

PART 2 OF SCHEDULE 2

DIRECT AGREEMENT

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

and

BC TRANSPORTATION FINANCING AUTHORITY

and

SUN LIFE ASSURANCE COMPANY OF CANADA

and

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

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THIS DIRECT AGREEMENT is made as of the ● day of ●, 2005

BETWEEN:

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

(the "Province")

AND

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

("BCTFA")

AND

SUN LIFE ASSURANCE COMPANY OF CANADA, an insurance company
governed by the *Insurance Companies Act* (Canada), for itself and as agent and
trustee for and on behalf of the Senior Funders

(the "Agent")

AND

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

(the "Concessionaire")

WHEREAS:

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

NOW THEREFORE in consideration of the mutual promises and agreements of the Parties herein expressed and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto hereby covenant and agree as follows:

1. **DEFINITIONS AND INTERPRETATION**

1.1 **Definitions**

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

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

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

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

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

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

“Concession Agreement” means the agreement entitled “Okanagan Lake New Crossing Concession Agreement” among the Province, BCTFA and the Concessionaire dated as of ● pursuant to which the Concessionaire has been engaged to carry out the Project, as the same may be amended, modified, supplemented or replaced from time to time.

“Court” means any court of competent jurisdiction.

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

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

“Disclosed Data” has the meaning given in the Concession Agreement.

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

“Enforcement Action” means any enforcement procedure commenced under any of the Security.

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

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

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

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

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

“Joint Insurance Account” has the meaning given in the Concession Agreement.

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

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

“Novation Effective Date” means the later of:

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

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

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

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

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

“Proposed Novation Date” means:

- (a) the date on which it is proposed by the Agent under Section 5.1 [Proposed Substitute Concessionaire] that a novation will become effective; or
- (b) if later, the date which is 7 days after the Province has consented in accordance with this Agreement to the proposed novation.

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

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

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

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

“Remedial Action Plan” has the meaning given to it in Section 4.3.

“Representative” means:

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

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

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

“Retention Account” has the meaning given in the Concession Agreement.

“Section 20.7.1.2. Insurances” means any contractor’s all risks, property damage or contractor’s pollution liability (to the extent not covered by Section 20.7.1.1 of the Concession Agreement and excluding any business interruption or loss of profits insurance proceeds payable to the Concessionaire under such policy) insurance policies, referred to in Section 20.7.1.2 of the Concession Agreement.

“Security” means the security interests in the Project Documents, the Concession Agreement and any other assets which are granted by the Concessionaire to the Agent pursuant to the Security Documents.

“Security Documents” means the Credit Agreement, the promissory notes specified section 2.6 of the Credit Agreement and all collateral documents specified in Section 4.1.1 of the Credit Agreement, as the same may be amended, modified, supplemented and/or replaced from time to time to the extent permitted under Section 2.3.3 of the Concession Agreement.

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

“Senior Funding Agreements” has the meaning given in the Concession Agreement.

“Step-In Date” means the date on which the Province receives a Step-In Notice from the Agent; provided, that if possession of the Project is necessary in order to perform the rights of the Concessionaire under the Concession Agreement but such possession cannot reasonably be achieved upon the delivery of the Step-In Notice by the Agent, the Step-In Date shall be postponed until the date on which such possession is obtained so long as the Agent proceeds with all reasonable due diligence promptly after the giving of the Step-In Notice to obtain such possession (including by commencing an appropriate Enforcement Action and proceeding with all reasonable due diligence to obtain appropriate judicial relief).

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

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

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

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

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

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

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

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

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

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

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

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

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

1.2 Interpretation

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

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- 1.2.1 headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
 - 1.2.2 all capitalized terms used in this Agreement which are not otherwise defined will have the respective meanings given to such terms in the Concession Agreement;
 - 1.2.3 all references to Sections are references to Sections of this Agreement;
 - 1.2.4 all references to any agreement, document, standard, principle or other instrument include (subject to all relevant approvals and any other provision of this Agreement and the Concession Agreement expressly concerning such agreement, document, standard, principle or other instrument) a reference to that agreement, document, standard, principle or instrument as amended, supplemented, substituted, novated or assigned;
 - 1.2.5 all references to time of day are references to Pacific Standard time or Pacific Daylight Saving time, as the case may be;
 - 1.2.6 all monetary amounts are expressed in Canadian Dollars;
 - 1.2.7 words importing the singular include the plural and vice versa;
 - 1.2.8 words importing a particular gender include all genders;
 - 1.2.9 “person” includes an individual, corporation, partnership, joint venture, association, trust, pension fund, union, government, governmental body, governmental agency, authority, board, tribunal, commission or department and the heirs, beneficiaries, executors, personal or other legal representatives or administrators of an individual, and the receivers and administrators of a corporation;
 - 1.2.10 any reference to a public organization shall be deemed to include a reference to any successor to such public organization or any organization or entity which has taken over the functions or responsibilities of such public organization;
 - 1.2.11 references to “Parties” mean the parties to this Agreement (including, in the case of references to the Agent, the Senior Funders) and references to a “Party” mean any one of the parties to this Agreement;
 - 1.2.12 whenever the terms “will”, “shall” or “must” are used in this Agreement they are to be construed and interpreted as synonymous and are to be read as “shall”;

