

APPENDIX D: FORM OF INDEPENDENT CERTIFIER AGREEMENT

**APPENDIX D
FORM OF INDEPENDENT CERTIFIER CONTRACT
TO
SCHEDULE 4**

THIS AGREEMENT dated as of ●, 20● is entered into:

BETWEEN:

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF
BRITISH COLUMBIA**

(the “**Province**”)

AND:

●

(the “**Primary Contractor**”)

AND:

●

(the “**Independent Certifier**”)

WHEREAS:

- A. The Province, BC Transportation Financing Authority and the Primary Contractor have entered into the Project Agreement.
- B. Pursuant to the terms of the Project Agreement, the Province and the Primary Contractor wish to appoint the Independent Certifier to perform certain services in connection with the Project Agreement and the Independent Certifier wishes to accept such appointment.
- C. The Province, the Primary Contractor and the Independent Certifier wish to enter into this Agreement in order to record the terms upon which the Independent Certifier shall perform such services.

NOW THEREFORE in consideration of the covenants and agreements of the parties contained in this Agreement and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties covenant and agree as follows:

Strictly Confidential

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1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement, unless otherwise specified or the context otherwise requires, words and expressions which are defined in Schedule 1 [Definitions and Interpretation] of the Project Agreement (and not otherwise defined in this Agreement) have the meanings given to them in Schedule 1 [Definitions and Interpretation] of the Project Agreement, and the following words and expressions shall have the following meanings:

“Agreement” means this agreement including all recitals and Attachments to this agreement, as the same may be amended, supplemented or restated from time to time.

“Contract Material” means all material:

- (i) provided to the Independent Certifier or created or required to be created by any Project Agreement Party pursuant to this Agreement or the Project Agreement; and
- (ii) provided by or created or required to be created by the Independent Certifier as part of, or for the purpose of performing, the Functions, Duties and Obligations,

including documents, equipment, reports, technical information, plans, charts, drawings, calculations, tables, schedules and data (stored and recorded by any means).

“Contributing Agencies” means the Federal Government and TransLink.

“Dispute Resolution Procedure” means the procedure set out in Attachment 4 to this Agreement.

“Fee” means the fees payable by the Project Agreement Parties to the Independent Certifier for performing the Functions, Duties and Obligations, as such fees are specified in Attachment 2 to this Agreement.

“Functions, Duties and Obligations” means:

- (i) the issuance of the Relevant Certificates;
- (ii) the signing of the Construction Certificates and the Final Deficiency List;
- (iii) all of the functions to be performed by and duties and obligations imposed on the Independent Certifier under the Project Agreement in connection with the issuance of the Relevant Certificates and the signing of the Construction Certificates and the Final Deficiency List;
- (iv) all of the functions to be performed by and duties and obligations imposed on the Independent Certifier under this Agreement in connection with the issuance of the Relevant Certificates and the signing of the Construction Certificates and the

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Final Deficiency List, including the functions, duties and obligations described in Attachment 1 to this Agreement; and

- (v) all other actions which the Independent Certifier must take to perform its functions and comply with and discharge its duties and obligations under this Agreement and to perform the functions of and comply with and discharge the duties and obligations of the Independent Certifier under the Project Agreement in connection with the issuance of the Relevant Certificates and the signing of the Construction Certificates and the Final Deficiency List.

“**parties**” means the parties to this Agreement unless reference is made specifically to another agreement or document.

“**Project Agreement**” means the agreement entitled “Design Build Finance Agreement” made among the Province, BC Transportation Financing Authority and the Primary Contractor, dated ●, as the same may be amended, supplemented or restated from time to time.

“**Project Agreement Parties**” means the Province and the Primary Contractor collectively, and “**Project Agreement Party**” means either of the Province or the Primary Contractor.

“**Relevant Certificates**” means:

- (i) the Certificate of Substantial Completion;
- (ii) the Solemn Declaration/Certificate of Substantial Completion, as required by the Federal Contribution Agreement; and
- (iii) any Certificate of Total Completion (Reinstatement Work).

“**Variation**” means any change to the Functions, Duties and Obligations.

1.2 Interpretation

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

(a) The parties waive the application of any rule of law which otherwise would be applicable in connection with the construction of this Agreement that ambiguous or conflicting terms or provisions should be construed against the party who (or whose counsel) prepared the executed Agreement or any earlier draft of the same, or against the party benefiting from such terms or provisions.

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

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- (c) All references to Sections, subsections, paragraphs and Attachments are references to the relevant Sections, subsections and paragraphs of and Attachments to this Agreement unless reference is made to another agreement.
- (d) The words “**herein**”, “**hereof**” and “**hereunder**” and other words of similar import refer to this Agreement as a whole and not to any particular Section or subsection of or Attachment to this Agreement.
- (e) Unless a reference to a statute or statutory provision (including any subordinate legislation) refers to a statute or statutory provision in effect at a particular time (in which case the reference is to the statute or statutory provision in effect at that time), references to any statute or statutory provision (including any subordinate legislation) include any statute or statutory provision which amends, extends, consolidates or replaces the same or which has been amended, extended, consolidated or replaced by the same. References to any statute or statutory provision include any applicable orders, regulations, bylaws, ordinances, codes of practice, instruments or other subordinate legislation made under the relevant statute or statutory provision.
- (f) Words importing the singular include the plural and vice versa.
- (g) Words importing a particular gender include all genders.
- (h) Any reference to a corporate or other legal entity includes and is also a reference to any entity that is a successor to such entity.
- (i) All monetary amounts are expressed in Canadian dollars and all amounts to be calculated and paid pursuant to this Agreement are to be calculated and paid in Canadian dollars.
- (j) Any requirement for any thing or action to be “**in accordance with**” or “**in conformity with**” or “**in compliance with**” any standard, code, criteria or specification or other requirement or stipulation, and any requirement expressed using words or phrases of similar import, means that such thing or action is to exceed or at least equal that standard, code, criteria, specification or other requirement or stipulation.
- (k) The words “**include**”, “**includes**” or “**including**” are to be construed as meaning “include without limitation”, “includes without limitation” and “including without limitation”, respectively, and the words following “**include**”, “**includes**” and “**including**” shall not be considered to set forth an exhaustive list.
- (l) General words are not given a restrictive meaning:
- (i) if they are introduced by the word “**other**”, by reason of the fact that they are preceded by words indicating a particular class of act, matter or thing; or
 - (ii) by reason of the fact that they are followed by particular examples intended to be embraced by those general words.
- (m) Unless otherwise defined in this Agreement, words or abbreviations which have well-known and accepted trade meanings are used in accordance with those meanings.

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(n) All accounting and financial terms used herein are, unless otherwise indicated, to be interpreted and applied in accordance with GAAP, consistently applied.

