

Osler, Hoskin & Harcourt LLP
Suite 2500, TransCanada Tower
450 – 1st Street S.W.
Calgary, Alberta, Canada T2P 5H1
403.260.7000 MAIN
403.260.7024 FACSIMILE

OSLER

Terri-Lee Oleniuk
Direct Dial: 403.260.7034
toleniuk@osler.com
Our Matter Number: 1139434

September 2, 2014

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National Energy Board
517 - 10th Avenue SW
Calgary, AB T2R 0A8

Attention: Sheri Young, Secretary of the Board

Dear Ms. Young:

**Re: TransCanada Keystone Pipeline GP Ltd.
Hearing Order MH-001-2013
Set-Aside Mechanism (SAM) and Collection Mechanism (COM) Applications
NEB File: OF-AF-SAC 01**

We act as counsel to TransCanada Keystone Pipeline GP Ltd. (“Keystone”) regarding the above noted matter.

In the MH-001-2013 Reasons for Decision (“Decision”), the National Energy Board (“Board”) indicated that Keystone must, on September 2, 2014, file its trust agreement for approval.¹ Accordingly, please find attached Keystone’s Trust Agreement.

Keystone submits that the Trust Agreement complies with the Decision and is consistent with the indicative terms provided in Appendix VI.² As noted by the Board, the indicative terms are the substantive minimum requirements that must be incorporated into a trust agreement. In light of this and in an effort to assist the Board in its review of the Trust Agreement, attached are brief submissions in regard to where Keystone has expanded upon, and made minor modifications to, the indicative terms, along with a rationale for same.

If you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Yours very truly,

Original signed by

Terri-Lee Oleniuk
Enc.

cc: MH-001-2013 Participants

¹ National Energy Board, MH-001-2013 Reasons for Decision (May 2014) (A60676) at p 21; Appendix XIII [Decision].

² Decision, at Appendix VI.

TransCanada Keystone Pipeline GP Ltd. – Submission

Further to our recent discussions, below is a summary of modifications contained in the TransCanada Keystone Pipeline Trust Agreement (the “**TransCanada Keystone Agreement**”) as compared to the NEB’s indicative terms. The purpose of the below is to provide the NEB with a brief explanation of the more significant modifications in an effort to streamline the approval and avoid a lengthy information request process. In spite of these minor deviations, our view is that the Trust is nonetheless consistent with MH-001-2013.

As a preliminary matter, it should be noted that the TransCanada Keystone Agreement makes a distinction between the Beneficiary and the Company. The Beneficiary refers to the party that holds the beneficial interest in the pipeline and who, for purposes of the *Income Tax Act* (the “**Tax Act**”), is required to report the income therefrom and bears the burden of the liabilities associated therewith. The Company refers to the company who, on behalf of the party holding the beneficial interest in the pipeline, holds the regulatory authorization and subject to the regulation of the NEB in respect of the pipeline. The TransCanada Keystone Agreement defines the initial Beneficiary to be TransCanada Keystone Pipeline Limited Partnership and defines the Company to be TransCanada Keystone Pipeline GP Ltd.

The following headings are organized based on the headings provided in MH-001-2013 – Appendix VI – Indicative Terms.

Legal Characteristics of the Trust

The NEB’s indicative terms state:

The trust must be irrevocable. All contributions made by the pipeline company (Company) are irrevocable and cannot revert to the Company unless otherwise set out in these Indicative Terms.

The trust agreement (Agreement) must require the Company to make contributions which on an annual basis are equivalent to: (i) the Annual Contribution Amount (if using a surcharge); (ii) the dollar amount of the line item in the pipeline company’s revenue requirement (if collecting funds through the revenue requirement); (iii) the annual amount determined pursuant to Appendix XIV of the MH-001-2013 Reasons for Decision (if self-funding on an annual basis); or (iv) the entire present value of the ACE (if self-funding upfront).