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- 1.2.13 all accounting and financial terms used herein are, unless otherwise indicated, to be interpreted and applied in accordance with Canadian generally accepted accounting principles consistently applied;
- 1.2.14 the words of this Agreement are to be given their natural meaning;
- 1.2.15 the Parties have had the opportunity to take legal advice on this Agreement and no term is, therefore, to be construed contra proferentem;
- 1.2.16 the words “includes” or “including” are to be construed as being without limitation;
- 1.2.17 general words are not given a restrictive meaning:
- 1.2.17.1 if they are introduced by the word “other”, by reason of the fact that they are preceded by words indicating a particular class of act, matter or thing; or
 - 1.2.17.2 by reason of the fact that they are followed by particular examples intended to be embraced by those general words;
- 1.2.18 if the time for doing an act falls or expires on a day that is not a Working Day, the time for doing such act will be extended to the next Working Day;
- 1.2.19 the Province and the Agent will not be imputed with knowledge of any fact, matter or thing unless that fact, matter or thing is within the actual knowledge of those of its employees or agents (including, in the case of the Province, the Province’s Representative) who have responsibilities in connection with the conduct of the Undertakings and the Project; and
- 1.2.20 no provision of this Agreement is intended to derogate from or be inconsistent with or in conflict with any Laws and Regulations and should not be interpreted in a manner as to result in any derogation, inconsistency or conflict and if any such provision is found by a court of competent jurisdiction to be inconsistent with or in conflict with any Laws and Regulations, the applicable Laws and Regulations will prevail and such provision will be read down or rendered inoperative (either, generally or in such particular situation, as appropriate), to the extent of such conflict or inconsistency, as the case may be, and if any such provision is found by a court of competent jurisdiction to derogate from any Laws and Regulations, then such provision will be read down or rendered inoperative (either, generally or in such particular situation, as appropriate) to the extent of the derogation and for purposes of this Section 1.2.20, the following will be excluded from the definition of the defined phrase “Laws and Regulations”: “and the law of equity”, “ordinances” and “codes (including design and construction codes)”.

2. **NOTICE AND ACKNOWLEDGMENTS**

2.1 Notice of Security Interests

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

2.2 Acknowledgment of Security Assignment

Without prejudice and subject to Section 6 [Rights of the Province], the Province acknowledges that it has received notice of and consents to the assignment, pledge, charge and grant referred to in Section 2.1 [Notice of Security Interests]. The Province confirms that, as at the date of this Agreement, none of the Province, BCTFA or the Province's Representative has received any other notice of any other assignment or security interest granted over the Concessionaire's rights under the Concession Agreement and the Project Documents.

2.3 Concession Agreement Dealings

Notwithstanding the assignment referred to in Section 2.1 [Notice of Security Interests] or the granting of any other Encumbrance in or over the Concession Agreement by or pursuant to the Senior Funding Agreements, and without prejudice to Section 6 [Rights of the Province], until the Province is notified by the Agent to the contrary the Province will be entitled (save to the extent expressly provided otherwise in this Agreement) to exercise or enforce all rights, discretions and remedies under or in respect of the Concession Agreement and to perform or discharge its obligations under the Concession Agreement to the Concessionaire as if the Concessionaire was at all times the absolute and beneficial owner of all right, title, benefit and interest in and to the Concession Agreement. Without limiting the generality of the foregoing, the Province may make all payments under the Concession Agreement to the account of the Concessionaire specified in the relevant invoice issued by the Concessionaire until otherwise notified by the Agent at least 7 Working Days prior to the payment date (whereupon any such payment will be made to or to the order of the Agent).

2.4 Agreements and Security Documents

2.4.1 The Concessionaire, the Agent and the Senior Funders will not amend or modify the Senior Funding Agreements, or any of them, except where the Concessionaire is permitted to do so pursuant to the Concession Agreement.

2.4.2 The Agent acknowledges having received a copy of the Concession Agreement.

2.4.3 The Province acknowledges having received copies of the Senior Funding Agreements.

2.5 Assignment of Security Documents, Project Documents and Concession Agreement

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

2.5.2 Except as provided for in this Agreement, the Agent will not exercise any right it may have pursuant to the Security Documents to assign, transfer or otherwise dispose of the Project Documents, the Concession Agreement or any other assets which the Province has the right to acquire or to obtain pursuant to the Concession Agreement or any of them or any interest therein without the prior written consent of the Province, such consent not to be unreasonably withheld or delayed.

2.6 Notification re Additional Permitted Borrowing

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

2.6.1 the details and amount of any proposed Additional Permitted Borrowing, including:

2.6.1.1 the circumstances giving rise to the Additional Permitted Borrowing and reasons for the Additional Permitted Borrowing; and

2.6.1.2 the terms on which the Additional Permitted Borrowing will be borrowed;

2.6.2 on the first Working Day of each calendar month during which any Additional Permitted Borrowing is, or may be, subsisting, the amount outstanding under the Senior Funding Agreements, and, to the extent it is aware (having made reasonable and proper enquiry):

2.6.2.1 the amount of any Distribution made by the Concessionaire; and

2.6.2.2 the amount of any credit balance on any account of the Concessionaire.

3. NOTICES OF TERMINATION AND ENFORCEMENT

3.1 Termination Notice

3.1.1 The Province will not terminate or give a notice terminating the Concession Agreement as a result of an Event of Default (other than in accordance with this Agreement) unless:

3.1.1.1 the Province gives the Agent at least the Required Period of prior written notice (“Termination Notice”) specifying the Event of Default in reasonable detail which notice shall not be given until after the expiry of all applicable grace and remedy periods referred to in Section 40.4 [Remedy Provisions] of the Concession Agreement;

3.1.1.2 within 30 days of delivering a Termination Notice the Province gives notice (an “Indebtedness Notice”) to the Agent setting out:

3.1.1.2.1 all amounts of which the Province is aware which are due and payable by the Concessionaire to the Province or BCTFA under the Concession Agreement as at the date on which the Province delivered the Termination Notice; and

3.1.1.2.2 all amounts of which the Province is aware which will become due and payable by the Concessionaire to the Province or BCTFA under the Concession Agreement on or before the end of the Required Period; and

3.1.1.3 within the Required Period the Province has not received a Step-In Notice from the Agent or agreed to a Remedial Action Plan pursuant to Section 4.3 [Remedial Action Plan].

3.1.2 At any time after the Province delivers an Indebtedness Notice but before the Province receives a Step-In Notice, if the Province discovers amounts that have become due and payable by the Concessionaire to the Province or BCTFA under the Concession Agreement but which were not included in the Indebtedness Notice, the Province will deliver a further notice (a “Subsequent Indebtedness Notice”) to the Agent setting out those amounts.

