

SCHEDULE 9

COMPENSATION ON TERMINATION

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SCHEDULE 9

COMPENSATION ON TERMINATION

1. INTERPRETATION

1.1 Definitions

In this Schedule, in addition to the definitions set out in Schedule 1 of this Agreement:

“Adjusted Estimated Market Value” means as at the Termination Payment Date, the Estimated Market Value:

- (a) less an amount, without duplication, equal to the aggregate of:
 - (1) any Re-Bidding Costs; and
 - (2) any other amounts that the Authority is entitled to set-off or deduct under this Agreement,
- (b) plus an amount, without duplication, equal to the aggregate of:
 - (1) any Insurance Proceeds and Insurance Receivables;
 - (2) any accrued but unpaid amounts owing and payable by the Authority to Project Co under this Agreement; and
 - (3) all credit balances on any bank account held by or on behalf of Project Co on the date the Estimated Market Value is calculated,

to the extent that any of the above amounts have not been included in calculating the Estimated Market Value and, in the case of (b)(1) and (b)(3) above, the Authority has received or been assigned such amounts;

“Adjusted Highest Compliant Bid Price” means as at the Termination Payment Date, the Highest Compliant Bid Price:

- (a) less an amount, without duplication, equal to the aggregate of:
 - (1) any Re-Bidding Costs; and
 - (2) any other amounts that the Authority is entitled to set-off or deduct under this Agreement;
- (b) plus an amount, without duplication, equal to the aggregate of:
 - (1) any Insurance Proceeds and Insurance Receivables;
 - (2) any accrued but unpaid amounts owing and payable by the Authority to Project Co under this Agreement; and

- (3) all credit balances on any bank account held by Project Co on the Termination Date,

to the extent that any of the above amounts has not been taken into account in the relevant Compliant Bid and, in the case of (b)(1) and (b)(3) above, the Authority has received or been assigned such amounts in accordance with this Agreement;

“Compliant Bid” means a bid, proposal or other submission pursuant to a competitive process which meets the reasonable criteria that the Authority requires the party making the submission to meet as part of the Re-Bidding Process, which unless otherwise agreed by Project Co and the Authority will include:

- (a) compliance with the New Project Agreement terms;
- (b) the financial ability to pay the proposed capital sum as a single, lump sum payment to be made as of the date of the New Project Agreement and the financial ability to comply with the New Project Agreement terms for the price proposed;
- (c) such party is experienced in maintaining or operating a facility similar to the Facility or providing services similar to the Design and Construction or Services, as applicable;
- (d) the technical solution proposed by such party is capable of delivery and such party is technically capable of delivering and maintaining the Project or the remainder thereof, as the case may be.

“Estimated Market Value” means the amount determined to be the Fair Market Value of a New Project Agreement pursuant to Section 5.2 or 5.3 of this Schedule;

“Liquid Market” means that there are sufficient willing parties (being at least two parties each of whom is capable of being a Suitable Substitute Project Co and each of whom deals with the Authority at arm’s length) in the market for agreements in Canada for the provision of services under public private partnerships or other basis similar to this Agreement for the price that is likely to be achieved through a competitive process to be a reliable indicator of the Fair Market Value of this Agreement, provided that any entity controlled and established by the Senior Lenders specifically for the purposes of this Project will not be counted for the purpose of determining whether there are sufficient willing bidders in the market;

“Re-Bidding Costs” means the reasonable costs incurred by the Authority in connection with the Re-Bidding Process and the calculation of the Estimated Market Value;

“Re-Bidding Process” means the process set out in Section 4 of this Schedule;

“Re-Bidding Process Monitor” means a third party appointed by Project Co pursuant to Section 4.9 of this Schedule.

2. TERMINATION ON EXPIRY DATE

If the Termination Date is the Expiry Date, the Authority will pay to Project Co on the Termination Payment Date a Termination Payment of \$1.