The TransCanada Keystone Pipeline Trust (the “**Trust**”) has been established as an irrevocable trust. While the Board’s indicative terms state that the Agreement must require the Company to make contributions which on an annual basis are equivalent to the Annual Contribution Amount, the TransCanada Keystone Agreement provides that “[t]he parties hereto acknowledge that the Beneficiary shall contribute the Annual Contribution Amount to the Trust as directed by the Tribunal” (Section 2.02). This slight modification clarifies that the obligation of the Beneficiary to contribute the Annual Contribution Amount is imposed separate and apart from the TransCanada Keystone Agreement (*i.e.*, pursuant to a Board order under Part IV for tolls and tariffs). The reasons for this modification are twofold: (1) the Beneficiary (not the Company) is required to make contributions in order for such contributions to be tax deductible; and (2) because the contributions must be made by the Beneficiary, the TransCanada Keystone Agreement cannot impose obligations on the Beneficiary, as it is not a party to the agreement.

Amendments

The NEB's indicative terms state:

The Trustee and the Beneficiary may agree to amendments of the Agreement, including all schedules. However, all amendments to the Agreement, including schedules, must be approved by the Board before they are effective.

As the Beneficiary is not a party to the TransCanada Keystone Agreement, amendments to the agreement are to be agreed upon between the Trustee and the settlor, subject to the Board's approval (Section 7.01).

Control over Investments

The NEB's indicative terms state:

The Trustee is responsible for receiving, holding, investing and releasing the Fund. The Trustee must control and hold the Funds and have complete control of the Fund's investment management. The Trustee has full discretion to invest the Fund in Qualified Investments.

The Trustee may appoint agents and employ or retain legal counsel, accountants, appraisers or other experts or advisors that are reasonably required. This includes appointing and retaining any of the Trustee's affiliates or subsidiaries to assist in the investment of the Fund. The Trustee has the ability, at its absolute discretion (subject to the Agreement), to act or rely upon any opinion or advice given by these agents, experts and advisors.

Any investment manager that is appointed to manage the Fund's assets must be appointed by the Trustee, not the Company. However, the Trustee may consult with the Company on the investment of the Fund. The Agreement should contain any additional powers required for the Trustee to carry out this role.

As it is the Beneficiary that is economically interested in the Trust funds, the Trustee is required to consult with the Beneficiary with respect to the investment of the Fund, rather than the Company. The Trustee's obligation to consult with the Beneficiary with respect to investments will be contained in the SIPP.

Surplus

The NEB's indicative terms state:

The Trustee has the discretion to distribute any surplus, or any part of the surplus, existing after all Reclamation Obligations are discharged among the class of beneficiaries or to an orphan pipeline fund.

The Board's Decision recognizes that it is extremely unlikely that surplus funds will remain in the Trust after the satisfaction of all abandonment obligations (page 31 of the Decision). However, the Board's Decision directs that the Agreement must address the possibility of a surplus. The TransCanada Keystone Agreement provides that any surplus will be distributed to the Beneficiary but removes the option of distributing surplus funds to an orphan pipeline fund.

After all the reclamation obligations of the Beneficiary are discharged, the Trust may cease to be a QET. Upon ceasing to be a QET, the Tax Act requires the Beneficiary of the Trust to include

the value of the Trust property into its income. This income inclusion is required by the Tax Act even if the funds are ultimately contributed to an orphan pipeline fund and it is not clear that the Beneficiary is entitled to a deduction for such contribution. It is TransCanada's view that the Beneficiary should receive the surplus funds if it is liable for tax on such funds.

Access – Mechanics of Access – Release of Money to Beneficiary

The NEB's indicative terms state:

Access to the Fund for the Reclamation Obligations of a Beneficiary, including the precise amount of the Fund to be released, is subject to the Board's determination on the facts of the particular case before it. Money in the Fund can be released, upon Board approval, either to a Beneficiary or to a third party designated by the Board, as set out below.