3.2 Revocation of Notice

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

3.3 Notice of Exercise of Other Remedies

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

3.4 Notice of Enforcement or Intention to Enforce by Agent

The Agent undertakes to give notice to the Province:

3.4.1 of the occurrence of any Enforcement Event, specifying particulars of the Enforcement Event in reasonable detail; and

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

The notice referred to in Section 3.4.1 will be given promptly and in any event not later than 7 days after the Agent becomes aware of the relevant Enforcement Event and before any Enforcement Action is taken in respect of the Concession Agreement, the Project Documents or any other assets which the Province has the right to acquire or to obtain pursuant to the Concession Agreement.

3.5 Priorities of Step-In Rights under Collateral Agreements

3.5.1 Notwithstanding any provision in the Collateral Agreements, the Province will not exercise any right it may have to step-in and assume (or cause a third party designated by the Province or BCTFA to step-in and assume) the Concessionaire's rights and obligations under the Design-Build Contract or the Operating and Maintenance Contract (including, without limitation, the issuance of a step-in notice by the Province pursuant to any Collateral Agreement), or to transfer, novate or assign such contract, unless:

3.5.1.1 the Province delivers notice (a "Province Collateral Agreement Notice") to the Agent of the Province's intention to step-in and assume the Concessionaire's rights and obligations under such contract, or to novate or assign such contract; and

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

termination sum payable by the Province pursuant to Section 44.2 [Compensation on Termination for Concessionaire Default] of the Concession Agreement is less than the Revised Senior Debt Termination Sum).

3.6 No Liquid Market

3.6.1 At any time during the Required Period the Agent may issue a written notice (the “No Liquid Market Notice”) to the Province setting out the reasons why the Agent does not believe that a Liquid Market exists.

3.6.2 On or before the date falling 14 days after the date on which a No Liquid Market Notice is received by the Province, the Province will notify the Agent of its opinion as to whether or not a Liquid Market exists. Where the Province believes that a Liquid Market does exist, such notice will set out the reasons for the Province’s belief. If the Province and the Agent do not agree whether or not a Liquid Market exists, then either the Province or the Agent may refer the dispute to be determined in accordance with Section 52 [Disputes Resolution Procedure] of the Concession Agreement.

3.6.3 If the Province and the Agent agree or it is determined in accordance with Section 52 [Disputes Resolution Procedure] of the Concession Agreement that no Liquid Market exists, the Concession Agreement will automatically terminate and the provisions of Section 44.2.4 [No Rebidding Procedure] of the Concession Agreement will apply.

3.6.4 If any dispute relating to this Section 3.6 [No Liquid Market] is determined under Section 52 [Disputes Resolution Procedure] of the Concession Agreement, the Required Period will be extended by the period of time spent determining such dispute under Section 52 [Disputes Resolution Procedure] of the Concession Agreement.

4. STEP-IN AND STEP-OUT

4.1 Step-In

4.1.1 At least 10 days before the Agent delivers a Step-In Notice, the Agent will deliver notice (an “Appointed Representative Notice”) to the Province of:

4.1.1.1 its intention to deliver a Step-In Notice; and

4.1.1.2 the identity of its proposed Appointed Representative.

4.1.2 If, at any time:

4.1.2.1 during the Required Period; or

4.1.2.2 during which an Enforcement Event is subsisting (whether or not a Termination Notice has been given by the Province),

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

4.1.3 During the Step-In Period, the Province will deal with the Appointed Representative instead of the Concessionaire in connection with all matters related to the Concession Agreement, and the Concessionaire agrees to be bound by all such dealings between the Province and the Appointed Representative to the same extent as if they had been between the Province and the Concessionaire. The Appointed Representative will at all times during the Step-In Period grant to the Province and its authorized representatives:

4.1.3.1 timely, full, complete and unrestricted access to all of the Concessionaire’s books, records and information; and

4.1.3.2 a right of access to the Appointed Representative’s books, records and information that is equivalent to the rights of access that the Province has to the Concessionaire books, records and information under the Concession Agreement,

in order to enable the Province to monitor the performance of the obligations under the Concession Agreement.

4.2 Step-Out

4.2.1 The Agent may at any time during the Step-In Period give the Province at least 30 days notice to terminate the Step-In Period on a date (to be specified in the notice) (the “Step-Out Date”) prior to the Step-In Expiry Date.

4.2.2 On the Step-Out Date the Appointed Representative will be released from all of its obligations and liabilities to the Province under the Concession Agreement arising prior to the Step-Out Date and all rights of the Appointed Representative against the Province under the Concession Agreement will be cancelled.

4.2.3 The Concessionaire will continue to be bound by the terms of the Concession Agreement, notwithstanding the occurrence of the Step-Out Date.

4.3 Remedial Action Plan

4.3.1 At any time during the Required Period, the Agent may put forward to the Province a remedial action plan for remedying any default which is the subject matter of the relevant Termination Notice or dealing with the circumstances giving rise to such default.

4.3.2 If the Province accepts the Remedial Action Plan in its absolute and unfettered discretion, the relevant Termination Notice shall be withdrawn and cancelled and the Concessionaire shall comply in all respects with the Remedial Action Plan put forward by the Agent and accepted by the Province, provided always that if there is a material breach or failure to carry out the Remedial Action Plan, the Province shall be entitled forthwith of becoming aware of the same to notify the Agent and, if such breach or failure is not remedied within 30 days, the Province may serve a Termination Notice under the Direct Agreement.

5. NOVATION

5.1 Proposed Substitute Concessionaire

At any time:

5.1.1 after an Enforcement Event has occurred; or

5.1.2 prior to the expiry of a Termination Notice; or

5.1.3 during the Step In Period,

the Agent may give notice on behalf of the Senior Funders (a “Proposed Novation Notice”) to the Province that it wishes to novate the Concessionaire’s rights and obligations under the Concession Agreement to another person (a “Proposed Substitute Concessionaire”) in accordance with the provisions of Section 5.5 [Implementation of Novation]. The Proposed Novation Notice will specify a Working Day, falling not later than 60 days after the date of the Proposed Novation Notice, on which such novation is to be effective; provided, that if possession of the Project is necessary in order to make such novation effective but such possession cannot reasonably be achieved prior to the expiry of such 60-day period, such period shall be extended for such longer period as may be reasonably necessary to obtain such possession so long as the Agent proceeds with all reasonable due diligence promptly after the giving of the proposed novation notice to obtain such possession (including by commencing an appropriate Enforcement Action and proceeding with all reasonable due diligence to obtain appropriate judicial relief).