3. TERMINATION FOR AUTHORITY EVENT OF DEFAULT OR AT AUTHORITY'S OPTION

3.1 Calculation

If either the Authority or Project Co terminates this Agreement pursuant to Section 2.1(a), Section 6.6 (Authority Election Not to Reinstate) or Section 13 (Authority Events of Default), the Authority will pay to Project Co on the Termination Payment Date a Termination Payment equal to the greater of:

- (a) the amount which would be determined under Section 6.1 of this Schedule if it applied; and
- (b) the aggregate amount, without duplication, of:
 - (1) the Senior Debt as at the Termination Payment Date;
 - (2) the Employee Payments and the Project Contractor Breakage Costs;
 - (3) any accrued but unpaid amounts owing and payable by the Authority to Project Co under this Agreement;
 - (4) any Insurance Receivables, if and to the extent Project Co has assigned them to the Authority; and
 - (5) the aggregate amount for which the Units and any amounts outstanding under Junior Debt could have been sold for Fair Market Value on the date immediately before the Termination Date based on the assumption that there has been no default by the Authority, that the sale is on a going concern basis and that no restrictions exist on the transfer of equity capital,

LESS, to the extent it is a positive amount, the aggregate of without double counting:

- (c) all credit balances on any bank accounts held by or on behalf of Project Co on the Termination Date and the value of any amounts due and payable from third parties (but only when received from third parties) but excluding any claims under a Project Contract or claims against other third parties which have not been determined or have been determined but not yet paid provided that in such case Project Co will assign any such rights and claims under the Project Contracts or claims against other third parties to the Authority and give the Authority reasonable assistance in prosecuting such claims; and
- (d) the market value of any other assets and rights of Project Co (other than those transferred to the Authority pursuant to this Agreement) less liabilities of Project Co properly incurred in carrying out its obligations under this Agreement as at the Termination Date to the extent realised before the Termination Payment Date or such later date as the assets can be realised provided that no account will be taken of any liabilities and obligations of Project Co arising out of:
 - (1) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in connection with Project Co's obligations in relation to the Project; or

- (2) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms.

To the extent that the assets and rights referred to in Section 3.1(d)(2) above are not realised and applied pursuant to that Section, Project Co will on payment of the amount due under this Section 3.1 assign such assets and rights to the Authority.

The above-determined amount will be adjusted upward or downward to the extent required under Sections 7.1 and 7.2 of this Schedule.

3.2 Notice to the Authority

As soon as practicable after termination of this Agreement pursuant to Section 2.1(a), Section 6.6 (Authority Election Not to Reinstate) or Section 13.3 (Project Co's Options) Project Co will, acting reasonably, notify the Authority of the Termination Payment as of an estimated Termination Payment Date and include in such notice the details and calculations of each component thereof, including a revised and up to date Financial Model and certificates from the Lenders as to the amounts owed to them. Project Co will provide to the Authority all such documents and information as may be reasonably required by the Authority to confirm the amount of the Termination Payment.

4. TERMINATION FOR PROJECT CO EVENT OF DEFAULT: RE-BIDDING PROCESS

4.1 Authority Election

If the Authority terminates this Agreement in accordance with Section 12.4 (Authority Termination Right), the Authority may, within 20 Business Days after the Termination Date, give notice to Project Co electing to have this Section 4 of this Schedule apply if:

- (a) there is a Liquid Market as at the Termination Date; and
- (b) the Senior Lenders have not:
 - (1) exercised their rights under Section 4 of the Lenders' Remedies Agreement; or
 - (2) transferred Project Co's rights and obligations under this Agreement to a Suitable Substitute Project Co and have not demonstrated to the Authority's satisfaction, acting reasonably, that they have used all reasonable efforts to do so,

but otherwise the Authority will require a determination in accordance with Section 5 and the provisions of that Section will apply.