(i) Release of Money to Beneficiary

Money must be released by the Trustee to a Beneficiary for the Reclamation Obligations referred to under "Circumstances for Access", above, upon presentation of:

- a) a written direction or order from the Board which confirms the amount to be disbursed and the timing of the disbursement; and
- b) a certificate of an officer of the Beneficiary referred to above confirming that it is not in default and that, to the officer's knowledge, the Beneficiary will not suffer default within a year following the date of the certificate of the officer.

The purpose of the provisions regarding the release of money to the Beneficiary is to ensure that the funds paid from the Trust to the Beneficiary are only used for abandonment purposes by protecting the funds from the Beneficiary's creditors. However, where abandonment work has already been completed and the Beneficiary is seeking a reimbursement for costs already incurred, there is no concern that the funds will be used inappropriately. Therefore, the TransCanada Keystone Agreement only provides for the issuance of a solvency certificate from an officer of the Beneficiary in cases where the funds are drawn from the Trust to pay for costs not yet incurred (Section 4.05).

Choice of Law, Term and Termination of the Trust

The NEB's indicative terms state:

The law governing the trust will be the law of a jurisdiction to which the trust has a real and substantial connection. If the trust has a real and substantial connection to more than one jurisdiction, and included is a jurisdiction that has abolished the rule against perpetuities (in both its common law and modified form), the Company must select the jurisdiction that has abolished the rule. In this case, there will be no specific term for the trust and the approval of the Board is required to terminate the trust. For example, if the trust has a real and substantial connection to Québec and Ontario, the choice of law must be Québec, and there will be no specific term for the trust.

Companies with trusts that have a real and substantial connection to either New Brunswick or British Columbia must, pursuant to the those provinces' *Conflict*

of *Laws Rules for Trusts Act*, respectively, select the law of one of Saskatchewan, Manitoba, Québec or Nova Scotia to govern the trust.

Companies with trusts whose governing law is either Alberta or Ontario must ensure that their trusts do not violate the modified rule against perpetuities in effect in those jurisdictions. The trust agreement must require that, no earlier than five years prior to the expiration of the perpetuity period:

- a) The trustee, with the approval of the Board, pay the funds held in trust to the company (provided that the Company is not in default); and
- b) The Company covenants, upon receipt of the funds, to immediately establish and contribute the funds to a new trust, which would have the same purpose and terms and conditions as the original trust.

The Trust will be governed by Alberta law as the Trust has a real and substantial connection to Alberta. Although TransCanada considered other jurisdictions in the selection of the choice of law, there were no jurisdictions that have abolished the rule against perpetuities in which the Trust will have a real and substantial connection and that have provincial QET tax legislation in place that applies to pipelines. It should be noted that the current Saskatchewan QET tax legislation only applies to trusts in respect of mines located in Saskatchewan and not to pipelines.

The key decisions to be taken in respect of the Trust will occur in Alberta, where the Trustee will perform its duties and the Beneficiary/Company has its head offices. On that basis, Alberta is considered the most appropriate jurisdiction as the governing law of the Trust and was chosen as the applicable law (Section 9.02). Through the Canadian Energy Pipeline Association (“CEPA”), the Group 1 Companies are in communication with the Government of Alberta regarding a legislative change making the rule against perpetuities inapplicable to QETs in Alberta. The Alberta Minister of Justice has indicated his support for exempting QETs from the rule against perpetuities and his intent to propose legislation to amend the *Perpetuities Act* (Alberta) to implement this exemption. The TransCanada Keystone Agreement contains provisions that will allow the Trust to continue with no specific term if the rule against perpetuities ceases to apply to QETs prior to the Trust Term (Section 4.05).

Sale

The NEB’s indicative terms state:

The Agreement must allow for the Trustee to release monies from the Fund if the Board approves the sale, transfer or other disposition of the Pipeline or a portion of it from the Company to another person.