Subject to Sections 3.1.1 and 5.3.3, if a Proposed Novation Notice is given prior to the termination of the Concession Agreement pursuant to a Termination Notice and no Step-In Notice has been given, the Concession Agreement shall not terminate as a result of any Termination Notice prior to the expiry of the 60-day period referred to above, provided that the Province's right to terminate the Concession Agreement due solely to the expiry of the aforesaid 60-day period and the fact that a Novation Effective Date has not occurred within such period shall be suspended in the circumstances described in Section 5.3.3 pending resolution of any dispute referred to therein and during the 60 day period after the giving of a subsequent Proposed Novation Notice pursuant to Section 5.4.

5.2 Information for Consent to Novation

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

5.2.1 its name and registered address;

5.2.2 the names of its shareholders and the share capital held by each of them (if the Proposed Substitute Concessionaire is a public company, the names of its shareholders who hold more than 10% of the voting rights of any class of shares in the Proposed Substitute Concessionaire and the share capital held by each of them);

5.2.3 the names of its directors and officers;

5.2.4 the manner in which it is proposed to finance the Proposed Substitute Concessionaire and the extent to which such financing is committed; and

5.2.5 the resources (including employees with appropriate qualifications, experience and technical competence, and contracts) which are available to the Proposed Substitute Concessionaire to enable it (as relevant) to construct, complete, maintain, operate and rehabilitate the Project Facilities, to carry out the Decommissioning and otherwise perform the obligations of the Concessionaire under the Concession Agreement.

5.3 Grant of Consent

5.3.1 The Province will not unreasonably withhold its consent to a proposed novation, but it will, without limitation, be reasonable for the Province to withhold its consent if the Agent has failed to show to the Province's reasonable satisfaction:

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- 5.3.1.1 the legal capacity, power and authority of the Proposed Substitute Concessionaire to become a party to and perform the obligations of the Concessionaire under the Concession Agreement;
- 5.3.1.2 that the technical competence, experience and financial standing of the Proposed Substitute Concessionaire and the technical and financial resources available to the Proposed Substitute Concessionaire (including committed financing referred to in Section 5.2.4 and contracts referred to in Section 5.2.5) are sufficient to perform the obligations of the Concessionaire under the Concession Agreement;
- 5.3.1.3 that the Proposed Substitute Concessionaire is not controlled by the Concessionaire or any Affiliate of the Concessionaire or a Restricted Person (for the purposes of this Section 5.3.1.3, the Contractor or Operator who has complied fully with the provisions of the Design-Build Contract or the Operating and Maintenance Contract respectively and whose act or omission is not responsible for any Termination Notice or Enforcement Event or Enforcement Act is not deemed to be an Affiliate of the Concessionaire);
- 5.3.1.4 (if, in the case of a Proposed Novation Notice given pursuant to Section 5.1.2, the Termination Notice was given following the occurrence of the Event of Default referred to in Section 40.1.2 of the Concession Agreement) that the Proposed Substitute Concessionaire and each of the entities referred to in Section 5.3.1.3 is wholly independent of and unconnected with any person who acquired an interest in the Concessionaire or Unitholder (as the case may be) giving rise to that Event of Default; and
- 5.3.1.5 that neither the Proposed Substitute Concessionaire nor any of its shareholders nor any Affiliates of the Proposed Substitute Concessionaire nor any of its shareholders is a Restricted Person except to the extent that any of the aforesaid shareholders or Affiliates of such shareholders is a publicly traded company.
- 5.3.1A For the purposes of Section 5.3.1.3, “control” means, with respect to a person, the ownership, whether direct or indirect and whether beneficial or otherwise, of, or the direct or indirect power to vote or transfer, any of the shares or units of ownership of that person having, directly or indirectly, the power to direct or cause the direction of the management, actions or policies of that person.
- 5.3.2 The Province will notify the Agent within 30 days of the later of receipt of a Proposed Novation Notice and receipt of all information required under Section

5.2 [Information for Consent to Novation] whether or not the Province consents to the proposed novation and if the Province fails to do so, it shall be deemed to have consented to the Proposed Novation.

5.3.3 If the Province notifies the Agent under Section 5.3.2 that the Province has decided not to consent to the proposed novation, then the Agent on behalf of the Senior Funders may by issuing and serving proceedings on the Province within 15 days of such notification refer any dispute concerning such matter to the Court and, where a Step-In Notice has been given, the Step-In Period will continue and the Province's right to terminate due solely to expiry of the Required Period will be suspended pending resolution of any dispute referred to in this Section 5.3.3 until it is finally agreed or determined by the Court or otherwise resolved between the parties whether the Province was reasonable in withholding its consent. If the Agent does not issue and serve such proceedings on the Province within such period of 15 days, it will be conclusively deemed to have accepted the Province's decision and neither the Agent, the Concessionaire nor any of the Senior Funders will be entitled to challenge the same. If the Province's decision not to consent to the proposed novation is subject to the Disputes Resolution Procedure under the Concession Agreement, the parties will be bound by the determination of the Disputes Resolution Procedure under the Concession Agreement.

5.4 Subsequent Proposed Novations

If the Province exercises its right under Section 5.3 [Grant of Consent] to withhold its consent to a proposed novation, this will not prejudice the ability of the Agent to give one or more subsequent Proposed Novation Notices pursuant to the provisions of Section 5.1 [Proposed Substitute Concessionaire] containing changed particulars relating to the same Proposed Substitute Concessionaire or particulars relating to another Proposed Substitute Concessionaire which the Agent has good cause to believe would fulfil the requirements of Section 5.3.1, provided that only one Proposed Novation Notice may be outstanding at any one time.