4.2 Re-Bidding Process

If Section 4 of this Schedule applies, the Authority will:

- (a) use all reasonable efforts to:

- (1) conduct the Re-Bidding Process so as to obtain the maximum Highest Compliant Bid Price; and
 - (2) implement and complete the Re-Bidding Process as soon as practicable after making the election under Section 4.1 of this Schedule; and
- (b) notify, as soon as practicable and acting reasonably, Project Co of the requirements and terms of the Re-Bidding Process, including the timing of the Re-Bidding Process and the criteria for a Compliant Bid and other matters which will be required to be taken into account by a Compliant Bid. Information provided to bidders during the Re-Bidding Process will include similar information to that provided to bidders in the original procurement process for the Project taking into consideration the relevance of such information and the status of the Project at the time of the Re-Bidding Process. All such references to bids and bidders include references to proposals and proponents and similar terms under other competitive projects.

4.3 Release of Information

Project Co hereby authorizes the Authority to release any information that is reasonably required under the Re-Bidding Process which would otherwise be subject to the restrictions in Section 17.1 (Confidentiality) and Section 17.2 (Personal Information).

4.4 Determination and Payment of Termination Payment

If Section 4 of this Schedule applies and:

- (a) the Adjusted Highest Compliant Bid Price is a positive amount, the Authority will pay to Project Co on the Termination Payment Date a Termination Payment equal to the Adjusted Highest Compliant Bid Price; or
- (b) the Adjusted Highest Compliant Bid Price is less than zero, an amount by which the Adjusted Highest Compliant Bid Price is less than zero will be due and payable by Project Co to the Authority on the date of execution of the New Project Agreement.

4.5 Notice to Project Co

As soon as practicable after receipt of the bids, the Authority will, acting reasonably, determine the Compliant Bids and will notify Project Co of the Adjusted Highest Compliant Bid Price and include in such notice the details and calculations of each component thereof.

4.6 New Project Agreement

Notwithstanding any Dispute relating to the Highest Compliant Bid Price, the Adjusted Highest Compliant Bid Price or the Re-Bidding Process, the Authority will be entitled to enter into a New Project Agreement with the New Project Co in accordance with the Re-Bidding Process.

4.7 Subsequent Authority Election

At any time prior to receipt by the Authority of a Compliant Bid or at any time thereafter with the consent of Project Co, acting reasonably, the Authority may, by notice to Project Co, elect for the provisions of Section 5 of this Schedule to apply and on such notice:

- (a) the provisions of Section 5 of this Schedule will apply; and
- (b) the Authority will have no liability to Project Co in respect of any breach of the provisions of Section 4 of this Schedule or in respect of making such election.

4.8 Time Limit for Re-Bidding Process

If the Authority has not signed a New Project Agreement with a New Project Co as contemplated by Section 4 of this Schedule within 18 months after the Termination Date:

- (a) the provisions of Section 5 of this Schedule will apply; and
- (b) the Authority will have no liability to Project Co in respect of any breach of the provisions of Section 4 of this Schedule or in respect of not signing a New Project Agreement.

4.9 Appointment of Re-Bidding Process Monitor

Project Co may, at its own cost, appoint a Re-Bidding Process Monitor for the purpose of monitoring and reporting to Project Co and the Senior Lenders on the Authority's compliance with the Re-Bidding Process.

4.10 Role of Re-Bidding Process Monitor

The Re-Bidding Process Monitor will be entitled to attend all meetings relating to the Re-Bidding Process, inspect copies of all relevant documentation and make submissions to the Authority as to compliance with the Re-Bidding Process. The Authority will not be bound to consider or act upon such submissions. The Re-Bidding Process Monitor will not disclose Confidential Information to Project Co or the Senior Lenders or take any action which might materially delay or interfere with the Re-Bidding Process but will be entitled to advise Project Co and the Senior Lenders on whether it considers that the Authority has acted in accordance with the Re-Bidding Process and determined the Highest Compliant Bid Price.

5. PROJECT CO EVENT OF DEFAULT: NO RE-BIDDING PROCESS

5.1 Application for No Re-Bidding Process

The provisions of Section 5 of this Schedule will apply if:

- (a) the Authority terminates this Agreement in accordance with Section 12.4 (Authority Termination Right) and does not, or is not entitled to, make the election under Section 4.1 of this Schedule; or
- (b) the Authority so elects under Section 4.7 of this Schedule; or

- (c) Section 4.8 of this Schedule requires it.