(o) No provision of this Agreement is intended to derogate from or be inconsistent with or in conflict with any Laws and no provision of this Agreement shall be interpreted in a manner as to result in any such derogation, inconsistency or conflict and, if any such provision is found by a court of competent jurisdiction to be inconsistent with or in conflict with any Laws, the applicable Laws will prevail and such provision will be read down or rendered inoperative (either generally or in such particular situation, as appropriate) to the extent of such conflict or inconsistency, as the case may be and, if any such provision is found by a court of competent jurisdiction to derogate from any Laws, then such provision will be read down or rendered inoperative (either generally or in such particular situation, as appropriate) to the extent of the derogation.

1.3 Obligations and Exercise of Rights by Project Agreement Parties

(a) All obligations of the Project Agreement Parties under this Agreement are and shall be several and not joint or joint and several.

(b) Except as specifically provided for in this Agreement, the rights of the Project Agreement Parties under this Agreement shall be exercised, and may only be exercised, by both of the Project Agreement Parties, including pursuant to Section 9.5 [Termination for Convenience].

2. ROLE OF THE INDEPENDENT CERTIFIER

2.1 Engagement

The Project Agreement Parties hereby appoint the Independent Certifier, and the Independent Certifier hereby accepts such appointment, to perform the Functions, Duties and Obligations in accordance with this Agreement and the provisions of the Project Agreement. The Independent Certifier shall perform the Functions, Duties and Obligations in accordance with this Agreement and the provisions of the Project Agreement.

2.2 Qualifications and Standard of Skill, Care and Diligence

The Independent Certifier represents and warrants to the Project Agreement Parties that:

(a) it has and shall continue to have all requisite professional qualifications, skill, knowledge and expertise;

(b) it holds and shall continue to hold all requisite permits, licences, consents and authorizations; and

(c) it has and shall continue to have all requisite expertise, qualifications, facilities, materials and equipment in addition to those referred to above,

required to undertake and perform the Functions, Duties and Obligations in accordance with the terms of this Agreement and the Project Agreement. The Independent Certifier shall exercise and ensure that all of its staff members and any other persons engaged by the Independent Certifier in the performance of the

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Functions, Duties and Obligations exercise the standard of skill, care and diligence in the performance of the Functions, Duties and Obligations that would be expected of an expert professional experienced in providing services in the nature of the Functions, Duties and Obligations for projects similar to the Project.

2.3 Duty of Independent Judgement and Reliance

- (a) In performing the Functions, Duties and Obligations, the Independent Certifier shall:
 - (i) act fully, impartially, honestly and independently having regard to the interests of each Project Agreement Party in accordance with the terms of the Project Agreement and this Agreement;
 - (ii) act reasonably and to the highest professional standards and in accordance with all Laws;
 - (iii) act in a timely manner:
 - A. in accordance with the times prescribed in this Agreement and in the Project Agreement; or
 - B. where no times are prescribed, within a reasonable time so as to enable the Project Agreement Parties to exercise their respective rights and perform their respective obligations under the Project Agreement; and
 - (iv) act in accordance with the directions of the Project Agreement Parties provided that the directions are not inconsistent with the other terms of this Agreement or the terms of the Project Agreement and do not vary or prejudice the Independent Certifier's authority or responsibilities or the exercise by the Independent Certifier of its professional judgement under this Agreement.
- (b) Although the Independent Certifier may take account of any opinions or representations made by the Project Agreement Parties, the Independent Certifier shall not be bound to comply with any opinions or representations made by either of them in connection with any matter on which the Independent Certifier is required to exercise its professional judgement.
- (c) The Independent Certifier acknowledges and agrees that the Project Agreement Parties are entitled to and will rely on the determinations, findings and certifications made or issued by the Independent Certifier under this Agreement.
- (d) The Independent Certifier further acknowledges and agrees that the Contributing Agencies are entitled to and will rely on the determinations, findings and certifications made or issued by the Independent Certifier under this Agreement. At the request of the Province, the Independent Certifier shall provide written confirmation to any Contributing Agency, in form satisfactory to such Contributing Agency, confirming and agreeing that such Contributing Agency is entitled to and may rely on any determinations, findings and certificates made or issued by the Independent Certifier under this Agreement and acknowledging that, in making or issuing

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such determinations, findings and certifications, the Independent Certifier owes a professional duty of skill, care and diligence in favour of such Contributing Agency.

2.4 Authority to Act

The Independent Certifier:

- (a) is an independent consultant and is not, and shall not purport to be, a partner, joint venturer or agent of any Project Agreement Party;
- (b) has no authority to give any directions to a Project Agreement Party or its officers, directors, members, employees, contractor, consultants or agents; and
- (c) has no authority to waive or alter any terms of the Project Agreement, nor to discharge or release a party from any of its obligations under the Project Agreement.

2.5 Knowledge of Requirements

The Independent Certifier represents and warrants to the Project Agreement Parties that:

- (a) it has reviewed the Project Agreement and informed and shall be deemed to have informed itself fully of the requirements of the Project Agreement as they relate to the performance of the Functions, Duties and Obligations and as to the nature of the Work provided for under the Project Agreement;
- (b) it shall inform itself fully of and shall be deemed to have informed itself fully of the contents of and requirements under all Contract Material as may become relevant from time to time to the performance of the Functions, Duties and Obligations;
- (c) without limiting Section 2.5(a) and Section 2.5(b), it has and shall be deemed to have informed itself fully of all time limits and other requirements for the performance of any Functions, Duties and Obligations which the Independent Certifier is required to perform under the Project Agreement and this Agreement;
- (d) it has and shall be deemed to have informed itself fully of the work necessary for the performance of the Functions, Duties and Obligations and the means of access to, communication with and facilities at the Site including restrictions on any such access and any applicable access protocols; and
- (e) it has satisfied itself as to the correctness and sufficiency of its assessment of the Functions, Duties and Obligations and that the Fee covers the cost of complying with all of the obligations under this Agreement and of all matters and things necessary for the due and proper performance of the Functions, Duties and Obligations.

2.6 Co-ordination and Provision of Information by Independent Certifier

The Independent Certifier shall:

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- (a) fully co-operate in good faith with the Project Agreement Parties;
- (b) carefully co-ordinate the performance of the Functions, Duties and Obligations with work performed and being performed by the Primary Contractor and, where applicable, the Province as contemplated by the Project Agreement;
- (c) without limiting its duties and obligations under Section 2.3 [Duty of Independent Judgement and Reliance] and Section 2.6(b), perform the Functions, Duties and Obligations so as to avoid unreasonably interfering with, disrupting or delaying work performed and being performed by the Primary Contractor and, where applicable, the Province or any other person as contemplated by the Project Agreement; and
- (d) contemporaneously provide copies to each Project Agreement Party of all reports, communications, certificates and other documentation that it provides to either Project Agreement Party.