5.5 Implementation of Novation

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

5.5.1 the Proposed Substitute Concessionaire will become a party to the Concession Agreement (in such capacity, the "Suitable Substitute Concessionaire") in place of the Concessionaire and thereafter will be treated as if it was named as a party thereto in place of the Concessionaire;

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

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

6. **RIGHTS OF THE PROVINCE**

6.1 Rights Not Prejudiced

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

6.2 Rights of Termination

If:

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

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

6.3 Termination of Concession Agreement During Step-In Period

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

- 6.3.1 solely on the grounds that the Agent has delivered a Step-In Notice or Proposed Novation Notice or (subject to compliance with the requirements of this Agreement) taken any Enforcement Action;
- 6.3.2 for an Event of Default that occurred before the Step-In Date that was not continuing at the Step-In Date;
- 6.3.3 for an Event of Default that occurred before the Step-In Date and was continuing at the Step-In Date, unless:
 - 6.3.3.1 the Event of Default relates to amounts referred to in Section 3.1.1.2.1 and the Province has not received full payment by the Step-In Date;
 - 6.3.3.2 the Event of Default relates to amounts referred to in Section 3.1.1.2.2 and the Province has not received full payment by the last day of the Required Period;
 - 6.3.3.3 the Event of Default relates to amounts set out in a Subsequent Indebtedness Notice and the Province has not received full payment by the date which is 30 days after the date on which the Province sent the Subsequent Indebtedness Notice to the Agent or the Step-In Date, whichever is later;
 - 6.3.3.4 the Event of Default relates to amounts, of which the Province was not aware at the time the Termination Notice was given, which subsequently become payable and are not discharged on or before the date falling 30 days after the date upon which the liability for the amounts is notified to the Agent or the Step-In Date, whichever is the later;
 - 6.3.3.5 the Event of Default relates to the Works or the Decommissioning, and the Appointed Representative is failing to use all reasonable efforts to implement any remedial program pursuant to the Concession Agreement to remedy the Event of Default or to deal with the circumstances which gave rise to the same, or the Substantial Completion Date or the Completion Date does not occur on or before the date six months (or such longer period, if agreed to in writing by the Province) after the Substantial Completion Longstop Date or the Completion Longstop Date respectively; or

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- 6.3.3.6 the Event of Default relates to any aspect of the performance of the Undertakings (other than the Works and the Decommissioning), and the Appointed Representative is failing to use all reasonable efforts to implement any remedial program pursuant to the Concession Agreement to remedy the Event of Default or to deal with the circumstances which gave rise to the same or the Event of Default remains unremedied on the date which is 60 days after the Step-In Date or such longer period of time as may be agreed to by each of the Agent and the Province in its sole discretion if the Event of Default is capable of being remedied but is not capable of being remedied by the Appointed Representative using all reasonable efforts during the initial 60 day period of time; or
- 6.3.4 on the basis of any Availability/Performance Deductions made or Warning Notices given to the Concessionaire before the Step-In Date, provided that all such Availability/Performance Deductions and Warning Notices will continue to have effect for all other purposes.

For greater certainty, the Province will be entitled to terminate the Concession Agreement by written notice to the Concessionaire and the Appointed Representative for an Event of Default that occurs during the Step-In Period in accordance with the terms of the Concession Agreement, provided that for the purposes of termination under the Concession Agreement, Availability/Performance Deductions made or Warning Notices given to the Concessionaire before the Step-In Date will not be taken into account during the Step-In Period but will be taken into account after the Step-In Period and, except as provided in Section 5.5.6, for all other purposes.

6.4 Province's Remedial Rights

- 6.4.1 For greater certainty and without limiting the generality of Section 6.1 [Rights Not Prejudiced], the Province will be entitled at all times to exercise its rights under Sections 26.5 [Province's Remedial Rights] and 43.1 [Step-In Rights] of the Concession Agreement respectively.
- 6.4.2 Without prejudice to the Province's rights under Sections 26.5 [Province's Remedial Rights] and the Province's rights under Section 43.1 [Step-In Rights] of the Concession Agreement will continue until such time as the Appointed Representative or the Suitable Substitute Concessionaire has demonstrated to the reasonable satisfaction of the Province that it will ensure the performance and is capable of ensuring the performance of the obligations of the Concessionaire under the Concession Agreement, whereupon the Appointed Representative during the Step-In Period or the Suitable Substitute Concessionaire (as the case may be) will be entitled to have access to the Site and the Adjacent Areas for the purpose of ensuring the performance of such obligations.

6.5 Set-off and Withholding of Payment

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

- 6.5.1 to set-off, withhold, suspend or retain payments due to the Concessionaire under the Concession Agreement in accordance with the provisions of the Concession Agreement;
- 6.5.2 to require the application of insurance proceeds in accordance with the provisions of Section 20.7 [Application of Proceeds] of the Concession Agreement; and
- 6.5.3 without prejudice to Section 3.5.3 or Section 3.5.4, to exercise rights in respect of the transfer of assets under the Concession Agreement, including pursuant to Sections 43.4 [Transfer of Assets, etc], 44.1.3, 44.2.1.2, 44.3.7, 44.4.3 and 44.5.2 of the Concession Agreement,

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

6.6 Insurance Proceeds

- 6.6.1 The Concessionaire will notify the Agent within 7 days of the occurrence of (a) any event which gives rise to a single claim of, or (b) a series of events which

give rise to claims of an aggregate value of, more than \$25,000 (index linked) under any Section 20.7.1.2 Insurances.

6.6.2 The Agent may impose upon the Concessionaire reasonable requirements and procedures that are in addition to the provisions of Section 20.7.2 or 20.7.3 of the Concession Agreement, so long as such additional requirements and procedures do not cause the Concessionaire to contravene the provisions of the same such sections of the Concession Agreement.

6.7 Retention Account

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

6.8 Concessionaire's Obligations to Continue

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

6.8.1 the giving of a Step-In Notice or the expiry of the Step-In Period; or

6.8.2 the giving of a Proposed Novation Notice; or

6.8.3 any other provision of this Agreement.