5.2 Determination of Adjusted Estimated Market Value

Project Co and the Authority will act reasonably in agreeing on the Adjusted Estimated Market Value as of an estimated Termination Payment Date, provided that in determining the Estimated Market Value:

- (a) this Agreement will be assumed not to have been terminated and that neither party is in default under its terms;
- (b) all forecast amounts will be calculated on a Nominal basis;
- (c) each of the following will be calculated and discounted at the Base Case Project IRR:
 - (1) all future Service Payments which according to the Financial Model Project Co expected to receive from the Termination Date to the Expiry Date; and
 - (2) all amounts payable by the Authority to Project Co in respect of a Compensation Event pursuant to Section 8.3 (Project Co's Entitlements Upon a Compensation Event) and all other payments, other than Services Payments as set out in (1) above, which the Authority is required to make to Project Co prior to the Expiry Date which Project Co has not been paid in accordance with this Agreement;
- (d) the total of all costs forecast to be reasonably incurred by the Authority as a result of termination and related to providing the Design, Construction and Services itself or by others from the Termination Date to the Expiry Date will be calculated and discounted at the Base Case Project IRR, such costs to include (without double counting):
 - (1) all reasonable costs required to put the Facility in the condition required by this Agreement (including, in the case of termination prior to Service Commencement, the reasonable costs required to be expended to achieve Service Commencement) and to meet the level of performance that will deliver the Service Payments referred to in Section 5.2(c)(1) of this Schedule;
 - (2) an amount equal to all Taxes deemed paid by Project Co to achieve the Base Case Project IRR; and
 - (3) the projected cost of operating, maintaining and performing life cycle rehabilitation for the Facility from the Termination Date to the Expiry Date, such costs to be determined on the basis that:
 - (A) the costs referred to in Section 5.2(d)(1) of this Schedule put the Facility in the condition required by this Agreement and that the Facility meets the said level of performance; and
 - (B) in the case of termination prior to Service Commencement, costs in respect of Services will be in amounts contemplated by the Financial Model at the Effective Date,

in each case such costs to be in substantially similar categories to those set out in the Financial Model at the Effective Date, but not (subject to (B) above) necessarily of the same amounts as those costs set out in the Financial Model at the date of this Agreement, and to be forecast at a level that will deliver the Service Payments referred to in Section 5.2(c)(1) of this Schedule, with such costs to include a reasonable risk margin to cover a realistic and reasonable risk assessment of likely cost overruns; and

- (e) if applicable, GST payable by Project Co pursuant to Section 182 of the *Excise Tax Act (Canada)*, and if Section 182 of the *Excise Tax Act (Canada)* is not applicable but GST is otherwise payable on the Termination Payment, the amount of GST will be added to the Termination Payment.

The above determined amount will be adjusted upward or downward to the extent required under Section 7.1 of this Schedule.

5.3 Determination by Valuator

If the Authority and Project Co cannot agree on the Adjusted Estimated Market Value within 30 days after the date on which the Authority elected for the provisions of Section 5 of this Schedule to apply or they were deemed to apply, then either party may require, by notice to the other party, that the Adjusted Estimated Market Value be determined by a Valuator as of an estimated Termination Payment Date. If the parties cannot agree on the appointment of a Valuator within 5 Business Days of such notice, the appointment of the Valuator will be a Dispute and resolved, with a Valuator appointed, pursuant to the Dispute Resolution Procedure.

5.4 Determination and Payment of Termination Payment

If Section 5 of this Schedule applies and:

- (a) the Adjusted Estimated Market Value is a positive amount, the Authority will pay to Project Co on the Termination Payment Date a Termination Payment equal to the Adjusted Estimated Market Value; and
- (b) the Adjusted Estimated Market Value is less than zero, an amount equal to the amount by which the Adjusted Estimated Market Value is less than zero will be due and payable by Project Co to the Authority within 20 Business Days of receipt of an invoice from the Authority.