2.7 Ability to Fulfill Terms of Agreement; Conflict of Interest

- (a) The Independent Certifier represents and warrants to the Project Agreement Parties that:
 - (i) it has no knowledge of any fact, circumstance or condition that adversely affects or might adversely affect or be perceived as adversely affecting its ability to perform the Functions, Duties and Obligations without bias and in accordance with the terms of this Agreement; and
 - (ii) no actual or perceived conflict of interest exists or is likely to arise in the performance of the Functions, Duties and Obligations or any of its other obligations under this Agreement.
- (b) The Independent Certifier shall not (and shall at all times have and maintain in place practices and procedures to ensure that it does not) perform services for or provide advice to any other person or engage in any other activity that may or does give rise to any actual or perceived conflict of interest in the performance of the Functions, Duties and Obligations or any of its other obligations under this Agreement. Without limiting the foregoing, if during the term of this Agreement any such actual or perceived conflict or risk of actual or perceived conflict of interest arises, the Independent Certifier shall notify the Project Agreement Parties immediately in writing of that conflict or risk of conflict, including full particulars of all relevant facts and circumstances with respect thereto, and, without limiting any other rights or remedies of the Project Agreement Parties, shall forthwith provide each of the Project Agreement Parties with such further information relating thereto as it may request and take such steps as may be required by each of the Project Agreement Parties to avoid or mitigate that conflict or risk.

2.8 Independent Certifier Personnel

- (a) The Independent Certifier represents and warrants to the Project Agreement Parties that it has and shall continue to have expert and professional staff who are competent, experienced and qualified to perform, and who hold all requisite licences and other professional qualifications

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necessary to perform, the Functions, Duties and Obligations in accordance with the terms of this Agreement and the Project Agreement.

(b) Subject to Section 2.7 [Ability to Fulfill Terms of Agreement; Conflict of Interest], the Independent Certifier shall use only the partners, directors or employees described in Attachment 3 to this Agreement in connection with the performance of the Functions, Duties and Obligations and such persons' services shall be available for so long as may be necessary to ensure the proper performance by the Independent Certifier of the Functions, Duties and Obligations. Such persons shall have full authority to act on behalf of and bind the Independent Certifier for all purposes in connection with this Agreement.

(c) None of the persons listed in Attachment 3 to this Agreement shall be removed or replaced unless such person ceases to work as a partner in or director or employee of the Independent Certifier due to circumstances beyond the control of the Independent Certifier or such person is unable to work because of death or illness. The Independent Certifier shall notify the Project Agreement Parties of any such circumstances and shall be responsible for finding a replacement who shall previously have been approved in writing by each of the Project Agreement Parties.

3. ROLE OF THE PROJECT AGREEMENT PARTIES

3.1 Cooperation

The Project Agreement Parties shall co-operate with and provide reasonable assistance to the Independent Certifier to enable the Independent Certifier to perform the Functions, Duties and Obligations and its other obligations under this Agreement.

3.2 Instructions in Writing

All instructions given to the Independent Certifier by the Project Agreement Parties shall be in writing and signed by each of the Province's Representative and the Primary Contractor's Representative. Such written instructions shall be valid only if signed by both the Province's Representative and the Primary Contractor's Representative.

3.3 Information and Services

Each of the Project Agreement Parties shall make available to the Independent Certifier, as soon as practicable from time to time, all information, documents and particulars necessary for the Independent Certifier to perform the Functions, Duties and Obligations, including such information, documents and particulars required in order for the Independent Certifier to determine whether Substantial Completion or, if applicable, Total Completion (Reinstatement Work) has occurred or the Final Deficiency List is correct, and shall provide copies of all such information, documents and particulars provided by it to the Independent Certifier to the other Project Agreement Party.

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3.4 Additional Information

If any information, documents or particulars are reasonably required to enable the Independent Certifier to perform the Functions, Duties and Obligations and have not been provided by the Project Agreement Parties, then:

- (a) the Independent Certifier shall give notice in writing to the Primary Contractor's Representative and the Province's Representative of the details of the information, documents or particulars demonstrating the need and the reasons why they are required; and
- (b) the Primary Contractor shall arrange, at its own cost, the provision of the required information, documents or particulars, unless the required information, documents or particulars are not in the Primary Contractor's possession but are in the Province's possession, in which case they will be provided by the Province.

3.5 Right to Enter and Inspect

Upon giving reasonable prior notice to the Province's Representative and the Primary Contractor's Representative, the Independent Certifier (and any person authorized by it) may enter upon and inspect the Work, the Site, the Project Infrastructure or any part or parts thereof at any reasonable time in connection with the exercise or performance or proposed exercise or performance of rights or obligations under this Agreement, subject to:

- (a) observance of the rules established by the Primary Contractor or other relevant person as to safety and security for the Work and the Site;
- (b) not causing unreasonable delay to the carrying out of the Work by reason of its presence at the Site; and
- (c) not causing any damage to the Work, the Site or the Project Infrastructure.

3.6 Project Agreement Parties Not Relieved

Neither Project Agreement Party shall be relieved from performing or observing its obligations, or from any other liabilities, under the Project Agreement as a result of either the appointment of, or any act or omission by, the Independent Certifier.

3.7 Project Agreement Parties Not Liable

On no account shall either Project Agreement Party be liable to the other Project Agreement Party for any act or omission of the Independent Certifier whether under or purportedly under a provision of the Project Agreement, this Agreement or otherwise, provided that any such act or omission shall not extinguish, relieve, limit or qualify the nature or extent of any right or remedy of either Project Agreement Party against, or any obligation or liability of either Project Agreement Party to, the other Project Agreement Party which would have existed regardless of such act or omission.

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4. QUALITY

4.1 Quality Project Plan

The Independent Certifier shall:

- (a) develop and implement a quality project plan identifying the processes and outcomes involved in performing the Functions, Duties and Obligations that complies with all requirements of the Independent Certifier's quality assurance accreditation, and is otherwise satisfactory to each of the Project Agreement Parties;
- (b) within 14 days after the date of this Agreement, provide such quality project plan to each of the Project Agreement Parties;
- (c) provided such quality project plan is satisfactory to the Project Agreement Parties, implement and comply with such quality project plan; and
- (d) if such quality project plan is not satisfactory to the Project Agreement Parties (any dissatisfaction of either Project Agreement Party shall be discussed with the other before determining whether such plan is satisfactory or not), within 7 days after receiving notice from the Project Agreement Party to that effect, revise and resubmit the quality project plan to the Project Agreement Parties, and, once it is satisfactory to each of the Project Agreement Parties, implement and comply with such quality project plan as so revised.

4.2 Quality Project Plan Not to Relieve Independent Certifier

The Independent Certifier shall not be relieved of any responsibilities or obligations in respect of the performance of the Functions, Duties and Obligations and shall remain solely responsible for performing the Functions, Duties and Obligations notwithstanding:

- (a) the obligation of the Independent Certifier to develop and implement a quality project plan; or
- (b) any comment or direction upon, review or acceptance of, approval to proceed with or request to vary any part of the quality project plan by the Project Agreement Parties.