7. NATURE OF OBLIGATIONS

7.1 Province's and BCTFA's Obligations etc.

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

7.2 Concessionaire Acknowledgment

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

8. ASSIGNMENT

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

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

8.2.1 the Province's prior written consent to any such assignment or transfer will be required if and for so long as the Agent or any of the Senior Funders is in default of any of its obligations or liabilities under this Agreement; and

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

8.3 The Province and BCTFA may, on written notice to the Concessionaire and the Agent, novate, assign or otherwise transfer the benefit of the whole or part of this Agreement to any person who is a permitted novatee, assignee or transferee under Section 45.6 [Assignment by Province and BCTFA] of the Concession Agreement. If and to the extent that such novatee, assignee or transferee has assumed the obligations and liabilities of the Province and BCTFA under the Concession Agreement in connection with any novation, assignment or transfer effected pursuant to Section 45.6 [Assignment by Province and BCTFA] of the Concession Agreement, the Province will cause the aforesaid novatee, assignee or transferee to assume the obligations and liabilities of the

Province and BCTFA under this Agreement, whereupon the Province and BCTFA will be released from all of their obligations and liabilities hereunder. The Concessionaire and the Agent will do all things and execute all further documents as may be necessary in connection therewith.

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

9. COUNTERPARTS

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

10. PAYMENT

10.1 Payments

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

10.2 GST

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

11. DEFAULT INTEREST

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

12. WAIVER

12.1 Direct Agreement

Failure by any party to this Agreement at any time to enforce any provision of this Agreement or to require performance by any other party hereto of any of the provisions of this Agreement will not be construed as a waiver of any such provision and will not affect the validity of this Agreement or any part thereof or the right of such party to enforce any provision in accordance with its terms.

12.2 Concession Agreement

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

13. PARTIAL INVALIDITY

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

14. CONFIDENTIALITY

14.1 Confidentiality

Each Party agrees, for itself and its respective directors, officers, employees and agents, to keep confidential and not to disclose to any person (save as hereinafter provided) any of the terms of this Agreement or any information provided to or arising or acquired by it pursuant to the terms or performance of this Agreement or otherwise in relation to the Project (including without limitation all documents and information supplied in the course of legal proceedings) (together the "Confidential Information").

14.2 Exceptions

Notwithstanding Section 14.1 [Confidentiality], a Party will be entitled to disclose the whole or any part of the Confidential Information:

14.2.1 to its directors, officers, employees, sub-contractors, agents or professional advisors to the extent necessary to enable it to perform (or to cause to be performed) or to protect or enforce any of its rights or obligations under this Agreement; or

14.2.2 when required to do so by Laws and Regulations or by or pursuant to the rules or any order having the force of law of any Court, association or agency of competent jurisdiction or any governmental agency; or

14.2.3 to the extent that the Confidential Information has, except as a result of breach of confidentiality, become publicly available or generally known to the public at the time of such disclosure; or

14.2.4 to the extent that the Confidential Information is already lawfully in the possession of the recipient or lawfully known to the recipient prior to such disclosure; or

14.2.5 to the extent that it has acquired the Confidential Information from a third party who is not in breach of any obligation as to confidentiality to any other Party; or

14.2.6 in the case of the Agent, to the Senior Funders and prospective permitted assignees and participants under the Senior Funding Agreements to the extent reasonably required by the Senior Funders in connection with their position as Senior Funders to the Project and to a prospective novatee of this Agreement; or

14.2.7 in the case of the Province and BCTFA:

14.2.7.1 to the extent required for the purpose of the design, construction, completion, commissioning and testing of the Works, the completion of the Decommissioning, the operation, maintenance, rehabilitation or improvement of the Project Facilities or the carrying out by the Province, BCTFA or the Minister of any statutory or other duties or functions in respect of the Project Facilities in the event of termination of the Concession Agreement;

14.2.7.2 (without limiting Section 14.2.2) in relation to the outcome of the procurement process for the Project as may be required to be published;

- 14.2.7.3 to any ministry, office or agency of the Province (including for greater certainty the Auditor General and the Office of the Comptroller General) where required for parliamentary, governmental, statutory or judicial purposes;
- 14.2.7.4 whether or not falling within Section 14.2.7.2, to the Ministry, Partnerships BC and any other Governmental Authority (including without limitation any Public Authority); or
- 14.2.7.5 as required pursuant to the Freedom of Information and Protection of Privacy Act,

and, in the case of Section 14.2.1 and Section 14.2.6 above, upon obtaining from such person or entity to whom the disclosure is to be made an undertaking of strict confidentiality in relation to the Confidential Information in question.

14.3 Continuation of Confidentiality Obligations

The obligations of the Parties under this Section 14 [Confidentiality] will continue for a period of 5 years following the date of termination of the Concession Agreement.

14.4 Publicity Regarding Disputes

No party to this Agreement will without the prior written consent of the others publish alone or in conjunction with any other person any articles or other material relating to any dispute arising under this Agreement nor impart any information regarding any such dispute except to its professional advisors under obligations of confidentiality and except and to the extent that such publication arises out of any statutory or regulatory obligation applicable to that party.

14.5 Remedies

Without prejudice to any other rights and remedies that any other Party would have, each of the Parties agrees that damages would not be an adequate remedy for any breach of this Section 14 [Confidentiality] and that any other Party will be entitled to the remedies of injunction, specific performance and/or other equitable relief for any threatened or actual breach of this Section 14 [Confidentiality], subject, in the case of a claim for any such remedy against the Province, to the provisions of the Crown Proceeding Act, R.S.B.C. 1996, c.89.

15. ENTIRE AGREEMENT

This Agreement (when read together with the Concession Agreement but without prejudice thereto, save to the extent affected hereby, and without prejudice to the Senior

Funding Agreements and the Security Documents) contains or expressly refers to the entire agreement between the Parties with respect to the specific subject matter hereof and expressly excludes any warranty, condition or other undertaking implied at law or by custom and supersedes all previous agreements and understandings between the Parties with respect thereto, and each of the Parties acknowledges and confirms that it does not enter into this Agreement in reliance on any representation, warranty or other undertaking not fully reflected in the terms of this Agreement.

