject to the rights of the Mortgagee under any Lenders Direct Agreement, the termination of this Agreement shall occur upon the expiry of a period of 30 days following a final decision of the Arbitrator to the effect that the right to terminate was validly exercised.

### **32.14 Costs of Arbitration**

Pending determination by the Arbitrator, the parties shall share equally, and be responsible for their respective shares of, all costs relating to the Arbitrator, as and when due.

## **ARTICLE 33 CONFIDENTIALITY**

### **33.1 Confidentiality**

Each party shall hold in confidence all documents and other information, whether technical or commercial, supplied by or on behalf of the other party (including without limitation all documents, information supplied in the course of proceedings under the dispute resolutions



procedure) and shall not publish or otherwise disclose the same otherwise than for the purposes contemplated by this Agreement, save

- (a) with the other party's written consent;
- (b) as may necessarily be required by Laws and Regulations, or any relevant stock exchange or other competent regulatory authority;
- (c) as the Grantor may require for the purpose of the Project in the event of termination of this Agreement; or
- (d) that which is in or enters the public domain other than as a result of a breach of the obligations imposed by this Section 33.1,

provided that the provisions of this Section 33.1 shall not apply to the documents comprising this Agreement or the reports to be provided by the Concessionaire to the Grantor pursuant to this Agreement or restrict any party from passing such documents and information to its professional advisors and that the Concessionaire may, subject to appropriate confidentiality restrictions, pass to any Mortgagee or prospective Mortgagee such documents and other information as is reasonably required by such Mortgagee or prospective Mortgagee, or such other persons as may be necessary to carry out the Concessionaire's obligations under this Agreement.

### **33.2 Freedom of Information and Protection of Privacy Act and Personal Information Protection Act**

The obligations of the parties pursuant to Section 33.1 shall be subject to the *Freedom of Information and Protection of Privacy Act* and the *Personal Information Protection Act*, as applicable thereto. The parties acknowledge that this Agreement and the Concessionaire Information contains information that would be detrimental to the business and other interests of the Concessionaire if disclosed.

**ARTICLE 34  
MISCELLANEOUS**

**34.1 Notice**

All notices, other communications and Approvals required or permitted by this Agreement shall be in writing and shall be delivered, sent by facsimile or by registered mail (return receipt requested) to:

- (a) in the case of the Grantor:

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF  
BRITISH COLUMBIA, as represented by the Minister of Energy and Mines**  
6<sup>th</sup> Floor, 1810 Blanshard Street  
PO Box 9323, Station Provincial Government  
Victoria, British Columbia, V8T 4J1

Attention: Director, Infrastructure Development, Oil and Gas Division  
Facsimile: (250) 952-0922

- (b) in the case of the Concessionaire:

**SYD ROAD LIMITED PARTNERSHIP**  
1000 – 1066 West Hastings Street  
Vancouver, British Columbia, V6E 3X1

Attention: President of the General Partner  
Facsimile: (604) 646-2481

or at such other address or facsimile number of which the addressee may from time to time have notified the addressers. A notice, other communication or Approval shall be deemed to have been sent and received (i) on the day it is delivered or on the day on which transmission is confirmed by the sender's facsimile records, if sent by facsimile, or if the notice is received after ordinary office hours (time of place of receipt), the notice, other communication or Approval shall be deemed to have been sent and received on the next day, or (ii) on the seventh day after mailing if sent by registered mail, except that if there is mail disruption, it must be actually received.

**34.2 Time of the Essence**

Time is of the essence of every provision of this Agreement. Extension, waiver or variation of any provision of this Agreement shall not be deemed to affect this provision and there shall be no implied waiver of this provision.

**34.3 Further Acts**

The parties shall do or cause to be done all such further acts and things as may be reasonably necessary or desirable to give full effect to this Agreement. Without limiting the

foregoing, each party will at any time and from time to time execute and deliver or cause to be executed and delivered such further instruments and take such further actions as may be reasonably requested by the other party or parties in order to cure any defect in the execution or delivery of this Agreement.

#### **34.4 Holding Over**

If the Concessionaire remains in possession of all or any part of the Concession Highway Lands after the expiration of the Term, such holding over shall be deemed to be a trespass.

#### **34.5 Interest**

Except as otherwise expressly set out in this Agreement, any amount of money not paid when due under this Agreement shall bear interest at the Variable Interest Rate then in effect from time to time plus three percentage points, from the date such money is due until payment and both before and after judgment.

#### **34.6 Costs**

Except as otherwise provided in this Agreement, each party shall be responsible for its own costs and expenses incurred in connection with performing and observing its obligations and covenants under this Agreement.

#### **34.7 Enurement and Binding Effect**

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

#### **34.8 No Partnership**

Nothing contained in this Agreement shall constitute or be deemed to create a partnership, joint venture or principal and agent relationship between the Grantor and the Concessionaire.

#### **34.9 Cumulative Remedies**

Unless otherwise expressly provided in this Agreement, the rights, remedies, powers and privileges conferred on the parties hereunder are not intended to be exclusive and each will be cumulative and in addition to and not in substitution for every other right, remedy, power and privilege existing or available to either party under this Agreement, any other agreement, at law or in equity, and the exercise by either party of any right, remedy, power or privilege will not preclude the simultaneous or later exercise by such party of any other right, remedy, power or privilege.

**34.10 No Registration of Concession Agreement and Ground Lease**

The Concessionaire acknowledges and agrees that neither all nor any part of this Concession Agreement and lease included in this Agreement, nor any notice hereof, will be registered or recorded in any land title office or other office of public record against title to the Concession Highway Lands.

**34.11 Counterparts**

This Agreement may be executed in any number of counterparts which, taken together, shall constitute one and the same agreement. This Agreement shall be effective when it has been executed by each of the parties hereto and delivered to all parties hereto.

IN WITNESS WHEREOF, this Agreement has been executed by the parties hereto as of the date first written above.

**HER MAJESTY THE QUEEN IN RIGHT OF  
THE PROVINCE OF BRITISH COLUMBIA,  
as represented by the Minister of Energy and Mines**

Per: \_\_\_\_\_

Name:

Title:

**SYD ROAD LIMITED PARTNERSHIP, by its  
GENERAL PARTNER, LEDCOR SYD LIMITED**

Per: \_\_\_\_\_

Name: Scott Lyons

Title: Senior Vice President