5. SUSPENSION

5.1 Notice by Project Agreement Parties

The performance of the Functions, Duties and Obligations (or any part thereof) may be suspended at any time by the Project Agreement Parties:

- (a) if the Independent Certifier fails to comply with its obligations under this Agreement, immediately by the Project Agreement Parties giving notice in writing signed by each of the Province's Representative and the Primary Contractor's Representative to the Independent Certifier; or

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(b) in any other case, by the Project Agreement Parties giving five Business Days' notice in writing signed by each of the Province's Representative and the Primary Contractor's Representative to the Independent Certifier.

5.2 Costs of Suspension

The Independent Certifier shall:

(a) subject to the Independent Certifier complying with Section 8.1 [Notice of Variation], be entitled to recover any extra costs incurred by the Independent Certifier by reason of a suspension pursuant to Section 5.1(b), such costs to be valued as a Variation under Section 8.1 [Notice of Variation] and Section 8.2 [No Adjustment]; and

(b) have no entitlement to be paid any costs, expenses, losses or damages arising from a suspension pursuant to Section 5.1(a).

5.3 Recommencement

Following any suspension pursuant to Section 5.1 [Notice by Project Agreement Parties], the Independent Certifier shall recommence the performance of the Functions, Duties and Obligations (or any part thereof) as soon as practicable following the receipt of a written notice signed by each of the Province's Representative and the Primary Contractor's Representative requiring it to do so.

6. INSURANCE AND LIABILITY

6.1 Independent Certifier's Professional Indemnity Insurance

(a) The Independent Certifier shall have and at all times maintain in full force and effect:

(i) professional errors and omissions insurance:

- A. in the minimum amount of [REDACTED] per claim and in the aggregate, with a deductible of not more than [REDACTED] per claim and from an insurer and on terms satisfactory to each of the Project Agreement Parties;
- B. with a term and extended reporting period from the date of this Agreement until the expiration of [REDACTED] following the cessation of performance of the Functions, Duties and Obligations; and
- C. covering liability which the Independent Certifier might incur as a result of any breach of its obligations or any breach of a duty owed by the Independent Certifier in a professional capacity to the Project Agreement Parties or the Contributing Agencies, or any of them, under or in connection with this Agreement or the performance of the Functions, Duties and Obligations; and

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- (ii) comprehensive general liability insurance in the minimum amount of [REDACTED] per claim and in the aggregate, with no deductible for personal injury or bodily injury, and a deductible of not more than [REDACTED] per occurrence for property damage, and from an insurer and on terms and conditions satisfactory to each of the Project Agreement Parties.

- (b) The Independent Certifier shall provide copies of its insurance policies and renewals to each of the Project Agreement Parties (or as either of them may direct) upon request.

6.2 Workers Compensation Insurance

The Independent Certifier shall, at its own cost, insure its liability (including its common law liability) as required under any applicable occupational health and safety statutes and regulations in relation to its employees engaged in the performance of the Functions, Duties and Obligations.

7. PAYMENT FOR SERVICES

7.1 The Fee

- (a) In consideration of the Independent Certifier performing the Functions, Duties and Obligations in accordance with this Agreement, the Project Agreement Parties shall pay the Independent Certifier the Fee.
- (b) The Fee includes all taxes (except for HST), disbursements and expenses (including accommodation, car hire, equipment and travel expenses), overheads and profit to perform the Functions, Duties and Obligations.

7.2 Payment of Fee

Each of the Project Agreement Parties shall pay one-half of the Fee to the Independent Certifier in accordance with the payment schedule specified in Attachment 2 to this Agreement. The obligation of each Project Agreement Party to pay its one-half of the Fee to the Independent Certifier is a several obligation and not subject to joint or joint and several liability, and neither Project Agreement Party shall have any liability whatsoever for the non-payment by the other Project Agreement Party of any fees or costs payable by such other Project Agreement Party under this Agreement.

7.3 Appropriation

The Independent Certifier acknowledges that it is aware of the provisions of subsection 28(2) of the *Financial Administration Act* (British Columbia).

8. VARIATIONS

8.1 Notice of Variation

- (a) If the Independent Certifier believes, other than in the case of a “Variation Order” under Section 8.3 [Variation Procedure], that any direction given by the Project Agreement Parties constitutes or involves a Variation, it shall:

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- (i) within five Business Days after receiving the direction, give notice to the Project Agreement Parties that it considers the direction constitutes or involves a Variation; and
 - (ii) within five Business Days after giving a notice under Section 8.1(a)(i), submit a written claim to the Project Agreement Parties which includes detailed particulars of the effect which compliance with the alleged Variation will have on its costs of performing the Functions, Duties and Obligations (whether by an increase or a decrease), the adjustment to the Fee proposed by the Independent Certifier if the alleged Variation is implemented, and how the amounts referred to in the claim were calculated.
- (b) Regardless of whether the Independent Certifier considers that such a direction constitutes or involves a Variation, the Independent Certifier shall continue to perform the Functions, Duties and Obligations in accordance with this Agreement and all directions, including any direction in respect of which notice has been given under this Section.

8.2 No Adjustment

If the Independent Certifier fails to comply with Section 8.1 [Notice of Variation], the Fee shall not be adjusted as a result of the relevant direction.

8.3 Variation Procedure

- (a) The Project Agreement Parties may issue a document titled “Variation Price Request” to the Independent Certifier which shall set out details of a proposed Variation which the Project Agreement Parties are considering.
- (b) Within five Business Days after the receipt of a Variation Price Request pursuant to Section 8.3(a), the Independent Certifier shall provide the Project Agreement Parties with a written notice in which the Independent Certifier sets out detailed particulars of the effect which the proposed Variation will have on its costs of performing the Functions, Duties and Obligations (whether by an increase or a decrease), the adjustment to the Fee proposed by the Independent Certifier if the proposed Variation is implemented, and how the amounts referred to in the notice were calculated.
- (c) The Project Agreement Parties may then direct the Independent Certifier to carry out the Variation by issuing a written document titled “Variation Order” and signed by each of the Province’s Representative and the Primary Contractor’s Representative which shall state either that:
 - (i) the Fee is adjusted as set out in the Independent Certifier’s notice; or
 - (ii) the adjustment (if any) to the Fee shall be determined under Section 8.4 [Cost of Variation].

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8.4 Cost of Variation

(a) Subject to Section 8.2 [No Adjustment], the Fee shall be adjusted for all Variations or suspensions pursuant to Section 5.2(a) by:

- (i) the amount (if any) stated in the “Variation Order” in accordance with Section 8.3(c)(i);
- (ii) if Section 8.4(a)(i) is not applicable, an amount determined pursuant to the fee schedule for Variations in Attachment 2 to this Agreement; or
- (iii) where such rates or prices are not applicable, a reasonable amount to be agreed between the Project Agreement Parties and the Independent Certifier or, failing agreement, determined in accordance with the Dispute Resolution Procedure.

(b) Any reductions in the Fee shall be calculated on the same basis as any increases.

9. TERM AND TERMINATION

9.1 Term

Subject to earlier termination in accordance with its terms, this Agreement shall commence on ● and continue in full force until:

- (a) 60 days after the Substantial Completion Date; or
- (b) such later date as may be mutually agreed between the Project Agreement Parties and the Independent Certifier.