6. NO-FAULT TERMINATION

6.1 Calculation

If Project Co or the Authority terminates this Agreement pursuant to Section 6.7, 6.8, 6.9, 6.15, 8.4 or 8.6, the Authority will pay to Project Co on the Termination Payment Date a Termination Payment equal to the aggregate of:

- (a) the Senior Debt as at the Termination Payment Date;

- (b) any accrued but unpaid amounts owing and payable by the Authority to Project Co under this Agreement;
- (c) the amount, if any, by which the Junior Debt exceeds the amount of all Distributions made in respect of Junior Debt;
- (d) the amount, if any, by which the amount of capital contributed to Project Co by the Partners exceeds the amount of Distributions made by Project Co to its Partners; and
- (e) the Employee Payments and the Project Contractor Breakage Costs,

less the amount of any Distributions other than those referred to in (c) and (d) above. If the aggregate of the amount calculated above is less than the Senior Debt plus the amount referred to in (e) above, then the Termination Payment will be increased so that it is equal to the aggregate of the Senior Debt plus the amount referred to in (e) above.

The above determined amount will be adjusted upward or downward to the extent required under Sections 7.1 and 7.2 of this Schedule.

6.2 Notice to the Authority

As soon as practicable after termination of this Agreement as contemplated by this Section 6, Project Co will, acting reasonably, notify the Authority of the Termination Payment as of an estimated Termination Payment Date and include in such notice the details and calculations of each component thereof, including a revised and up to date Financial Model and certificates from the Senior Lenders as to the amounts owed to them and will also provide to the Authority all such documents and information reasonably necessary to confirm the amount of the Termination Payment.

7. ADJUSTMENTS AND DISPUTES

7.1 Income Tax Gross-Up - Partnership Project Co

For the purpose of this Section 7.1:

"Deemed Corporate Project Co" means a fictional fully taxable single purpose British Columbia resident corporation that (i) is, and has since the date of this Agreement been, a subsidiary of a public corporation carrying on an active business with the same fiscal year end as Project Co; and (ii) has had the same revenues and expenses as Project Co and has taken all exemptions, relief, allowances, deductions, set offs and credits permitted under Tax Laws since the date of this Agreement so as to minimize its Tax payable; and

"Taxable Shareholder Portion" means that percentage, measured as at the time of the event that led to the termination of this Agreement, of the total equity interests of Project Co that are not owned, directly or indirectly, by persons described in Section 149 of the *Income Tax Act (Canada)*, or the equivalent section if there are changes to the *Income Tax Act (Canada)*.

If a Termination Payment is payable by the Authority under Section 3 or Section 6 of this Schedule, then the Authority will pay to Project Co the Taxable Shareholder Portion of the additional amount that would be required to be paid to the Deemed Corporate Project Co to put it in the same position after Income Tax

as it would have been in had the Termination Payment (or portion thereof) not been subject to any such Income Tax, taking account of any exemption, relief, allowances, deduction, setting off or credit in respect of Income Tax (whether available by choice or not) which would be available to the Deemed Corporate Project Co to reduce the Tax to which the Termination Payment, or any portion thereof, would be subject.

7.2 Time Related Adjustments

It is understood that the calculations of the Termination Payment pursuant to Sections 3, 4, 5 and 6 of this Schedule are as of an estimated Termination Payment Date and that such estimated date may not be the actual Termination Payment Date for reasons including the existence of a Dispute. The parties will act reasonably in adjusting the amount of such calculated Termination Payment to reflect the actual Termination Payment Date.

7.3 Senior Debt

The Authority will be entitled to rely on one or more certificates of officers of the Senior Lenders or their agent(s) as conclusive evidence of the amount of the Senior Debt. The receipt of this amount by Project Co, the Senior Lenders or their agent(s) will discharge the Authority's obligation to pay any portion of compensation due to Project Co that is attributable to the Senior Debt.