16. EXPIRY

16.1 Extinguishment of Rights

If:

16.1.1 the Concession Agreement expires or is terminated (except by the Province in breach of this Agreement) for whatever reason and, in the case of termination, any termination compensation payable by the Province as a consequence of the termination in accordance with the provisions of the Concession Agreement is paid; or

16.1.2 all sums due and owing to the Senior Funders by the Concessionaire under the Senior Funding Agreements are repaid or paid by the Concessionaire and the Senior Funders are not required to make further advances to the Concessionaire under the Senior Funding Agreements,

then the rights of the Agent for itself and on behalf of the Senior Funders under this Agreement will be extinguished and the Agent, at no cost to the Province, will (subject to Sections 3.5.3 and 3.5.4) release and discharge any Security over the Concession Agreement, the Project Documents and any other assets which the Province has the right to acquire or to obtain pursuant to the Concession Agreement which has not previously been released and discharged. The Agent will provide notice to the Province of the date referred to in Section 16.1.2 within 30 days of its occurrence.

16.2 Agent's Rights

The right of the Agent to serve a Step-In Notice in accordance with Section 4.1 [Step-In] or to put forward a Remedial Action Plan under Section 4.3 [Remedial Action Plan] or a Proposed Novation Notice in accordance with Section 5.1 [Proposed Substitute Concessionaire], including in accordance with Section 5.4 [Subsequent Proposed Novations], will be exercisable on more than one occasion, provided that any Event of Default existing at the commencement of the prior Step-In Period or occurring during the prior Step-In Period was cured by the time of delivery of the subsequent Step-In Notice

and further provided that no more than one Step-In Notice or Proposed Novation Notice may be outstanding at any particular time.

17. AUTHORITY

17.1 Warranty of Authority

The Agent represents and warrants to and undertakes with each of the Province, BCTFA and the Concessionaire that the Agent is duly authorized by each of the Senior Funders to assume the obligations expressed to be assumed by it pursuant to this Agreement and to undertake on behalf of each Senior Funder in the terms of this Agreement so as to bind such Senior Funder to the provisions of Sections 2.4.1, 5.3.3, 20.1 and 20.2 as if it were a Party to this Agreement, and each such Senior Funder will be so bound in accordance with the terms of this Agreement.

17.2 Authority

The Parties:

17.2.1 are entitled to assume that any act done, document executed or entered into or waiver given by the Agent has been duly authorized by each of the Senior Funders; and

17.2.2 are not obliged to make any enquiry as to the authority of the Agent in doing, executing, entering into or giving such act, document or waiver.

18. AMENDMENTS

No purported amendment or modification of this Agreement will be valid unless in writing executed by the Parties (and in the case of the Senior Funders, it will be sufficient if the same are executed on their behalf by the Agent).

19. NOTICES

19.1 Requirement for Writing

Wherever in this Agreement provision is made for the giving or issuing of any notice, consent or approval by any person (a "Notice"), unless otherwise specified such Notice will be in writing and the words "notify", "consent" or "approve" will be construed accordingly.

19.2 Addresses

Any Notice will be duly given if signed by or on behalf of a duly authorized officer of the person giving the Notice and personally delivered to, sent by a recognized express mail or courier service (with delivery receipt requested), or sent by confirmed facsimile transmission with telephone confirmation, to the following addresses:

Province and BCTFA

Ministry of Transportation
5th Floor, 940 Blanshard Street
Victoria BC V8W 9T5
Facsimile: (250) 387 6431
Attention: Assistant Deputy Minister, Highways

Agent

Sun Life Assurance Company of Canada
225 King Street West, 11th Floor
Toronto, Ontario M5V 3C5

Facsimile: (416) 595-0131
Attention: Director, Investment Project Finance and Structured Finance

Concessionaire

Okanagan Lake Concession Limited Partnership
c/o 2800 – 666 Burrard Street
Vancouver, BC V6C 2Z7

Facsimile: 604 687 1612
Attention: President

19.3 Changes

Any Party may change its address for notice to another address in British Columbia by prior notice to the other Parties.

19.4 Receipt

Any Notice will be deemed to have been received:

19.4.1 if sent by personal delivery or by an express mail or courier service, when delivered;

19.4.2 if sent by facsimile, upon sending, subject to:

-
- 19.4.2.1 confirmation of uninterrupted transmission by a transmission report, and
- 19.4.2.2 there having been no telephonic communication by the recipient to the sender (any such telephonic communication to be confirmed in writing) that the facsimile has not been received in legible form:
- (i) within 3 hours after sending, if sent on a Working Day and between the hours of 9.00 a.m. and 4.00 p.m.; or
 - (ii) by noon on the next following Working Day if sent after 4.00 p.m. on a Working Day but before 9.00 a.m. on the next following Working Day,

provided that any Notice given by facsimile will be confirmed by letter sent by personal delivery or by a recognized express mail or courier service, with delivery receipt requested, but without prejudice to the original fax Notice if received in accordance with this Section 19.4.2.

20. ACKNOWLEDGMENT AND WAIVER

20.1 Acknowledgment

The Agent on behalf of the Senior Funders acknowledges that the Disclosed Data made available to the Concessionaire prior to the date of the Concession Agreement has been made available on the basis set out in Sections 6.1 [Site Inspection and Investigation] and 38.2 [Disclaimer] of the Concession Agreement.