9.2 Notice of Breach

If the Independent Certifier commits a breach of this Agreement, the Project Agreement Parties may give written notice to the Independent Certifier:

- (a) specifying the breach; and
- (b) directing its rectification within the period specified in the notice, being a period not less than five Business Days from the date of service of the notice.

9.3 Termination for Breach

If the Independent Certifier fails to rectify the breach within the period specified in the notice issued under Section 9.2 [Notice of Breach], and without prejudice to any other rights or remedies which the Project Agreement Parties or either of them may have, the Project Agreement Parties may immediately terminate this Agreement by written notice to the Independent Certifier signed by each of the Province’s Representative and the Primary Contractor’s Representative.

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9.4 Termination for Financial Difficulty

Without prejudice to any other rights or remedies which the Project Agreement Parties or either of them may have, the Project Agreement Parties may immediately terminate this Agreement by written notice to the Independent Certifier signed by each of the Province's Representative and the Primary Contractor's Representative if any event described in the definition of Primary Contractor Insolvency in Section 1.1 [Definitions] of Schedule 1 of the Project Agreement occurs in relation to the Independent Certifier.

9.5 Termination for Convenience

Notwithstanding anything to the contrary in this Agreement, the Project Agreement Parties may at any time terminate this Agreement upon 30 days' written notice to the Independent Certifier signed by each of the Province's Representative and the Primary Contractor's Representative.

9.6 Independent Certifier's Rights upon Termination for Convenience

Upon a termination under Section 9.5 [Termination for Convenience], the Independent Certifier shall:

- (a) continue to perform the Functions, Duties and Obligations on a day-to-day basis until the effective date of termination in the notice provided pursuant to Section 9.5 [Termination for Convenience], unless otherwise directed by the Project Agreement Parties;
- (b) be entitled to be reimbursed by the Project Agreement Parties for the value of the Functions, Duties and Obligations performed by it to the date of termination; and
- (c) not be entitled to any damages or other compensation in respect of the termination, including (without limitation) any amount in respect of:
 - (i) the lost opportunity to earn a profit in respect of the Functions, Duties and Obligations not performed at the date of termination;
 - (ii) any lost opportunity to recover overheads from the turnover which would have been generated under this Agreement but for it being terminated; and
 - (iii) any indirect, consequential or special losses or damages.

9.7 Termination by Independent Certifier

Notwithstanding anything to the contrary in this Agreement, if a Project Agreement Party fails to pay its one-half of the Fee or costs payable to the Independent Certifier in accordance with its obligations under this Agreement and such failure is not rectified within 20 Business Days following written notice of such failure given by the Independent Certifier to each of the Project Agreement Parties, the Independent Certifier may, so long as the failure continues, suspend work and terminate this Agreement upon further written notice to each of the Project Agreement Parties.

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9.8 Procedure upon Termination

Upon completion of the Independent Certifier's engagement under this Agreement or earlier termination of this Agreement in accordance with its terms (whether under any of Sections 9.3, 9.4, 9.5 and 9.7 or otherwise) the Independent Certifier shall:

- (a) co-operate with the Project Agreement Parties;
- (b) hand over to the Project Agreement Parties all Contract Material and all other information concerning the Project held or prepared by the Independent Certifier; and
- (c) as and when required by the Project Agreement Parties, meet with them and such other persons nominated by them with a view to providing them with sufficient information to enable the Project Agreement Parties to execute the Project or the persons nominated to perform the Functions, Duties and Obligations.

9.9 Effect of Termination

Except as otherwise expressly provided in this Agreement, termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination (including the right of the Project Agreement Parties to recover damages from the Independent Certifier).

9.10 Survival

Termination of this Agreement shall not affect the continuing rights and obligations of the Project Agreement Parties and the Independent Certifier under Sections 6.1, 6.2, 9.6, 9.8, 9.9, 10.1, 11.7 or 11.8, this Section, or any other Section of this Agreement which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

10. INDEMNITY

10.1 Indemnity

- (a) The Independent Certifier shall indemnify and hold the Project Agreement Parties and each of them and their respective employees, directors, officers, representatives and agents (collectively, the "**Project Agreement Parties Indemnitees**") harmless from and against any and all losses, claims, damages, liabilities, costs and expenses (including costs and expenses incurred in retaining another person to act as the Independent Certifier under the Project Agreement in the event of termination of this Agreement pursuant to Section 9.3 [Termination for Breach] or Section 9.4 [Termination for Financial Difficulty]) incurred or suffered by any of the Project Agreement Parties Indemnitees by reason of, resulting from, in connection with, or arising out of:
 - (i) the breach of any representation, warranty, covenant, term, duty or obligation of the Independent Certifier set out in or arising under this Agreement or the Project Agreement; or
 - (ii) any act or omission of the Independent Certifier in connection with the subject matters of this Agreement.

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(b) For the purposes of this Section, “costs and expenses” includes lawyers’ fees and expenses, accountants’ fees and expenses, arbitration costs, court costs and all other reasonably incurred out-of-pocket costs and expenses on a full indemnity basis.

10.2 Reliance on Documentation

In the discharge of its duties under this Agreement, the Independent Certifier is entitled to rely on the proper and correct issue of all documentation by the Project Agreement Parties under this Agreement and the Project Agreement.

11. GENERAL

11.1 Entire Agreement

This Agreement and the Project Agreement constitute the entire agreement between the parties with respect to the subject matter hereof, and supersede all communications, arrangements and agreements, either oral or written, made or entered into prior to the date of this Agreement between the Project Agreement Parties or either of them and the Independent Certifier with respect to the subject matter hereof.

11.2 Negation of Employment

(a) The Independent Certifier, its officers, directors, members, employees, servants and agents and any other persons engaged by the Independent Certifier in the performance of the Functions, Duties and Obligations shall not, by virtue of this Agreement or the performance of the Functions, Duties and Obligations, become in the service or employment of the Project Agreement Parties or either of them for any purpose.

(b) The Independent Certifier shall be responsible for all matters requisite as employer or otherwise in relation to such officers, directors, members, employees, servants and agents and other persons who are engaged by the Independent Certifier.

11.3 Waiver

Except as expressly provided otherwise in this Agreement, any waiver of any provision of this Agreement shall only be effective if it is in writing signed by the waiving party, and no other failure by any party at any time to exercise a right under or to enforce any provision of this Agreement or to require performance by any other party of any of the provisions of this Agreement shall be construed as a waiver of any such provision and shall not affect the validity of this Agreement or any part thereof or the right of any party to enforce any provision in accordance with its terms. Any waiver shall only apply to the specific matter waived and only in the specific instance and for the specific purpose for which it is given.

11.4 Notices

Any notice, demand, request, consent, approval, objection, agreement or other communication required or permitted to be given, made or issued under this Agreement shall, unless otherwise specifically provided in this Agreement, be in writing signed by the providing party and delivered by

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hand, sent by a recognized courier service (with delivery receipt requested), or transmitted by facsimile transmission to the address or facsimile transmission number of each party set out below:

(a) if to the Primary Contractor:

•

Attention: •

Facsimile: •

(b) if to the Province:

•

Attention: •

Facsimile: •

(c) if to the Independent Certifier:

• **[NTD: Must be a BC address, or provide agent for service]**

Attention: •

Facsimile: •

or to such other address in British Columbia or facsimile transmission number as any party may, from time to time, designate to the other parties in the manner set out above. Any such notice, demand, request, consent, approval, objection, agreement or other communication shall be considered to have been received:

(d) if delivered by hand or by a courier service during business hours on a Business Day, when delivered and, if not delivered during business hours, upon the commencement of business hours on the next Business Day; and

(e) if sent by facsimile transmission during business hours on a Business Day, upon the sender receiving confirmation of the successful transmission and, if not transmitted during business hours, upon the commencement of business hours on the next Business Day following confirmation of the transmission.

11.5 Transfer and Assignment

(a) The Independent Certifier:

(i) shall not assign, transfer, mortgage, charge or encumber any right or obligation under this Agreement without the prior written consent of each of the Project

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Agreement Parties, which consent may be granted or withheld in the absolute and unfettered discretion of each Project Agreement Party; and

- (ii) agrees that any permitted assignment, transfer, mortgage, charge or encumbrance shall not operate to release or discharge the Independent Certifier from any obligation or liability under this Agreement save to the extent agreed by the Project Agreement Parties in their absolute and unfettered discretion.

(b) For the purposes of this Section, an assignment shall be deemed to have occurred where there is a change in effective control of the Independent Certifier after the date of this Agreement, being a change for any reason in the person or persons controlling:

- (i) the composition of the board of directors;
- (ii) the voting power of the board of directors;
- (iii) any class of shareholders; or
- (iv) more than half the issued shares in the capital,

in each case, of the Independent Certifier.

11.6 Governing Laws, Attornment and Disputes

(a) This Agreement is governed exclusively by, and is to be enforced, construed and interpreted exclusively in accordance with, the laws of British Columbia and the laws of Canada applicable in British Columbia, and the laws of British Columbia and the laws of Canada applicable in British Columbia are the proper law of this Agreement.

(b) Any dispute between the parties hereto with respect to any of the subject matters of this Agreement shall be resolved in accordance with, and the parties shall comply with, the Dispute Resolution Procedure.

(c) Where, in accordance with this Agreement or the Project Agreement, including the applicable dispute resolution procedures, a particular matter is referred to the Court or a party may initiate a proceeding in Court, the Court, subject to applicable Laws, has exclusive jurisdiction to entertain and determine such matter or proceeding and each of the parties irrevocably attorns to the jurisdiction of the Court.

11.7 Confidentiality

(a) The Independent Certifier shall ensure that:

- (i) except as required by law, neither it nor any of its officers, directors, members, employees, servants and agents disclose, or otherwise make public, any Contract Material or any other information or material acquired in connection with or during the performance of the Functions, Duties and Obligations without the prior written approval of each of the Project Agreement Parties (which approval

APPENDIX D: FORM OF INDEPENDENT CERTIFIER AGREEMENT

may be granted or withheld in the absolute and unfettered discretion of each Project Agreement Party); and

- (ii) no Contract Material is used, copied, supplied or reproduced for any purpose other than for the performance of the Functions, Duties and Obligations under and in accordance with this Agreement.

(b) The Project Agreement Parties may at any time require the Independent Certifier to give and to arrange for its officers, directors, members, employees, servants and agents engaged in the performance of the Functions, Duties and Obligations to give written undertakings, in the form of confidentiality agreements on terms required by the Project Agreement Parties, relating to the non-disclosure of Contract Material, in which case the Independent Certifier shall promptly arrange for such agreements to be made and delivered to the Project Agreement Parties.

11.8 Contract Material

(a) The Project Agreement Parties and the Independent Certifier agree that the Independent Certifier does not and shall not have any rights, including any Intellectual Property Rights, in any Contract Material provided to the Independent Certifier or created or required to be created by any Project Agreement Party.

(b) As between the Project Agreement Parties and the Independent Certifier, all title and ownership, including all Intellectual Property Rights, in and to the Contract Material created or required to be created by or behalf of the Independent Certifier as part of, or for the purposes of performing, the Functions, Duties and Obligations, is hereby assigned to the Province or, where such title, ownership and Intellectual Property Rights cannot be assigned before creation of the Contract Material, it shall be assigned to the Province on creation. In addition, to the extent that Intellectual Property Rights may subsist in such Contract Material so created by or on behalf of by the Independent Certifier, the Independent Certifier hereby permanently and irrevocably waives all past, present and future moral rights therein and the Independent Certifier shall ensure that any agent, contractor or employee of the Independent Certifier shall waived all such moral rights.

(c) The Independent Certifier shall do or cause to be done all such things and execute and deliver or cause to be executed and delivered all such documents as reasonably requested by the Province in order to confirm or perfect the assignment of Intellectual Property in the Contract Material referred to in this Section and the waivers of moral rights in respect thereof.

(d) The Independent Certifier represents, warrants and shall ensure that all Contract Materials created by or on behalf of it will be original and will not infringe the Intellectual Property Rights of any third party.

11.9 Time of the Essence

Time is of the essence of this Agreement, and remains of the essence in respect of any extension of time given.

APPENDIX D: FORM OF INDEPENDENT CERTIFIER AGREEMENT

11.10 Amendment

No amendment to this Agreement shall be binding unless it is in writing and signed by each of the parties hereto.

11.11 Severability

Each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law. If any provision of this Agreement is held to be invalid, unenforceable or illegal to any extent, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement. If any such provision of this Agreement is held to be invalid, unenforceable or illegal, the parties shall promptly endeavour in good faith to negotiate new provisions to eliminate such invalidity, unenforceability or illegality and to restore this Agreement as nearly as possible to its original intent and effect.

11.12 Binding Effect

Subject to the restrictions on transfer and assignment contained in this Agreement, this Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and permitted assigns.

11.13 Counterparts

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

IN WITNESS WHEREOF the Province, the Primary Contractor and the Independent Certifier have executed this Agreement as of the day and year first above written.

APPENDIX D: FORM OF INDEPENDENT CERTIFIER AGREEMENT

SIGNED on behalf of **HER MAJESTY THE**)
QUEEN IN RIGHT OF THE PROVINCE)
OF BRITISH COLUMBIA by a duly)
authorized representative of the **MINISTER**)
OF TRANSPORTATION AND)
INFRASTRUCTURE in the presence of:)

Signature)

Print Name)

Address)

Occupation)

[● PRIMARY CONTRACTOR] by its
authorized signatories

Per: _____
Authorized Signatory

Name: _____

Title: _____

Per: _____
Authorized Signatory

Name: _____

Title: _____

●
●, Ministry of Transportation and Infrastructure

APPENDIX D: FORM OF INDEPENDENT CERTIFIER AGREEMENT

[• INDEPENDENT CERTIFIER] by its
authorized signatories

Per: _____
Authorized Signatory

Name: _____

Title: _____

Per: _____
Authorized Signatory

Name: _____

Title: _____

APPENDIX D: FORM OF INDEPENDENT CERTIFIER AGREEMENT

**ATTACHMENT 1
TO INDEPENDENT CERTIFIER AGREEMENT**

FUNCTIONS, DUTIES AND OBLIGATIONS

1. The Independent Certifier shall do everything expressed in, or reasonably to be implied from, the Project Agreement as the functions of the Independent Certifier.
2. Without limiting the other provisions of this Agreement and the Project Agreement, and without limiting the generality of paragraph 1 of this Attachment, in order for the Independent Certifier to perform in accordance with the standards required of the Independent Certifier under this Agreement, the Independent Certifier shall, amongst other things, provide the following services and perform the following functions:
 - (a) review drawings and other Design Data, documentation and information related to the design, construction and completion of the Project Infrastructure that has been constructed, installed, altered, upgraded or augmented by the carrying out of the Work or any component thereof, on a select basis in the Independent Certifier's sole professional judgment and if and to the extent such review is required in order to issue the Relevant Certificates or to sign the Final Deficiency List;
 - (b) review such progress reports as may be delivered to the Independent Certifier for the Independent Certifier to be and to keep itself informed as to the progress of the Work as required in order to issue the Relevant Certificates or to sign the Final Deficiency List;
 - (c) signing to acknowledge receipt of all Construction Certificates;
 - (d) attend site meetings as requested by the Province's Representative and the Primary Contractor's Representative;
 - (e) attend commissioning tests, including re-tests, and inspections at the end of the construction activities to be performed as set out in the Design-Build Requirements or as otherwise required for the Primary Contractor to achieve Substantial Completion and, if applicable, Total Completion (Reinstatement Work), or any other component thereof;
 - (f) prior to issuing any Relevant Certificate, consider the views, comments and submissions of the Province's Representative in relation to the satisfaction of the conditions for the issuance of such Relevant Certificate, as the case may be;
 - (g) inspect the Work as required in order to issue the Relevant Certificates;
 - (h) review all documentation, including certificates and approvals, Permits, Design Data, certifications, test results and quality assurance audits, provided to the Independent Certifier pursuant to the Project Agreement or otherwise required for the Independent Certifier to discharge its obligations and perform its duties under this Agreement in respect of the issuance of the Relevant Certificates or the signing of the Final Deficiency List;

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APPENDIX D: FORM OF INDEPENDENT CERTIFIER AGREEMENT

- (i) consider all Laws as applicable to the issuance of the Relevant Certificates;
- (j) upon receipt of:
 - A. notice from the Primary Contractor, given in accordance with Article 4.1.2.3 [30 Business Days' Notice of Substantial Completion] or Article 4.3(b) [Certification of Total Completion (Reinstatement Work)], Part 3 [Certification and Completion] of Schedule 4 to the Project Agreement, carry out all necessary inspections of the Work within the time period set out in the applicable provision of such Article, and, within the time period set out in the applicable provision of such Article, either:
 - I. issue the Relevant Certificate to the Province and the Primary Contractor; or
 - II. notify the Primary Contractor and the Province's Representative of its decision not to issue the Relevant Certificate, and state in detail the reasons for such decision, including what further work may be required to achieve Substantial Completion or Total Completion (Reinstatement Work) as the case may be;
 - B. the Final Deficiency List from the Primary Contractor, given in accordance with Article 4.1.2.4 [Final Deficiency List], Part 3 [Certification and Completion] of Schedule 4 to the Project Agreement, carry out all necessary inspections of the Work within the time period set out in the applicable provision of such Article, and, within the time period set out in the applicable provision of such Article, either:
 - I. sign the Final Deficiency List and deliver a copy of same to the Primary Contractor and the Province's Representative; or
 - II. notify the Primary Contractor and the Province's Representative of its decision not to sign the Final Deficiency List, and state the reasons for such decision, including what further defects or deficiencies in the Work should be added to the Final Deficiency List;
- (k) if the Independent Certifier serves a notice under paragraph 2(i)A.II. of this Attachment and upon the Primary Contractor issuing a notice, pursuant to Article 4.1.2.8(a), Part 3 [Certification and Completion] of Schedule 4, to the Project Agreement to the Independent Certifier and the Province's Representative that such further works or other measures necessary or appropriate to remedy or remove the cause of the Independent Certifier's decision not to issue the Relevant Certificate have been completed, the Independent Certifier shall inspect such further works or measures within the time period set out in the applicable provision of such Article and the provisions of paragraphs 2(i)A. and (j) of this Attachment shall apply *mutatis mutandis* until the issuance of the Relevant Certificate;

APPENDIX D: FORM OF INDEPENDENT CERTIFIER AGREEMENT

- (l) if the Independent Certifier serves a notice under paragraph 2(i)B.II. of this Attachment and upon the Primary Contractor issuing a notice, pursuant to Article 4.1.2.8(b), Part 3 [Certification and Completion] of Schedule 4, to the Project Agreement to the Independent Certifier and the Province's Representative that such further works or other measures necessary or appropriate to remedy or remove the cause of the Independent Certifier's decision not to sign the Final Deficiency List have been completed, the Independent Certifier shall, if applicable, inspect such further works or measures within the time period set out in the applicable provision of such Article and/or review the amended Final Deficiency List and the provisions of paragraphs 2(i)B. and (k) of this Attachment shall apply *mutatis mutandis* until the issuance of the Relevant Certificate;
- (m) provide advice on other matters that may arise under the Project Agreement that the Project Agreement Parties may require in writing signed by each of the Province's Representative and the Primary Contractor's Representative;
- (n) participate in and give the Project Agreement Parties and their professional advisors all reasonable cooperation, access and assistance (including providing or making available documents and information and witnesses for attendance at hearings and other proceedings) in connection with any proceedings pursuant to the Dispute Resolution Procedure relating to any of the Functions, Duties and Obligations.

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**ATTACHMENT 2
TO INDEPENDENT CERTIFIER AGREEMENT**

FEE

[NTD: To be completed prior to execution of the Independent Certifier Agreement. This Attachment will include a fee schedule for Functions, Duties and Obligations and for Variations.]

APPENDIX D: FORM OF INDEPENDENT CERTIFIER AGREEMENT

**ATTACHMENT 3
TO INDEPENDENT CERTIFIER AGREEMENT**

INDEPENDENT CERTIFIER PERSONNEL

[NTD: To be completed prior to execution of the Independent Certifier Agreement.]

APPENDIX D: FORM OF INDEPENDENT CERTIFIER AGREEMENT

**ATTACHMENT 4
TO INDEPENDENT CERTIFIER AGREEMENT**

DISPUTE RESOLUTION PROCEDURE

1. Unless expressly provided otherwise in this Agreement, any dispute between or among the Province, the Primary Contractor, and the Independent Certifier with respect to the subject matters of this Agreement, any matter or dispute between the parties to this Agreement that, by the express terms of this Agreement, is to be resolved or determined by the Dispute Resolution Procedure, and any disagreement between or among the Province, the Primary Contractor, and the Independent Contractor with respect to any matter that, by the express terms of this Agreement, is to be agreed upon by the parties, shall be resolved in accordance with the Dispute Resolution Procedure set out in this Attachment which shall be followed in the order set out below unless the parties all agree otherwise in writing.
2. The parties shall each designate a person in a senior capacity to act as a representative under this Dispute Resolution Procedure (the “**Senior Management Representative**”).
3. The Province, the Primary Contractor, and the Independent Certifier agree that, during the term of this Agreement, each of them shall:
 - (a) identify and address all disputes in a prompt and timely manner so as to facilitate the resolution of disputes as they arise;
 - (b) use all reasonable efforts to resolve any disputes arising between them by amicable negotiations; and
 - (c) provide good faith disclosure of all relevant facts, information and documents to facilitate the resolution of any dispute.
4. When a dispute occurs, any party may give written notice of the dispute (the “**Dispute Notice**”) to the other party or parties, and the parties shall use all reasonable efforts as identified in paragraph 3 of this Attachment to resolve the dispute.
5. If the relevant Senior Management Representatives fail to resolve the dispute within ten Business Days after the dispute has been referred to them, any party to the dispute (the “**Initiating Party**”, which term when used shall, if appropriate, mean both Project Agreement Parties) may commence arbitration proceedings in respect of such dispute by delivering a notice (an “**Arbitration Dispute Notice**”) to all other parties to the dispute (the “**Responding Party**”, which term when used shall, if appropriate, mean both Project Agreement Parties) requiring that the dispute be resolved by arbitration proceedings in accordance with this Attachment.
6. The Arbitration Dispute Notice shall identify the nature of the dispute that is to be the subject of the arbitration, and any amount involved and the remedy sought.
- 7.

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8. If a dispute is referred to arbitration pursuant to this Attachment, the *Commercial Arbitration Act* (British Columbia) and the BCICAC's Domestic Commercial Arbitration Rules of Procedure shall apply to any arbitration conducted hereunder except to the extent that its provisions are modified by the express provisions of this Attachment or by agreement of the parties.

9. Within 15 Business Days following receipt of an Arbitration Dispute Notice by the Responding Party pursuant to paragraph 5 of this Attachment, the Initiating Party and the Responding Party shall appoint a single arbitrator acceptable to both of them.

10. If the parties fail to appoint such a single arbitrator within the period of time and in the circumstances set out in paragraph 8 of this Attachment, either party may apply to the BCICAC to select an arbitrator, in which case the BCICAC shall appoint an arbitrator at the earliest opportunity in accordance with Article 14 of the BCICAC's Domestic Commercial Arbitration Rules of Procedure .

11. Unless the parties to the dispute otherwise agree, no person may be nominated or appointed to act as an arbitrator who is or at any time has been involved or interested in the conduct of:

- (a) any of the Work on behalf of the Primary Contractor or any of its Subcontractors;
- (b) the Project on behalf of the Province; or
- (c) the Project on behalf of the Independent Certifier.

12. The arbitrator shall have appropriate qualifications by profession or occupation to decide the matter in dispute.

13. Meetings and hearings of the arbitrator shall take place in Vancouver, British Columbia or in such other place as the parties to the dispute may agree. 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 to the dispute adequate notice thereof. All meetings and hearings shall be in private unless the parties to the dispute otherwise agree, and each party may be represented at any meetings or hearings by legal counsel. Each party may examine and re-examine its witnesses and cross-examine those of the other party at the arbitration. There shall be no oral discovery unless otherwise ordered by the arbitrator.

14. All submissions prepared by a party in connection with any proceedings involving the arbitrator and all information, documents, notes and records prepared by the arbitrator and all decisions and determinations of the arbitrator shall be admissible in any other dispute resolution process, appeal or legal proceeding permitted in accordance with this Attachment. For greater certainty, nothing herein shall prevent the tendering of the same oral or written evidence before any other dispute resolution process, appeal or legal proceeding permitted in accordance with this Attachment and a proceeding arbitrated by an arbitrator. The arbitrator may testify in or in connection with any such dispute resolution process, appeal or legal proceeding.

15. The object of an arbitration hereunder is to ensure the just, expeditious and economical determination of the dispute. Without limiting the jurisdiction or powers of the arbitrator under the *Commercial Arbitration Act* (British Columbia), a submission to arbitration hereunder shall confer on the arbitrator the jurisdiction and power to:

APPENDIX D: FORM OF INDEPENDENT CERTIFIER AGREEMENT

- (a) determine any question of law arising in the arbitration;
- (b) determine any question as to the arbitrator's jurisdiction;
- (c) determine any question of dishonesty arising in the dispute;
- (d) order any party to the dispute to furnish further details of its case, in fact or in law to any other party to the dispute;
- (e) proceed with the arbitration notwithstanding any failure or refusal of a 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 reasonable notice that the Arbitrator intends to do so;
- (f) 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;
- (g) make one or more interim awards;
- (h) hold meetings and hearings and make a decision in British Columbia or elsewhere with the concurrence of the parties;
- (i) 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;
- (j) 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; and
- (k) include, as part of any award, the payment of interest at the Prime Rate from an appropriate date as determined by the arbitrator.

The jurisdiction and powers referred to in this paragraph shall be exercised at the discretion of the Arbitrator subject only to applicable Laws and the provisions of this Agreement.

16. Subject to the provisions of the *Commercial Arbitration Act* (British Columbia), the arbitrator shall send a decision in writing to the parties to the dispute within 20 Business Days following the conclusion of all hearings referred to in paragraph 12 of this Attachment 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 to the dispute otherwise agree, shall state the reasons for the decision.

17. Subject to the rights of appeal that any party may have under the provisions of the *Commercial Arbitration Act* (British Columbia), the decision of the arbitrator shall be final and binding on the parties to the dispute.

18. Notwithstanding:

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- (a) Section 10.1 [Indemnity] of this Agreement;
- (b) Section 11.1 [Indemnification by Primary Contractor], Section 11.5 [Indemnification by the Province] and Section 11.6 [Limited Indemnity for Contamination], all of the Project Agreement; and
- (c) any other provision of this Agreement or the Project Agreement,

each party to a dispute shall bear its own costs of the process for resolution of the dispute by arbitration (including all legal fees and expenses). The parties to a dispute shall share equally, and be responsible for their respective share of, all costs of the arbitrator as and when due.

19. Any party to a dispute may initiate a proceeding in a Court in the following circumstances:

- (a) such party is appealing a decision of the arbitrator in accordance with the provisions of the *Commercial Arbitration Act* (British Columbia); or
- (b) such party is initiating a proceeding in a Court 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 temporary and preliminary injunctive relief and restraining orders and the appointment of a receiver or receiver and manager.