7.4 Disputes

If:

- (a) the Authority does not agree with Project Co's determination of the Termination Payment under Section 3 or Section 6 of this Schedule, the Authority may, within 20 Business Days of the notice referred to in Section 3.2 or Section 6.2 of this Schedule as the case may be, refer the matter to the Dispute Resolution Procedure; or
- (b) Project Co does not agree with the Authority's determination of the Adjusted Highest Compliant Bid Price under Section 4 of this Schedule or the Valuator's determination of the Adjusted Estimated Market Value under Section 5 of this Schedule, Project Co may, within 20 Business Days of the notice referred to in Section 4.5 of this Schedule or the Valuator's determination under Section 5.3 of this Schedule, refer the matter to the Dispute Resolution Procedure.

If either party does not refer the matter to the Dispute Resolution Procedure within the periods provided for in (a) or (b) above, as applicable, such party will be deemed to have agreed to the amount of the applicable determination of the Termination Payment as of the estimated Termination Payment Date.

8. PAYMENTS

8.1 Termination Payment Date

The Termination Payment Date will be determined as follows:

- (a) if the Termination Payment is determined pursuant to Section 2 of this Schedule, the Termination Payment Date will be the Expiry Date;

- (b) if the Termination Payment is determined pursuant to Section 3, 5 or 6 of this Schedule, the Termination Payment Date will be:
 - (1) if the amount thereof is agreed to or deemed agreed to by the Authority and Project Co under Section 7.4 of this Schedule, the earlier of:
 - (A) the date advised by the Authority; and
 - (B) 60 days after such agreement or deemed agreement, as the case may be; or
 - (2) if the amount thereof is the subject of a Dispute, 45 days after the amount of the Termination Payment is determined under the Dispute Resolution Procedure; and
- (c) if the Termination Payment is determined pursuant to Section 4 of this Schedule, the Termination Payment Date will be the earliest of:
 - (1) 45 days after the Adjusted Highest Compliant Bid Price has been agreed or determined pursuant to the Dispute Resolution Procedure; and
 - (2) 30 days after the New Project Co has executed and delivered the New Project Agreement.

8.2 Tax Allocations

The Authority and Project Co will:

- (a) act reasonably and will co-operate with each other to determine the Income Tax treatment resulting from a Termination Payment and to allocate the Termination Payment to each of the non-fixed assets transferred to the Authority pursuant to Section 14.3 (Transfer to Authority of Assets, Contracts, etc.) so as to minimize the amount of Taxes payable on such transfer;
- (b) failing agreement on such treatment or allocation, use the treatment or allocation determined by the Authority unless and until such time as a different treatment or allocation is determined under the Dispute Resolution Procedure or by Canada Revenue Agency (after all appeals have been exhausted); and
- (c) use the allocation agreed to in (a) above or determined in accordance with (b) above in their respective Tax filings and returns.

8.3 Liability for Sales Taxes

The Authority will be responsible for all applicable sales Taxes payable in connection with the transfers referred to in Section 14.3 (Transfer to the Authority of Assets, Contracts, etc.) and will indemnify and save Project Co harmless in respect of any such sales Taxes.

8.4 GST Filings

If Section 182 of the *Excise Tax Act (Canada)* applies to a Termination Payment, the Authority and Project Co will submit their respective GST filings in respect of any period in which a Termination Payment was made on the basis that Section 182 of the *Excise Tax Act (Canada)* will apply to any such Termination Payment.

8.5 Full Settlement

Any and all amounts paid by the Authority to Project Co under this Schedule will be in full and final settlement of each party's rights and claims against each other for termination of this Agreement and any Project Contract, whether under contract, tort, restitution or otherwise, but without prejudice to:

- (a) any antecedent liability of either party to the other that arose prior to the date of termination of this Agreement (but not from the termination itself) to the extent such liability has not already been taken into account in determining the Termination Payment; and
- (b) any liability of either party to the other that may arise after the date of termination of this Agreement (but not from the termination itself), including, for greater certainty, liabilities arising under the provisions of this Agreement which are intended by Section 17.11 (Survival) to survive termination, to the extent any such liability has not already been taken into account in determining the Termination Payment.