20.2 Waiver

Without prejudice to Section 20.1[Acknowledgment]:

20.2.1 the Agent on behalf of the Senior Funders agrees and confirms that the Province and BCTFA will not be liable to any of the Agent or the Senior Funders (whether in contract, tort, by statute or otherwise howsoever and whether or not arising out of any negligence on the part of the Province, BCTFA or any of their employees, contractors or agents) in respect of any inaccuracy, error, omission, unfitness for purpose, defect or inadequacy of any kind whatsoever in the Disclosed Data;

20.2.2 the Province and BCTFA give no warranty or undertaking to the Agent or the Senior Funders or any of them that the Disclosed Data represents all of the information in its possession or power (either during the procurement process for the Project or at the execution of this Agreement or the Concession Agreement)

relevant or material to the Project or the obligations undertaken by the Agent or any other person under this Agreement;

20.2.3 the Province and BCTFA will not be liable to the Agent or the Senior Funders or any of them in respect of any failure to disclose or make available (whether before or after the execution of this Agreement) to any of them or the Concessionaire any information, documents or data, nor to keep the Disclosed Data up to date, nor to inform such parties (whether before or after execution of this Agreement or the Concession Agreement) of any inaccuracy, error, omission, unfitness for purpose, defects or inadequacy in the Disclosed Data;

20.2.4 the Agent on behalf of the Senior Funders acknowledges and confirms that it will not be entitled to make any claim against the Province or BCTFA whether in damages or for extensions of time or additional payments under this Agreement or the Concession Agreement on the grounds of any misunderstanding or misapprehension in respect of the Disclosed Data or the matters referred to in Section 6.1 [Site Inspection and Investigation] of the Concession Agreement or on the grounds that incorrect or insufficient information relating thereto or to the Site or Adjacent Areas was given to it by any person, whether or not in the employ of the Province or BCTFA, or by or on behalf of the Concessionaire. Nor will any Party be relieved from any risks or obligations imposed on or undertaken by it under this Agreement on any such ground.

20.3 Appropriation

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

21. GOVERNING LAW AND JURISDICTION

21.1 Law

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

21.2 Jurisdiction

The Parties agree that the Courts of the Province of British Columbia will have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with or arising out of this Agreement and hereby irrevocably attorn to the jurisdiction of such Courts.

22. CONSENTS AND APPROVALS

- 22.1 Unless otherwise specified, where any consent, permission, expression of satisfaction or other approval is to be given by any party under the terms of this Agreement, the same may be given or withheld in the absolute and unfettered discretion of such party.
- 22.2 The provisions of this Agreement and the rights and obligations of the parties hereunder are subject and without prejudice to and in no way limit or constitute a waiver of any requirement to obtain the approval of the Lieutenant Governor in Council pursuant to section 2(1) of the *Transportation Investment Act* in respect of the entering into of an agreement as contemplated in the aforesaid section 2(1) that may result from or be required under the provisions of this Agreement or as a result of any action taken in the exercise of rights hereunder after the date hereof.

23. RELATIONSHIP OF PARTIES

This Agreement is not intended to and does not create or establish between the Parties any relationship as partners, joint venturers, employer and employee, or of principal and agent. None of the Concessionaire, the Agent or any of its or their representatives is or shall be deemed to be an employee or agent of the Province or BCTFA.

24. ENUREMENT

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

25. CONFLICT IN DOCUMENTS

In the event of any ambiguity, conflict or inconsistency between the provisions of this Agreement and the provisions of the Concession Agreement, the provisions of this Agreement will prevail.

26. FURTHER ASSURANCES

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

27. MISCELLANEOUS

- 27.1 The Province and BCTFA will, at the Concessionaire's expense, take whatever action the Agent or an Appointed Representative effecting a novation in accordance with Section 5.5 [Implementation of Novation] may require for perfecting any transfer or release under Sections 4 [Step-In and Step-Out] and 5 [Novation], including the execution of any

transfer or assignment and the giving of any notice, order or direction and the making of any registration which, in each case, the Agent or Appointed Representative reasonably requires.

27.2 Neither the Province nor BCTFA will take any action to appoint a receiver or receiver-manager or institute proceedings in respect of the bankruptcy, liquidation, dissolution or winding-up of the Concessionaire.

27.3 If:

27.3.1 the Agent has given a Step-In Notice to the Province pursuant to Section 4.1 [Step-In] or the Province has consented in writing to a proposed novation of the Concessionaire's rights and obligations under the Concession Agreement to another person pursuant to Section 5 [Novation]; and

27.3.2 the approval of the Lieutenant Governor in Council is required to be obtained, pursuant to subsection 2(1) of the *Transportation Investment Act*, in relation to the appointment of an Appointed Representative under Section 4.1 [Step-In] or a proposed novation to which the Province has consented pursuant to Section 5 [Novation]; and

27.3.3 the approval of the Lieutenant Governor in Council has not been obtained on or before that date which is 60 days after: (a) the date on which the Province receives a Step-In Notice from the Agent (in the case of an appointment of an Appointed Representative), or (b) the Proposed Novation Date (in the case of a proposed novation to which the Province has consented pursuant to Section 5 [Novation]),

the Agent, on behalf of the Senior Funders, will be entitled to give a notice to the Province (the "Agent's Election") requiring the termination of the Concession Agreement. Within 10 days of receipt by the Province of the Agent's Election, the Province will terminate the Concession Agreement pursuant to Section 42.4 [Termination for Failure to Obtain Lieutenant Governor in Council Approval] of the Concession Agreement.

28. PROOF OF AUTHORITY

The Province reserves the right to require anyone executing this Agreement on behalf of the Concessionaire or the Agent to provide proof, in a form acceptable to the Province, that they have the requisite authority to execute this Agreement on behalf of and to bind the Concessionaire or the Agent and the Senior Funders, as applicable.

29. TIME

Time is of the essence of this Agreement. If any Party expressly or impliedly waives the requirement that time will be of the essence, that Party may reinstate that requirement by delivering notice to the other Party or Parties who is or are affected.

IN WITNESS WHEREOF this Agreement has been executed as of the day and year first before written.

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

JOHN DYBLE
Deputy Minister,
Ministry of Transportation

BC TRANSPORTATION FINANCING AUTHORITY

By:

JOHN DYBLE
Chief Executive Officer

THE CONCESSIONAIRE

**OKANAGAN LAKE CONCESSION LIMITED
PARTNERSHIP**

By: Its General Partner, Okanagan Lake Concession
Limited

Name: Andre Dufour

Title: Director

SUN LIFE ASSURANCE COMPANY OF CANADA

By:

Name:

Title: