

# **OPERATING AGREEMENT**

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**OPERATING AGREEMENT**

**THIS AGREEMENT** made in duplicate as of the 14th day of November, 2014.

**BETWEEN:**            **HER MAJESTY THE QUEEN IN RIGHT OF CANADA (“Her Majesty”)**, represented by the Minister of Transport (“**Minister**”),

**OF THE FIRST PART**

**AND:**                **STRATHCONA REGIONAL DISTRICT (“SRD”)**  
                              (**“Port Operator”**),

**OF THE SECOND PART**

**WHEREAS** the parties have entered into an Agreement to Transfer (“Agreement to Transfer”) as of the 14th day of November, 2014, which relates to the Ports located at Owen Bay located at Sonora Island, British Columbia; Port Neville located at Johnstone Strait, British Columbia; and Surge Narrows located at Read Island, British Columbia;

**AND WHEREAS** under the Agreement to Transfer the parties have agreed to enter into this Agreement;

**AND WHEREAS** the Port Operator wishes to Operate, on its own behalf and not on behalf of Her Majesty, the Ports located at Owen Bay located at Sonora Island, British Columbia; Port Neville located at Johnstone Strait, British Columbia; and Surge Narrows located at Read Island, British Columbia for a specified period of years;

**AND WHEREAS** Her Majesty has and will retain, after the Transfer Date, regulatory authority and enforcement powers with respect to standards of safety and security for the marine industry and traveling public at ports in Canada;

**NOW THEREFORE THIS AGREEMENT WITNESSES** that, in consideration of the mutual covenants and agreements herein and subject to the terms and conditions hereinafter set out, the parties agree as follows:

**ARTICLE 1 – DEFINITIONS**

**Section 1.01 Definitions**

1.01.01            In this Agreement:

**“Agreement”** means this Operating Agreement, as amended from time to time and includes the documents attached as Schedules “A”, “B”, “C” and “D” inclusive,

which form an integral part of this Agreement as fully as if they were set forth in their entirety;

**“Agreement to Transfer”** means the Agreement entered into between the parties as of the 14th day of November, 2014, with respect to the following ports, Owen Bay, located at Sonora Island, British Columbia; Port Neville located at Johnstone Strait, British Columbia; and Surge Narrows located at Read Island, British Columbia;

**“Applicable Environmental Laws”** means all federal and provincial environmental laws of general application in the Province of British Columbia respecting environmental matters as those laws apply to the Port Operator or the Port or Her Majesty. In the event of conflict of laws, the highest standard shall be met;

**“Assignment, Assumption and Indemnity Agreement”** means the document referred to in Section 2.02 of the Agreement to Transfer when executed and delivered;

**“Bill of Sale”** means the document referred to in Section 2.02 of the Agreement to Transfer when executed and delivered;

**“Business Day”** means a day other than a Saturday, Sunday or statutory holiday in the Province of British Columbia;

**“Canadian Inspection Services”** means inspection services as provided by legislation of the CIS Departments, including the act of collecting revenue and of receiving, controlling, examining, interviewing, searching, detaining, removing and clearing conveyances, travelers and goods entering, departing or transiting Canada;

**“Chattels”** means items of tangible personal property (other than Consumable Stock) which are used for the Operation of the Ports;

**“CIS Departments”** means those departments or agencies of Her Majesty or any successor department or agency which provide Canadian Inspection Services at Canadian ports and includes:

- (a) Agriculture and Agri-Food Canada;
- (b) Canada Border Services Agency;
- (c) Canada Revenue Agency;
- (d) Citizenship and Immigration Canada;
- (e) Health Canada;
- (f) Public Safety Canada; and
- (g) Transport Canada;

**“Closing”** means the execution and delivery of the Instruments listed in Section 2.02 of the Agreement to Transfer;

**“Closing Date”** means a date on or before the 14<sup>th</sup> day of the month of November, 2014;

**“Consumable Stock”** means consumables which are used for the Operation of the Ports;

**“Contaminant”** means any substance, howsoever defined in any Applicable Environmental Laws, which is hazardous to persons, animals or plants and which affects the soil of or the water (including sediment) in, on, over or under the Port Lands or any Port Facilities;

**“Contracted Operator”** has the meaning set out in Article 3 of this Agreement;

**“Contribution”** means a payment for a specified purpose, which is subject to being accounted for and audited pursuant to the Contribution Agreement;

**“Contribution Agreement”** means the document referred to in Section 2.02 of the Agreement to Transfer when executed and delivered;

**“Costs”** means all expenses, losses, charges and payments relating to an event and including any professional, consultant and legal fees (on a “solicitor and his own client” basis) of professionals and consultants retained by a party;

**“Damages”** means any loss, cost or damage including, but not limited to direct, indirect, incidental, special, exemplary, consequential or otherwise, loss of profits or revenue, interference with business operations, loss of tenants, lenders, investors or buyers, diminution in value of the Ports or any part thereof, inability to use any part of the Ports and Costs;

**“Eligible Expenditures”** means reasonable and substantiated expenditures directly related to the Operation of the Ports, which are in the Minister’s opinion properly and reasonably incurred and is limited to:

- (a) those items listed in Schedule “D” hereto;
- (b) expenditures relating to the purchase of operating, maintenance or construction equipment and related facilities that:
  - (i) bring the Ports up to a minimum safety standard; or
  - (ii) render the Ports in compliance with regulatory or insurance requirements;
- (c) expenditures for the replacement or improvement of facilities for the purpose of:
  - (i) bringing the Ports up to a minimum safety standard; or

- (ii) rendering the Ports in compliance with regulatory or insurance requirements;
- (d) expenditures relating to environmental land clean-up;
- (e) expenditures related to the purchase of real property upon which Port Facilities are encroaching; and
- (f) expenses related to the Federal Goods and Services Tax (GST) and/or the Provincial Sales Tax (PST), net of any input tax credits or rebates that may be claimed by the Port Operator.

For the purposes of this definition, a “reasonable expenditure” means the price paid for an item or service is one that would be paid in a competitive and open market, in the area serviced by the Ports, under conditions where there is a willing buyer and a willing seller, each acting prudently, knowledgeably, and under no undue influence.

“**Existing Expenditure Agreement**” has the meaning set out in the Assignment, Assumption and Indemnity Agreement;

“**Existing Facilities**” means any wharf, dock, pier, float, dolphin, berthing or mooring facility, breakwater, building, structure, improvement, infrastructure, facility and utility located on, in, over, under or through the Port Lands which is owned by Her Majesty immediately prior to the Transfer Date, and all pavement, landscaping and fixtures associated therewith;

“**Existing Revenue Agreement**” has the meaning set out in the Assignment, Assumption and Indemnity Agreement;

“**Highest and Best Use Value at Transfer Date (HBUV)**” means One Dollar (\$1.00) in Canadian currency, as determined by Her Majesty;

“**Minister**” means the Minister of Transport or any person authorized in writing to act on the Minister’s behalf;

“**Navigation Aids**” means

- (a) light houses, light ships, floating and other lights, lanterns and other signals, buoys and beacons, radio aids to marine navigation, anchors and landmarks acquired, constructed, repaired, maintained, improved, erected, placed or laid down for the greater security and facility of marine navigation, and
- (b) any equipment or special electrical distribution cables required to bring electrical power to or to operate any aids contemplated in Paragraph (a) of this definition;

**“Operate” or “Operation”** means to carry out or cause to be carried out in an active, diligent and continual basis, and at minimum, the activities described in Schedule “A”;

**“Operating Period”** means the period of time during which the Port Operator is obligated to Operate the Ports in accordance with Section 3.01;

**“Operating Port Records”** means the Port Operator’s records relating to the business and affairs of the Operation of the Ports and shall include but not be limited to:

- (a) records relating to the management, operation, maintenance, repairs and replacement of the Port Facilities; and
- (b) statistics related to the use of the Ports;

**“Person”** means any individual, company, corporation, partnership, firm, trust, sole proprietorship, government or government agency, authority or entity, however designated or constituted;

**“Port”** means the Port Lands, including the Port Facilities;

**“Port Facilities”** means Existing Facilities and includes those facilities described in Schedule “C”;

**“Port Lands”** means all and singular those certain parcels or tracts of lands and premises situate, lying and being at Owen Bay, Port Neville, and Surge Narrows, British Columbia as more particularly described in Schedule “B”;

**“Remedial Work”** means any work required under the Applicable Environmental Laws to remedy an adverse environmental condition caused by the existence of a Contaminant affecting the soil or the water (including sediment) in, on, over or under the Port;

**“Report”** means the following documents:

Owen Bay:

*Regional Harbours and Ports Phase I Environmental Site Assessment Owen Bay, British Columbia* was conducted by Golder Associates Ltd. in 1999

*Regional Harbours and Ports Environmental Audit 2007 Owen Bay, Sonora Island, BC* was conducted by Golder Associates Ltd. on August 21, 2007

*Regional Harbours and Ports Environmental Audit 2010 Owen Bay, Sonora Island, BC* was conducted by Transport Canada on July 26, 2010



*Stage 1 Preliminary Site Investigation Owen Bay Public Port Facility, Owen Bay BC conducted by SNC-Lavalin Inc. on October 3, 2013*

Port Neville:

*Regional Harbours and ports Phase I Environmental Site Assessment Port Neville, British Columbia conducted by Golder Associates Ltd. in 1999*

*Regional Harbours and Ports Stage II Preliminary Site Investigation Port Neville Public Wharf Port Neville, British Columbia conducted by Golder Associates Ltd. on May 28, 2004*

*Regional Harbours and Ports Environmental Audit 2007 Port Neville, BC conducted by Transport Canada on August 21, 2007*

*Regional Harbours and Ports Environmental Audit 2010 Port Neville, BC conducted by Transport Canada on July 26, 2010*

*Stage 1 Preliminary Site Investigation Port Neville Public Port Facility, Port Neville BC conducted by SNC-Lavalin Inc. on October 10, 2013*

Surge Narrows:

*Regional Harbours and Ports Phase I Environmental Site Assessment Surge Narrows, British Columbia conducted by Golder Associates Ltd. on December 9, 1999*

*Regional Harbours and Ports Environmental Audit 2007 Surge Narrows, Read Island, BC conducted by Transport Canada on August 21, 2007*

*Regional Harbours and Ports Environmental Audit 2010 Surge Narrows, Read Island, BC conducted by Transport Canada on July 26, 2010*

*Stage 1 Preliminary Site Investigation Surge Narrows Public Port Facility, Read Island BC conducted by SNC-Lavalin Inc on October 3, 2013*

*Stage 1 Preliminary Site Investigation and Supplementary Intrusive Investigation Surge Narrows Public Port Facility, Read Island BC conducted by SNC-Lavalin Inc on March 31, 2014*

*Site Remediation, Surge Narrows Public Port Facility, Read Island BC conducted by SNC-Lavalin Inc on October 20, 2014*

**“Screening Report”** has the meaning set out in subsection 2(1) of the *Canadian Environmental Assessment Act* (1992 c.37);

“**Subcontractor**” has the meaning set out in Article 3 of this Agreement; and

“**Transfer Date**” means the day immediately following the Closing Date commencing at 00:00 hours.

## ARTICLE 2 – TERM

### Section 2.01 Effective Date and Term of the Agreement

2.01.01 This Agreement shall take effect on the Transfer Date and, subject to compliance with the Port Records Provisions, shall terminate three (3) years from the Transfer Date.

## ARTICLE 3 – OPERATION OF THE PORTS

### Section 3.01 Operation of the Ports

3.01.01 As of the Transfer Date, the Port Operator shall, on its own behalf and not on behalf of Her Majesty, Operate the Ports for a period of three (3) years in accordance with the terms and conditions of this Agreement and applicable law.

3.01.02 For the purposes of Subsection 3.01.01, and subject to Subsection 13.15.01, the Port Operator may fulfill its obligation by entering into an arrangement with a Person (“Contracted Operator”) to Operate the Ports on the Port Operator’s behalf provided that:

- (a) the Port Operator shall obtain from the Contracted Operator and from any other Person who has entered into an arrangement with the Contracted Operator to Operate the Ports (“Subcontractor”), written covenants, obligations or agreements with respect to the Operation of the Ports in terms which are no less stringent than this Agreement which shall include, but are not limited to, obligations for the Contracted Operator and any Subcontractor to:
  - (i) acknowledge and agree to be bound by the provisions of the Contribution Agreement with respect to Contribution funds, or any part thereof, disbursed to the Contracted Operator by the Port Operator;
  - (ii) maintain a separate account exclusively dedicated for the Operation of the Ports and at a minimum, maintain separate ledger accounts for all revenues and expenses;

- (iii) keep records of operating costs and revenues for the Ports in accordance with generally accepted accounting principles and keep such records separately from any other records;
  - (iv) permit all records, including financial statements, of the Contracted Operator and any Subcontractor with respect to the Operation of the Ports and anything directly related to this Agreement, to be open for audit and inspection by the Minister during business hours, and to permit the Minister to take copies and extracts therefrom;
  - (v) provide, to the satisfaction of the Minister, such information as may be required in connection with the audit and inspection referred to in Subparagraph (iv); and
  - (vi) meet the obligations referred to in Subparagraphs (iv) and (v) for six (6) years computed from the date of termination of the Operating Agreement;
- (b) notwithstanding any arrangements made by the Port Operator with a Contracted Operator or Subcontractor, the Port Operator shall retain management of, and responsibility for, this Agreement, Project Contribution Agreements, Contribution Agreements and all obligations thereunder;
  - (c) the Port Operator shall remain liable to Her Majesty in respect of all its obligations hereunder notwithstanding any arrangements with a Contracted Operator or Subcontractor.

- 3.01.03 The Port Operator shall provide to the Minister, within thirty (30) days of their execution, copies of all agreements between the Port Operator and the Contracted Operator and all agreements between the Contracted Operator and any Subcontractor entered into during the term of this Agreement regarding the Operation of the Ports. Receipt by the Minister of such copies does not constitute approval or acceptance by Her Majesty of any of the terms and conditions of the agreements.
- 3.01.04 The Port Operator shall keep, perform or observe all of the covenants, agreements, provisions, conditions or provisos in any other agreement made between the parties hereto regarding the Ports on the part of the Port Operator to be kept, performed, or observed.
- 3.01.05 Without limiting the generality of Subsection 3.01.01, the Port Operator shall, at its cost:
- (a) comply with all laws, regulations, by-laws, standards and rules now or hereafter in force, applicable to the Port Operator or to the Operation of the Ports;

- 3.01.06 Subject to any other agreement which the parties may make regarding the Ports or navigable waters adjacent to the Ports, nothing in this Agreement precludes Her Majesty from continuing, on or after the Transfer Date, to carry on or cause to be carried on at the Port or navigable waters adjacent to the Ports, governmental functions including, without limitation:
- (a) functions relating to marine navigation and traffic control, including functions relating to Navigation Aids administered by the Department of Fisheries and Oceans (Canadian Coast Guard) or any successor department or agency;
  - (b) certain protective policing functions, particularly as they relate to marine security and the prevention of terrorism;
  - (c) Canadian Inspection Services;
  - (d) functions relating to inspection and security for which the Department of Transport is responsible, or any successor department or agency; and
  - (e) the enforcement of law.

### **Section 3.02 Termination of Operations**

- 3.02.01 Where, during the Operating Period, the Port Operator intends to cease to Operate the Port, the Port Operator shall give to the Minister six (6) months prior notice of its intention to cease to Operate the Ports as of a specified date.
- 3.02.02 *Clause deleted intentionally.*

### **Section 3.03 Deemed Notice**

- 3.03.01 Where Her Majesty becomes aware that the Port Operator and its Contracted Operator (if any) have ceased to Operate the Ports and the Minister has not received notice as required under Subsection 3.02.01, subject to Her Majesty providing the Port Operator with a fifteen (15) day notice, the Port Operator shall be deemed to have given notice to the Minister on the date of expiration of the fifteen (15) day notice.

## **ARTICLE 4 – DISPOSITION OF PORT LANDS, PORT FACILITIES AND SIGNIFICANT CHATTELS**

### **Section 4.01 Definition**

4.01.01 For the purposes of this Article:

**“Significant Chattels”** means any of the chattels listed in Schedule “A” to the Bill of Sale which, if it had remained the property of Her Majesty would have had on the day of disposition, a listed depreciated book value of One Hundred Thousand Dollars (\$100,000.00) or greater.

**“Deemed Proceeds of Disposition”** means

- (a) with respect to the Ports:
  - (i) an amount equal to the Highest and Best Use Value at Transfer Date (HBUV); or
  - (ii) if the amount in Subparagraph (i) cannot be determined for the portion of the Ports being disposed, an amount equal to the highest and best use value of the Port Lands or Port Facilities located thereon at the time of the proposed disposal as determined, at the Port Operator’s expense, by an independent appraiser appointed by Her Majesty;
- (b) with respect to Significant Chattels, an amount equal to the listed depreciated book value of the Significant Chattel, at the date of the proposed disposal, as if it had remained the property of Her Majesty.

### **Section 4.02 The Port Operator’s Ability to Deal with Port Lands, Port Facilities and Significant Chattels during Operating Period**

- 4.02.01 During the Operating Period, the Port Operator may mortgage, pledge or otherwise encumber the Port Lands, Port Facilities or any or all Significant Chattels with the prior written consent of the Minister, such consent not to be unreasonably withheld.
- 4.02.02 Subject to Subsections 4.02.03 to 4.02.05, inclusive, and notwithstanding Section 13.15, the Port Operator may, during the Operating Period, dispose of any portion of the Port Lands, Port Facilities or any and all Significant Chattels which are not necessary for the Operation of the Ports.
- 4.02.03 During the Operating Period, if the Port Operator proposes to dispose of any portion of the Port Lands, Port Facilities or Significant Chattels, the Port Operator, prior to entering into any binding agreement,

- (a) shall send a notice to the Minister, setting out in sufficient detail a description of the Port Lands, Port Facilities or the Significant Chattels it proposes to dispose of;
- (b) obtain the Minister's prior written consent for the disposal; and
- (c) may request a meeting with the Minister to ascertain the Deemed Proceeds of Disposition.

4.02.04 If any portion of the Port Lands, Port Facilities and/or any and all Significant Chattels, are disposed of during the Operating Period, the Port Operator shall credit to a separate revenue account,

- (a) the Deemed Proceeds of Disposition with respect to the Port Lands; and
- (b) the Deemed Proceeds of Disposition with respect to the Port Facilities; and
- (c) the Deemed Proceeds of Disposition with respect to all or any of the Significant Chattels.

These amounts shall be used by the Port Operator:

- (i) firstly, to repay to Her Majesty any amount paid by Her Majesty under the Contribution Agreement.
- and
- (ii) secondly (after payment under Subparagraph (i) of this Section), to pay for Eligible Expenditures for the Operation of the Ports as set out in Schedule "D" to this Agreement and/or capital improvements in support of Port Operations.

4.02.05 If, during the Operating Period, the Port Operator fails to apply the Deemed Proceeds of Disposition in accordance with the provisions of Subsection 4.02.04, such amount shall constitute a debt due to Her Majesty.

**Section 4.03 The Port Operator's Ability to Deal with Port Lands, Port Facilities and Significant Chattels during Monitoring Period**

*Clause deleted intentionally.*

**ARTICLE 5 – REMEDIAL WORK****Section 5.01 Her Majesty's Obligation**

- 5.01.01 Subject to Subsection 5.01.02 and Sections 5.02 to 5.05, inclusive, Her Majesty shall, as soon as is reasonably feasible upon receipt of the Report, at Her Majesty's own cost and expense, perform or have performed any Remedial Work.
- 5.01.02 The parties agree that Her Majesty's obligations under Subsection 5.01.01 are for the exclusive benefit of the Port Operator and successors and permitted assigns and shall not be for the benefit of any other Person.

**Section 5.02 Limitations on Her Majesty's Liability**

- 5.02.01 The parties agree that for the purposes of Subsection 5.01.01, the Contaminants shall be determined by reference to the Applicable Environmental Laws in existence immediately prior to the Transfer Date in respect of lands zoned industrial/commercial.
- 5.02.02 For greater certainty, the parties agree that in no event shall Her Majesty be responsible or liable for Remedial Work relating to any Contaminant
- (a) if the Contaminant was added to or put in, on or over the Port Lands or Port Facilities on or after the Transfer Date;
  - (b) if any act or omission of any Person on or after the Transfer Date contributed to any substance becoming a Contaminant;
  - (c) which, on or after the Transfer Date, is released or spilled, or leaks or flows from any container, tank, pipe, conduit, tube or any related or other equipment in which any substance is contained or by or through which any substance is transmitted or transported; or

**Section 5.03 Performance of Remedial Work**

- 5.03.01 If the Remedial Work for which Her Majesty is responsible has not been completed prior to the Transfer Date, the Port Operator
- (a) shall provide to Her Majesty and Her officers, employees, agents, contractors, subcontractors and consultants access to the Ports at any time or times during reasonable hours and without cost in order to perform such Remedial Work; or

- (b) may undertake to carry out the Remedial Work where Her Majesty agrees to contribute to the Port Operator that portion of the contract price related solely to the performance of such Remedial Work.

#### **Section 5.04 Contract**

- 5.04.01 The Port Operator shall not perform any Remedial Work or enter into any contract to perform any Remedial Work for which it will claim any contribution from Her Majesty without the prior written consent of Her Majesty.
- 5.04.02 If the Remedial Work undertaken by the Port Operator or the contract entered into by the Port Operator to perform Remedial Work includes the performance of any other work,
  - (a) the Port Operator's cost of the Remedial Work, or
  - (b) the portion of the contract price related solely to the Remedial Workshall be identified and separated from the balance of the cost of the work.
- 5.04.03 For the purposes of Subsection 5.04.02, Her Majesty's liability shall be:
  - (a) conditional upon the identification and separation, on a fair and accurate basis, of that portion of the cost which is directly and solely related to the Remedial Work from all other work being performed, and
  - (b) limited to the portion of the cost directly and solely related to the Remedial Work.

#### **Section 5.05 Right of Entry**

- 5.05.01 The Port Operator agrees that Her Majesty and Her agents, employees or contractors may enter upon the Ports at any time during reasonable hours, with machinery or equipment, for the purpose of carrying out the Remedial Work pursuant to Subsection 5.03.01, provided that by the exercise of such rights Her Majesty shall:
  - (a) indemnify and save harmless the Port Operator from all claims and demands directly arising from the negligent exercise of the right of entry by Her Majesty, Her agents, employees or contractors for whom in law Her Majesty is responsible; and
  - (b) repair and make good or pay compensation for any damage done to the Ports directly arising from the negligent exercise of the right of entry by Her Majesty, Her agents, employees or contractors for whom in law Her Majesty is responsible.



## ARTICLE 6 – DEBTS DUE TO HER MAJESTY

### Section 6.01 Debts Due to Her Majesty

6.01.01 Any amount owed to Her Majesty under this Agreement shall constitute a debt due to Her Majesty, and the Port Operator shall, on demand for payment issued by the Minister, pay all such amount forthwith to Her Majesty.

### Section 6.02 Interest on Debts Due to Her Majesty

6.02.01 In accordance with the *Interest and Administrative Charges Regulations*, SOR/96-188, in all cases where there is a debt due to Her Majesty, interest calculated and compounded monthly at the average bank rate plus three per cent is payable on that amount and accrues during the period beginning on the due date and ending on the day on which payment is received by Her Majesty or a duly authorized agent of Her Majesty.

### Section 6.03 Set-Off

6.03.01 If there is a debt due to Her Majesty by the Port Operator, Her Majesty may, in Her sole discretion and in addition to any other remedies available to Her Majesty, retain the amount of the indebtedness by way of deduction from or set-off against any sum of money that may be due or payable by Her Majesty to the Port Operator.

## ARTICLE 7 – DEFAULT

### Section 7.01 Default

7.01.01 If, during the term of this Agreement,

- (a) the Port Operator is in default of any provision of this Agreement, other than Subsection 3.01.01, or of any provision of any other agreement referred to in the Agreement to Transfer, and such default continues for a period of fifteen (15) days after notice by Her Majesty to the Port Operator specifying the nature of the default and requiring the default to be remedied;
- (b) the Port Operator becomes bankrupt or insolvent, goes into receivership or takes the benefit of any statute from time to time relating to bankrupt or insolvent debtors, or is required to wind up or dissolve by any order or resolution, or is unable to meet its liabilities as they become due;
- (c) the Port Operator is convicted of any offence against the law, order or regulation of Canada or duly constituted authority thereof or the conditions of

any licence, or of being an accessory to any such offence, and if such offence is committed in connection with the Operation of the Ports; or

- (d) the Contracted Operator or the Subcontractor
- (i) does not maintain the Contribution in a separate account exclusively dedicated to the Operation of the Ports;
  - (ii) does not maintain separate ledger accounts for all revenues and expenditures relating to the Operation of the Ports;
  - (iii) does not keep records in accordance with generally accepted accounting principles and does not keep such records separately from any other records;
  - (iv) does not keep open for audit and inspection by the Minister, during business hours, the records with respect to the Ports and anything directly related to the Agreement; or
  - (v) does not furnish to the Minister such other information as the Minister considers relevant in connection with an audit and inspection referred to in Subsection 12.03.01; and

such default continues for a period of fifteen (15) days after notice by Her Majesty to the Port Operator specifying the nature of the default and requiring the default to be remedied;

this shall constitute default and Her Majesty may, in addition to any other remedies available to Her Majesty, terminate this Agreement.

## **ARTICLE 8 – RIGHT TO CHARGE**

### **Section 8.01 Right to Charge**

- 8.01.01 Nothing in this Agreement precludes the Port Operator and its successors and permitted assigns from charging and taking whatever lawful action the Port Operator deems appropriate in order to charge and collect berthage, wharfage and other user charges at the Ports.
- 8.01.02 The Port Operator covenants to give not less than ninety (90) days advance public notice, through appropriate local media, of its intention to impose any port user charges or any planned increases in port user charges (excluding rent). The public notice shall include an explanation of the justification for such imposition of or increase in the ports user charges.

**ARTICLE 9 – NO PARTNERSHIP, JOINT VENTURE OR AGENCY****Section 9.01 No Partnership, Joint Venture or Agency**

- 9.01.01 Her Majesty and the Port Operator expressly disclaim any intention to create a partnership, joint venture or agency. It is understood, acknowledged and agreed that nothing contained in this Agreement nor any acts of Her Majesty or the Port Operator shall constitute or be deemed to constitute Her Majesty and the Port Operator as partners, joint venturers or principal and agent in any way or for any purpose. The Port Operator shall not represent or hold itself out to be an agent of Her Majesty. No party shall have any authority to act for or to assume any obligations or responsibility on behalf of the other party.
- 9.01.02 The Port Operator agrees to be liable to Her Majesty for any liability that Her Majesty incurs by virtue of being found to be liable with the Port Operator as a partner of, joint venturer with, or principal of the Port Operator. For greater certainty, the Port Operator assumes no responsibility for any liability to Her Majesty arising as a result of the act or omission of Her Majesty or Her agent which are the basis for the finding that Her Majesty or Her agent is a partner of, joint venturer with, or principal of the Port Operator.
- 9.01.03 For greater certainty, neither this Agreement nor any other agreement made pursuant to this Agreement nor any other document which may be necessary or desirable for purposes of completing the transaction contemplated by this Agreement, shall constitute or be construed or be deemed to constitute or be construed as a delegation by the Minister to the Port Operator of any of his powers, duties or functions.

**ARTICLE 10 – INDEMNITY AND CONDUCT OF ACTIONS****Section 10.01 Indemnity**

- 10.01.01 The Port Operator agrees, at all times, to indemnify and save harmless Her Majesty or any of Her officers, servants, employees or agents from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted in any manner based upon, occasioned by or attributable to the execution of this Agreement or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder, except claims for damage resulting from the negligence of any officers, servants, employees, or agents of Her Majesty while acting within the scope of their duties or employment.
- 10.01.02 If Her Majesty is made a party to any action, suit or proceeding in respect of a matter for which the Port Operator is obligated to indemnify Her Majesty, the Port Operator shall defend such action, suit or proceeding in the name of Her Majesty at the Port

Operator's expense. The foregoing obligation of indemnification is subject to the requirement that the Port Operator, in respect of any claim made by a third party, be notified by Her Majesty of all material particulars thereof and be afforded an opportunity at the Port Operator's sole expense to resist, defend and compromise the same, provided that the Port Operator is not obligated to do so; and further provided that if the Port Operator does not assume the defense of such claim, Her Majesty may defend against the claim in any manner She deems appropriate and may take such action as may be reasonably prudent in the circumstances to settle the claim.

## ARTICLE 11 – ARBITRATION

### Section 11.01 - Arbitration

11.01.01 In the event a dispute, conflict, claim or controversy (“Dispute”) arises out of or in connection with this Agreement, and the parties are not able to resolve the Dispute through discussions, then with the written agreement of the parties (“Arbitration Agreement”), the Dispute will be referred to binding arbitration in accordance with the *Commercial Arbitration Act* (R.S. 1985, c. 17 2<sup>nd</sup> Supp.).

For the purposes of this Article, a Dispute includes, without limitation, a dispute, conflict, claim or controversy, not involving the interpretation or application of the public law of Canada, and concerning:

- (a) the formation, validity, interpretation, application or enforceability of this Agreement;
- (b) the performance, breach, termination or other discharge of the Agreement;
- (c) the duties, rights, obligations or remedies of the parties pursuant to the Agreement.

11.01.02 For the purpose of each arbitration under this Agreement, the Port Operator shall constitute one party to the arbitration and Her Majesty shall constitute the other party to the arbitration.

11.01.03 If a Dispute arises and the parties do not resolve some or all of the Dispute through discussions, then, either party may give written notice, in accordance with Section 13.16, to the other party of its intent to enter into an Arbitration Agreement (“Notice of Intent”). If the parties have not entered into an Arbitration Agreement within fifteen (15) Business Days of receipt of the Notice of Intent, the parties are not obligated to enter into such an Arbitration Agreement.

11.01.04 The parties shall, in the Arbitration Agreement, concisely describe the matter submitted for arbitration. The parties further agree that the arbitral proceedings will

consist of oral hearings for the presentation of evidence (either oral, written or both) and for oral argument and that such hearings are to be held within sixty (60) Business Days of the date of the Arbitration Agreement.

- 11.01.05 (a) An arbitration under this Agreement shall be conducted by one arbitrator chosen by agreement of the parties.
- (b) If the parties are unable to agree on the choice of an arbitrator within ten (10) Business Days from the date of execution of the Arbitration Agreement there shall be (3) arbitrators (the “Arbitral Panel”).
- (c) Either party may nominate one arbitrator and upon doing so shall in writing notify the other party of that nomination. Within (10) Business Days after receiving such notice, the other party shall nominate a second arbitrator. The two arbitrators shall within ten (10) Business Days after selection of the second arbitrator select a third arbitrator to be chairperson of the Arbitral Panel and to act jointly with them. If the two arbitrators fail to agree on the selection of the third arbitrator, the third arbitrator shall be designated by the ADR Institute of Canada upon application by either party.
- (d) A person eligible for appointment as an arbitrator:
- (i) will be an experienced arbitrator or counsel having training in arbitration;
  - (ii) be an independent and impartial; and
  - (iii) preferably, will have knowledge of, or experience in the subject matter in dispute.
- 11.01.06 The sole arbitrator or Arbitral Panel, as the case may be, (“Arbitrator”) shall have the right to grant legal and equitable relief and to award costs (including legal fees and the costs of the arbitration) and interest. The Arbitrator shall not be authorized to decide ex aequo et bono or as amiable compositeur. Nothing contained therein shall be construed to permit the Arbitrator to award punitive, exemplary or any similar damages.
- 11.01.07 Except to the extent that it may be inconsistent with the procedure set out in this Article, the *Commercial Arbitration Code (Commercial Arbitration Act (R.S. 1985, c. 17 2<sup>nd</sup> Supp.))* shall govern the arbitration of a Dispute under this Agreement.
- 11.01.08 The arbitration shall take place in the City of Vancouver, Province of British Columbia, at such place and time as the Arbitrator may fix for the purpose of hearing the evidence and representations that the parties may present. The arbitration proceedings shall be conducted in either French or English, with the agreement of

the parties. No later than twenty (20) Business Days after the hearing the representations and evidence of the parties, the Arbitrator shall make its determination in writing and deliver one copy to each of the parties.

- 11.01.09 The arbitration proceedings shall be open to the public.
- 11.01.10 The parties agree to an exchange of all information upon which they intend to rely in any oral or written presentation during the arbitration. This exchange shall be completed no later than ten (10) Business Days prior to the date set for the arbitration hearing.
- 11.01.11 All information exchanged during this entire procedure shall be regarded as “without prejudice” communications. However, evidence that is independently admissible or discoverable shall not be rendered inadmissible or non-discoverable by virtue of its use during the arbitration.
- 11.01.12 Subject to the *Commercial Arbitration Code (Commercial Arbitration Act (R.S. 1985, c. 17 2<sup>nd</sup> Supp.))*, the decision of the Arbitrator, or a majority of its members, shall be final and binding upon the parties in respect of all matters relating to the arbitration, the conduct of the parties during the proceedings, and the final determination of the issues in the arbitration. The decision shall be in writing and include reasons for the decision. Judgment upon any award rendered by the Arbitrator may be entered in any court having jurisdiction thereof.
- 11.01.13 The costs of any arbitration hereunder shall be borne by the parties in the manner specified by the Arbitrator in its determination.
- 11.01.14 The Arbitrator shall resolve the Dispute in accordance with the laws of British Columbia.
- 11.01.15 It is agreed that the sole arbitrator or any member of the Arbitral Panel will neither request nor testify on behalf of any of the parties in any subsequent proceeding between the parties or where they are opposed in interest. It is further agreed that the personal notes and written opinions of the sole arbitrator or any member of the Arbitral Panel made in relation to this arbitration are confidential and may not be used in any subsequent proceeding between the parties, or where they are opposed in interest.

## **ARTICLE 12 – ACCOUNTING RECORDS, FINANCIAL REPORTS, AUDIT AND PERFORMANCE REPORTING**

### **Section 12.01 Separate Account**

- 12.01.01 The Port Operator shall maintain a separate account exclusively dedicated for the Operation of the Ports and, in that regard shall, at a minimum, maintain separate ledger accounts for all revenues and expenses.

### **Section 12.02 Records**

- 12.02.01 The Port Operator shall keep records, and shall ensure that any Contracted Operator and Subcontractor keep records, for the Operation of the Ports in accordance with generally accepted accounting principles and the Port Operator shall keep such records and shall ensure that any Contracted Operator and Subcontractor keep such records separately from any other records.
- 12.02.02 The Port Operator shall prepare and maintain for the Operating Period, and shall ensure that any Contracted Operator and/or Subcontractor shall prepare and maintain, the Operating Port Records.
- 12.02.03 The Port Operator shall, on request, provide to the Minister, copies of any record referred to in Article 12 and such other information the Minister requires to carry out the Minister's functions.

### **Section 12.03 Audit and Inspection**

- 12.03.01 The Port Operator shall keep open for audit and inspection by the Minister, and shall ensure that any Contracted Operator and Subcontractor keep open for audit and inspection by the Minister, during business hours, the records with respect to the Ports and anything directly related to the Agreement, and, the Minister may take copies and extracts therefrom.
- 12.03.02 The Port Operator shall furnish, and shall ensure that the Contracted Operator and Subcontractor furnish, to the Minister such other information as the Minister considers relevant in connection with the audit and inspection referred to in Subsection 12.03.01.
- 12.03.03 The requirements referred to in Sections 12.02 and 12.03 shall remain in effect for six (6) years after the date of the termination of the Operating Agreement.
- 12.03.04 The Port Operator understands and agrees that any audit carried out by or on behalf of the Minister may be disclosed to the public by any means.

## ARTICLE 13 – GENERAL PROVISIONS

### Section 13.01 Entire Agreement

- 13.01.01 This Agreement and the other agreements referred to in this Agreement, set forth the entire agreement between the parties concerning the subject matter hereof. No representation or warranty expressed, implied or otherwise is made by Her Majesty to the Port Operator or by the Port Operator to Her Majesty except as expressly set out in this Agreement or the other agreements referred to in this Agreement.

### Section 13.02 Subdivisions

- 13.02.01 Unless otherwise stated, a reference in this Agreement by numerical or alphabetical designation to an Article, Section, Subsection, Paragraph, Subparagraph or Schedule shall refer to the Article, Section, Subsection, Paragraph, Subparagraph or Schedule bearing that designation in this Agreement.

### Section 13.03 Headings

- 13.03.01 The division of this Agreement into Articles, Sections, Subsections, Paragraphs, and Subparagraphs and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Agreement.

### Section 13.04 Number and Gender

- 13.04.01 Words importing the singular number shall include the plural and words denoting the masculine gender shall include the feminine, if the context so requires.

### Section 13.05 Accounting Terms and Principles

- 13.05.01 All accounting and financial terms used in this Agreement shall, except where otherwise provided either expressly or by necessary implication in this Agreement, be interpreted and applied in accordance with generally accepted accounting principles and generally accepted auditing standards in Canada as they exist from time to time.
- 13.05.02 Where the Canadian Institute of Chartered Accountants or any successor thereto includes a statement in its Handbook or any successor thereto on a method or alternative methods of accounting, such statement shall be regarded as the only generally accepted accounting principle and generally accepted auditing standard applicable to the circumstances that it covers and references herein to generally accepted accounting principles and generally accepted auditing standards shall be interpreted accordingly.



**Section 13.06 Business Day**

- 13.06.01 If the day on which any act or payment is required to be done or made under this Agreement is a day which is not a Business Day, then such act or payment shall be duly performed or made if done on the next following Business Day.

**Section 13.07 Schedules**

- 13.07.01 All capitalized words and phrases used in any of the attached Schedules have the same meanings as defined in this Agreement unless specifically defined in the Schedule.

**Section 13.08 Statutes, Regulations and Rules**

- 13.08.01 Any reference in this Agreement to all or any part of any statute, regulation or rule shall, unless otherwise stated, be a reference to that statute, regulation or rule or the relevant part thereof, as amended, substituted, replaced or re-enacted from time to time.

**Section 13.09 Governing Law**

- 13.09.01 This Agreement shall be interpreted in accordance with the laws in force in the Province of British Columbia, subject always to any paramount or applicable federal laws. Nothing in this Agreement is intended to or shall be construed as limiting, waiving or derogating from any federal Crown prerogative.

**Section 13.10 Construed Covenants**

- 13.10.01 All of the provisions and each obligation or agreement of this Agreement, even though not expressed as a covenant, are to be construed as covenants and agreements as though the words importing such covenants and agreements were used in each separate provision hereof.

**Section 13.11 Time of Essence**

- 13.11.01 Time is of the essence of this Agreement.

**Section 13.12 Amendment**

- 13.12.01 This Agreement may be amended only by a written agreement signed by the parties.

**Section 13.13 Waiver**

- 13.13.01 The failure by any party to insist in any one instance upon the strict performance by the other party of obligations hereunder shall not constitute a waiver or relinquishment of any such obligations as to any other instances, and the same shall continue in full force and effect.
- 13.13.02 No covenant or condition of this Agreement may be waived by any party except by the written consent of that party, and forbearance or indulgence by that party in any regard whatsoever and no matter how long shall not constitute a waiver of the covenant or condition and until performed or waived in writing that party shall be entitled to invoke any remedy available to that party under this Agreement or by law, despite the forbearance or indulgence.

**Section 13.14 Severability**

- 13.14.01 If, for any reason, any provision of this Agreement, other than any provision which is of fundamental importance to the arrangement between the parties, is, to any extent, held or rendered invalid or unenforceable, then the particular provision is deemed to be independent of and severed from the remainder of this Agreement, and all the other provisions of this Agreement nevertheless continue in full force and effect.

**Section 13.15 Assignment, Successors and Assigns**

- 13.15.01 The Port Operator shall not
- (a) assign its rights and obligations contained in this Agreement, or
  - (b) transfer, mortgage, lease or otherwise dispose of the Ports
- without the prior written consent of the Minister, not to be unreasonably withheld.
- 13.15.02 Notwithstanding any assignment by Her Majesty or any permitted assignment by the Port Operator of their respective benefits under this Agreement, Her Majesty and the Port Operator shall, unless otherwise stated, each remain liable to the other in respect of its obligations hereunder.
- 13.15.03 No rights enure to the benefit of any transferee or assignee of the Port Operator unless the transfer or assignment is expressly permitted by this Agreement or consented to in writing by the Minister.
- 13.15.04 Nothing expressed or implied in this Agreement or in the other agreements referred to in this Agreement is intended to or shall be construed to confer on or to give any Person, other than the parties hereto and the successors and assigns of Her Majesty and the successors and permitted assigns of the Port Operator, any rights or remedies

under or by reason of this Agreement or any other agreement referred to in this Agreement.

### Section 13.16 Notice

13.16.01 All notices or other communications necessary for the purposes of this Agreement shall be in writing and delivered personally or by courier, or sent by registered mail or by prepaid post or by facsimile, addressed,

(a) in the case of Her Majesty, to:

Transport Canada, Pacific Region  
Suite 620, 800 Burrard Street  
Vancouver, B.C. V6Z 2J8  
Attention: Regional Director, Programs Branch

Telephone: 604-666-2387  
Facsimile: 604-666-2961

or to such other address or facsimile number or addressed to such other Person as the Minister may, from time to time, designate in writing to the Port Operator; and

(b) in the case of the Port Operator, to:

Strathcona Regional District  
301-990 Cedar Street  
Campbell River, B.C. V9W 7Z8  
Attention: Chief Administrative Officer

Telephone: 250-830-6700  
Facsimile: 250-830-6710

or to such other address or facsimile number or addressed to such other Person as the Port Operator may, from time to time, designate in writing to the Minister.

13.16.02 Any notice or other communication is considered to have been received:

- (a) in the case of facsimile, on actual receipt, and
- (b) in all other cases, on the date of delivery.

If the postal service is interrupted, or threatened to be interrupted, or is substantially delayed, any notice shall be delivered personally or by facsimile.

**Section 13.17 House of Commons**

- 13.17.01 No member of the House of Commons or Senate shall be admitted to any share or part of this Agreement, or to any benefit to arise from it, that is not otherwise available to the general public.

**Section 13.18 Conflict of Interest**

- 13.18.01 No person governed by the post-employment terms and conditions set out in the *2003 Values and Ethics Code for the Public Service* shall derive a direct benefit from this Agreement unless that person complies with the applicable post-employment provisions.

**Section 13.19 No Bribe**

- 13.19.01 The Port Operator warrants that no bribe, gift, commission or other inducement has been paid, given, promised or offered to any Government official or employee for the obtaining of this Agreement, contrary to Section 121 of the *Criminal Code* (R.S. 1985, c. C-46).

**Section 13.20 Survival**

- 13.20.01 The rights of Her Majesty under Articles 6, 9, 10 and 12 shall survive the termination of this Agreement.

IN WITNESS WHEREOF the Port Operator and Her Majesty have executed this Agreement as evidenced by the signatures of their duly authorized directors, officers or representatives as of the day and year hereinabove first written.

\_\_\_\_\_  
Witness

HER MAJESTY THE QUEEN  
IN RIGHT OF CANADA

Per: \_\_\_\_\_  
Minister of Transport

\_\_\_\_\_  
Witness

STRATHCONA REGIONAL DISTRICT

Per: \_\_\_\_\_  
Signature of Duly Authorized Signing Director

**JIM ABRAM**  
CHAIR, Regional Board

\_\_\_\_\_  
Print Name and Title of Authorized Signing Director

\_\_\_\_\_  
Witness

Per: \_\_\_\_\_  
Signature of Duly Authorized Signing Director

**THOMAS YATES**  
Corporate Officer

\_\_\_\_\_  
Print Name and Title of Authorized Signing Director

**SCHEDULE "A" – PORT ACTIVITIES**

This is Schedule "A" to the **Operating Agreement** made by Her Majesty the Queen in right of Canada and the Strathcona Regional District as of the 14th day of November, 2014.

**PORT ACTIVITIES**

Provide day to day operation of the Ports as berthage facilitating transportation of goods and people from the waterways.

**SCHEDULE “B” – PORT LANDS DESCRIPTION**

This is Schedule “B” to the **Operating Agreement** made by Her Majesty the Queen in right of Canada and the Strathcona Regional District as of the 14th day of November, 2014.

**PORT LANDS DESCRIPTION**

OWEN BAY:

Lot 1492, Sayward District, Sonora Island, B.C.

PORT NEVILLE:

Lot 1950, Coast District, Range 1, Port Neville, B.C.; and

SURGE NARROWS:

Lot 1425, Sayward District, Surge Narrows, Read Island, B.C.

**SCHEDULE “C” – PORT FACILITIES DESCRIPTION**

This is Schedule “C” to the **Operating Agreement** made by Her Majesty the Queen in right of Canada and the Strathcona Regional District as of the 14th day of November, 2014.

**PORT FACILITIES DESCRIPTION**

The Port Facility includes all Existing Facilities at the Ports, including:

Owen Bay:

- 1 Approach
- 1 Wharf
- 1 Float moored by 2 dolphins
- 1 Gangway

Port Neville:

- 1 Trestle approach
- 1 Wharfhead
- 2 Floats moored by dolphin piles
- 1 Gangway

Surge Narrows:

- 1 Approach
- 1 Gangway
- 1 Wharfhead
- 1 Landing Float
- 1 Seaplane Float
- 1 Frieght Shed
- 1 Derrick



**SCHEDULE "D" –ELIGIBLE EXPENSES FOR THE PURPOSES OF ARTICLE 4**

This is Schedule "D" to the **Operating Agreement** made by Her Majesty the Queen in right of Canada and the Strathcona Regional District as of the 14th day of November, 2014.

**Human Resources**

Salaries and Wages

Overtime

Allowances (Employee packages)

Employee Benefits (pension plan contributions, vacation pay, insurance plans relating to health, life, dental and income protection)

Training

Health Services

**Management, Maintenance and Repair**

Travel

Relocation

Postage and Freight

Telephone and Facsimile

Advertising

Publication

Insurance

Municipal Service Fees

Real Property Taxes

Public Utilities

Fuel

Materials and Supplies

Electronic Data Processing Supplies

Banking Fees

Investment Management Fees

Dredging

**Professional Services**

Security Services

Accounting Services

Architectural Services

Auditing Services

Engineering Services

Environmental Services

Informatic Services

Legal Services

Repair and Maintenance Services

**Rental Expenditures**

Rental - Land

Rental - Buildings

Rental - Machinery and Equipment

Rental - Watercraft

Rental - Motor Vehicle

Rental - Computer

Rental - Office Equipment

Rental - Telecommunication Equipment

Rental - Other