Although the Tax Act contains provisions with respect to the transfer of a beneficial interest in a QET, it does not currently contemplate the consequences in respect of transactions involving the transfer of a portion of a pipeline that has an associated QET, including the release of funds following such sale. There is a potential risk that the NEB’s indicative terms may not satisfy the requirement in paragraph (b) of the QET definition in the Tax Act that the trust be “maintained for the sole purpose of funding the reclamation of a qualifying site” or paragraph (b) of the definition of “excluded trust” that a Trust is not a QET if it is not “maintained at that time to secure the reclamation obligations of one or more persons or partnerships that are beneficiaries under the trust” (the “**Sole Purpose Requirement**”) on the basis that a release of funds on the transfer of the Pipeline may not be a distribution for the sole purpose of abandonment. Although it is TransCanada’s view that the release of funds approved by the Board for the

transfer of a Pipeline, or a portion thereof, is not inconsistent with the Sole Purpose Requirement, there is no certainty in this regard. As such, the TransCanada Keystone Agreement contemplates that if a transfer of the Pipeline or a portion thereof is not structured as a transfer of the Beneficiary's interest in the Trust, the agreement will require an amendment to address such circumstances. The TransCanada Keystone Agreement also provides that "[f]or greater certainty, it is anticipated that, upon the Tribunal's direction or order approving the sale, assignment, transfer or other disposition of the Pipeline or a portion thereof from the Beneficiary to another Person pursuant to paragraphs 74(1)(a), (b) and (c) of the NEB Act, one or more other trusts may be established for the same purpose as the Trust as set out in section 2.01" (Section 7.01).

Through CEPA, the Group 1 Companies intend to bring to the attention of the Department of Finance that it would be appropriate for the tax rules to directly address these sorts of transactions.

TRANSCANADA KEYSTONE TRUST AGREEMENT

THIS TRUST AGREEMENT made as of the ____ day of _____, 2014.

BETWEEN:

CIBC TRUST CORPORATION, a licensed trust company governed by the laws of Canada with a place of business located at 301 - 8th Avenue S.W. - 3rd Floor - Hollingsworth Building, Calgary Alberta, T2P 1C5

(the “**Initial Trustee**”)

AND:

TRANSCANADA KEYSTONE PIPELINE GP LTD., a corporation governed by the laws of Canada with a place of business located at 450 - 1st Street, S.W., Calgary Alberta, T2P 5H1

(the “**Settlor**”)

WHEREAS TransCanada Keystone Pipeline GP Ltd. (“**Keystone GP**”) holds the regulatory authorization allowing it to operate the pipeline described in Schedule “A” to this Agreement (the “**Pipeline**”) which is owned and operated through the TransCanada Keystone Pipeline Limited Partnership;

AND WHEREAS Keystone GP is subject to regulation by the National Energy Board under the *National Energy Board Act* (Canada) in respect of the Pipeline and TransCanada Keystone Pipeline Limited Partnership collects the tolls, pursuant to the National Energy Board’s regulation in respect of shipping on the Pipeline;

AND WHEREAS on 26 May 2009 the National Energy Board issued the RH-2-2008 Reasons for Decision, which requires each person holding an authorization to operate a pipeline under the *National Energy Board Act* (Canada) or the *Canadian Oil and Gas Operations Act* (Canada) to file a proposed process and mechanism to set aside funds to pay for the reclamation obligations in respect of the sites in Canada used for the operation of that pipeline;

AND WHEREAS on 12 March 2013, the National Energy Board issued the MH-001-2013 Hearing Order, establishing how it would consider each set-aside mechanism proposed;

AND WHEREAS on [date] the National Energy Board ordered Keystone GP to establish the trust governed by this agreement for the purpose of setting aside funds to secure the reclamation obligations of TransCanada Keystone Pipeline Limited Partnership in respect of the site in Canada used primarily by TransCanada Keystone Pipeline Limited Partnership for the operation of the Pipeline;

AND WHEREAS in satisfaction of the requirements imposed by the National Energy Board, Keystone GP wishes to establish an irrevocable trust for the purpose of setting aside funds to secure the reclamation obligations in respect of the site in Canada used primarily for the operation of the Pipeline and has transferred to the Trustee the Settlement Property set forth herein to be held by it upon the trusts and subject to the terms and conditions declared and contained herein;

AND WHEREAS the trust established hereunder shall be maintained for the sole purpose of securing the reclamation obligations in respect of the site in Canada used primarily for the operation of the Pipeline;

AND WHEREAS the Trustee has agreed to hold the Fund for the benefit of the Beneficiary upon the trusts and in accordance with the terms and conditions declared and contained in this Agreement;

NOW, THEREFORE, THIS TRUST AGREEMENT WITNESSETH that in consideration of the promises and of the mutual covenants herein contained, it is hereby mutually covenanted, agreed and acknowledged by and between the parties hereto that any property contributed by Keystone GP to the Trustee under this Agreement shall be held by the Trustee in trust on the terms and subject to the conditions set out herein.

ARTICLE 1 INTERPRETATION

1.01 Definitions

In this trust agreement, the following words or phrases have the following meanings:

- (a) **“Abandon”** and **“Abandonment”** has the meaning set out in the definition of “abandon” in the *National Energy Board Onshore Pipeline Regulations* (Canada), as amended from time to time;
- (b) **“Affiliate”** means, with respect to a Person, that Person’s affiliates within the meaning of the *Canada Business Corporations Act*, and for CIBC Trust Corporation includes, but is not limited to, CIBC World Markets Inc., CIBC Asset Management Inc., CIBC Mellon Trust Company, CIBC Mellon Global Securities Services Company, and CIBC Private Investment Counsel, a division of CIBC Asset Management;
- (c) **“Agreement”** means this trust agreement, including any schedules hereto and any amendments hereto;
- (d) **“Annual Contribution Amount”** means, in respect of any calendar year, the aggregate of all amounts collected through an abandonment surcharge in such calendar year to secure the Reclamation Obligations of the Beneficiary in respect of the Pipeline;
- (e) **“Applicable Law”** means all Canadian federal, provincial, territorial or non-Canadian laws, statutes, rules, regulations, official directives and orders of governmental authorities (whether administrative, legislative, executive otherwise), including judgments, orders and decrees of courts, commissions, boards or bodies exercising similar functions, that are applicable with respect to the matter in issue;

- (f) “**assets**” includes cash, securities, estates, property and rights of any kind whatsoever and any interests therein;
- (g) “**Beneficiary**” means a Person who, at the relevant time: (i) has an interest in the Pipeline and (ii) has Reclamation Obligations in respect of the Site, and for greater certainty, initially, TransCanada Keystone Pipeline Limited Partnership shall be the sole Beneficiary;
- (h) “**Business Continuity Plan**” means a plan or programme to ensure the continued availability of essential services, operations and programs, including all applicable resources, which plans are activated during, or immediately after, an emergency or disruption and are aimed at permitting the rapid and cost effective resumption of critical functions;
- (i) “**Business Day**” means any day except a Saturday, Sunday or a statutory holiday in the Province of Alberta;
- (j) “**Company**” means the person holding the regulatory authorization(s) to operate the Pipeline at the relevant time, whether on its own behalf or on behalf of one or more Persons, and for greater certainty, the initial Company shall be Keystone GP;
- (k) “**Company’s Notice of Termination**” has the meaning set out in section 3.04(a) of this Agreement;
- (l) “**Compensation Agreement**” has the meaning set out in section 5.01(a) of this Agreement;
- (m) “**Deactivate**” and “**Deactivation**” has the meaning set out in the definition of “deactivate” in the *National Energy Board Onshore Pipeline Regulations* (Canada), as amended from time to time;
- (n) “**Decommission**” and “**Decommissioning**” has the meaning set out in the definition of “decommission” set out in the *National Energy Board Onshore Pipeline Regulations* (Canada), as amended from time to time;
- (o) “**Default**” has the meaning set out in section 4.05(a)(ii) of this Agreement;
- (p) “**Fund**” means the Settlement Property and all other assets which are now or which at any time during the continuance of the Trust may be contributed, assigned, transferred or appointed to the Trustee to be held upon the trusts hereof, together with all interest or return from investing such assets, and all other assets which may at any time be substituted therefor, but excluding all amounts which have been paid or disbursed therefrom (whether out of capital or income) pursuant to the provisions of this Agreement;
- (q) “**Fund Property**” has the meaning set out in section 3.05(a) of this Agreement;
- (r) “**including**” or “**includes**” means “including (or includes) without limitation”;

- (s) “**NEB Act**” means the *National Energy Board Act* (Canada), as amended from time to time;
- (t) “**New Trust**” has the meaning set out in section 2.05(a)(ii) of this Agreement;
- (u) “**Person**” includes a partnership;
- (v) “**Pipeline**” means the pipeline described in Schedule “A” to this Agreement;
- (w) “**Qualifying Environmental Trust**” or “**QET**” means a “qualifying environmental trust” as that term is defined in the Tax Act;
- (x) “**Qualified Investments**” means all or any of those investments that from time to time are qualified investments for a Qualifying Environmental Trust, and for greater certainty, such qualified investments on the date hereof include only those types of property described in paragraphs (a), (b), (c) (c.1), (d) and (f) of the definition of “qualified investment” in section 204 of the Tax Act that are not encompassed within the definition of “prohibited investment” in subsection 211.6(1) of the Tax Act, which provisions, as they read as of the date hereof, are set out in Schedule “B” to this Agreement;
- (y) “**Reclamation**” means reclamation of the Site and includes:
 - (i) the physical Abandonment, Decommissioning or Deactivation of the Pipeline, including the satisfaction of any conditions imposed by the Tribunal in any order or direction approving the Decommissioning or Deactivation of the Pipeline or granting leave to Abandon the Pipeline;
 - (ii) the development of an Abandonment plan and the preparation of an application for leave to Abandon or for approval of the Deactivation or Decommissioning of the Pipeline; and
 - (iii) post-abandonment monitoring and remediation of the Site required by Applicable Law or any contract between the Company and any government authority, where post-abandonment refers to the period of time after the Company has satisfied the conditions of an order or direction issued by the Tribunal granting leave to Abandon.
- (z) “**Reclamation Obligations**” means the current and future obligations of the Beneficiaries to carry out Reclamation of the Site;
- (aa) “**Settlement Property**” means the amount of \$100.00 given and transferred to the Trustee by the Settlor as described in section 2.02(a);
- (bb) “**Settlor**” shall have the meaning ascribed to such term in the recitals;
- (cc) “**Site**” means any location or locations in Canada used primarily for the operation of the Pipeline;
- (dd) “**Standard of Care**” has the meaning set out in section 4.09 of this Agreement;

- (ee) “**Statement of Investment Policies and Procedures**” means a written statement of investment policies and procedures approved by the Company in respect of the Fund’s portfolio of investments which sets out broad policies and procedures for the Qualified Investments of the Fund, which may include: categories of investments; diversification of the investment portfolio; asset mix and rate of return expectations; liquidity of investments; the retention or delegation of voting rights acquired through Fund investments; and the method of, and basis for, the valuation of investments;
- (ff) “**Tax Act**” means the *Income Tax Act* (Canada) and the regulations promulgated thereunder, as amended from time to time;
- (gg) “**Tribunal**” means the National Energy Board, a tribunal established under the NEB Act or any successor administrative body having authority to regulate the Company in respect of the operation and abandonment of the Pipeline;
- (hh) “**Trust**” means the trust created by this Agreement, which shall be called the “**TransCanada Keystone Pipeline Trust**”;
- (ii) “**Trustee**” means the Initial Trustee or any successor Trustee pursuant to sections 3.03 or 3.04; and
- (jj) “**Trust Term**” or “**Term**” shall have the meaning set out in section 2.05(a) of this Agreement.

1.02 Interpretation

- (a) In this Agreement, words importing the singular shall include plural and *vice versa* and words importing gender include all genders.
- (b) All references to sections and schedules are to sections and schedules to, and forming part of, this Agreement.
- (c) Unless otherwise specified, all references to money amount are to the lawful currency of Canada.
- (d) Time is of the essence in the performance of the parties’ respective obligations under this Agreement.

1.03 Consultation

For greater certainty, where the Trustee is required in this Agreement to consult with the Beneficiary in respect of a decision, the Trustee shall, irrespective of the outcome of such consultation, retain the discretion otherwise provided in this Agreement to make the ultimate decision.

ARTICLE 2
ESTABLISHMENT OF THE TRUST

2.01 Qualifying Environmental Trust

It is the express intention of the parties hereto that the Trust settled under this Agreement will constitute a Qualifying Environmental Trust for the duration of the Trust. This Agreement shall be read and interpreted in light of, and consistently with, the definition of “qualifying environment trust” in the Tax Act, and Keystone GP and the Trustee shall not take any actions which would jeopardize the status of this Trust as a Qualifying Environmental Trust, and shall cause any party succeeding to the interests thereof to covenant to do the same.

2.02 The Trust: Settlement and Contributions

- (a) The Settlor hereby gives and transfers unto the Trustee the Settlement Property for the purpose of settling the Trust in accordance with the terms of this Agreement and appoints the Trustee. The Trustee hereby acknowledges the receipt from the Settlor of such Settlement Property to be held upon and subject to the trusts hereof, accepts the office of Trustee and agrees to adhere to the trusts, covenants and obligations set out in this Agreement, and agrees to discharge the same upon the terms and conditions herein set forth and to hold and exercise the rights, privileges and benefits conferred upon it by this Agreement for the purposes of the Trust.
- (b) The purpose of the Trust is to accept, hold and invest funds that are contributed to the Trust for the sole purpose of funding Reclamation Obligations. In carrying out its duties and obligations hereunder, the Trustee shall ensure that the Fund Property is kept separate and distinct from the other assets of the Trustee, except as permitted by section 4.15(e). If the Fund Property is mixed with the other assets of the Trustee, the resulting mixed property shall be deemed to be held in trust on behalf of the Beneficiaries, but only to the extent of the Fund Property.
- (c) The Trustee shall have the right at any time during the continuance of the Trust to accept such further or additional property which the Settlor or any other Person may donate, settle, assign, transfer, appoint or otherwise contribute to the Trust.
- (d) The Trust hereby created shall be irrevocable and the Settlor and Beneficiary are divested of any power whatsoever to revoke this Trust or to modify its terms or to amend this Agreement in any respect, except in accordance with Article 6.
- (e) The parties hereto acknowledge that the Beneficiary shall contribute the Annual Contribution Amount to the Trust as directed by the Tribunal. The Trustee shall have no obligation to ensure that the Annual Contribution Amount is remitted.

2.03 The Trust: Discretionary as to two or more beneficiaries

If the Trustee has received written notice from the Tribunal, a Company or a Beneficiary stating that the Fund is insufficient or likely to be insufficient to fully pay all costs to discharge the Reclamation Obligations, the Trustee shall make payments from the Fund on presentation of and pursuant to a written direction or order from the Tribunal indicating (i) the extent to which such costs are to be paid

from the Fund and (ii) if there is more than one Beneficiary, the amount to be allocated to each Beneficiary.

2.04 The Trust: Surplus Funds

Upon an order of the Tribunal confirming that all of the present and future Reclamation Obligations of each of the Beneficiaries has been satisfied thereby fulfilling the purpose of the Trust, the Trustee may, upon an order given by the Tribunal, distribute the residual assets of the Trust to: (1) the Beneficiary, where there is only one Beneficiary; and (2) where there is more than one Beneficiary, to such Beneficiaries in accordance with the directions of the Tribunal.

2.05 The Trust: Duration of the Trust

- (a) Except where section 2.05(b) applies:
 - (i) This Agreement shall terminate no later than the expiration of twenty one (21) years after the date of death of the last surviving lineal descendent of Queen Elizabeth II who was alive on the date the Trust is created (the “**Trust Term**”).
 - (ii) Not more than five (5) years and not less than one (1) year prior to the expiration of the Trust Term, the Trustee shall pay the entirety of the Fund to the Beneficiary, provided that the following conditions are satisfied:
 - (A) the Trustee has requested and received a certificate of an officer of the Beneficiary stating that: (1) to the best of the officer’s knowledge, the Beneficiary is not in Default and no events or circumstances have occurred which would reasonably be expected to result in a Default within one (1) year after the date the certificate is issued; and (2) the Beneficiary has established, with the approval of the Tribunal, a new irrevocable trust upon the same terms and subject to the same conditions as set out in this Agreement (the “**New Trust**”); and
 - (B) the Beneficiary has covenanted to: (1) upon receipt of the Fund, keep the Fund separate and distinct from other assets of the Beneficiary; and (2) immediately contribute or transfer to the New Trust the entirety of the Fund Property.
 - (iii) If the entirety of the Fund has not been paid to the Beneficiary pursuant to section (a)(ii) on or before one (1) year prior to the expiration of the Trust Term, the Trustee shall notify the Tribunal thereof not later than ten (10) months prior to the expiry of the Trust Term, and:
 - (A) if, not less than 90 days prior to the expiry of the Trust Term, the Tribunal provides direction to the Trustee with respect to the payment of the entirety of the Fund on termination of the Trust in accordance with the purpose of this Agreement, the Trustee will pay the entirety of the Fund in accordance with such direction and subject to Applicable Law; and

- (B) otherwise, the Trustee will pay the entirety of the Fund to Her Majesty in right of Canada prior to the expiry of the Trust Term.
- (b) If, after the date of this Agreement and prior to disbursement of the entirety of the Fund pursuant to section 2.05(a), the rule against perpetuities no longer applies to QETs governed by the law of the Province of Alberta, this Agreement shall have no specific term but shall commence on the date first mentioned above and shall continue until terminated in writing by the Beneficiary, with the approval of the Tribunal.

2.06 The Trust: Residence, Situs, Mind and Management and Head Office

The residence, situs, mind and management of the Trust shall be located in the Province of Alberta and the head office of the Trust shall be located at Calgary, Alberta, or such other place or places in Alberta as the Trustee may from time to time designate and will initially be located at 301 - 8th Avenue S.W. - 3rd Floor - Hollingsworth Building, Calgary Alberta, T2P 1C5. In furtherance thereof, the Trustee shall adhere to the requirements and procedures set out in Schedule "C".

ARTICLE 3 APPOINTMENT, RESIGNATION, AND REMOVAL OF TRUSTEE

3.01 Appointment

The Company has the power to appoint the Trustee and successor trustees, subject to the written approval of the Tribunal. The Trustee, and any successor trustee, on accepting such appointment shall agree to act as trustee of the Fund in accordance with terms and conditions of this Agreement.

3.02 Qualifications of Trustee

No Person shall be appointed or hold office as Trustee at any time unless such Person is, at such time, (i) licensed under the *Trust and Loan Companies Act* (Canada); (ii) a corporation resident in Canada for purposes of the Tax Act; (iii) authorized under the laws of Canada or a province to carry on in Canada the business of offering to the public its services as a trustee; and (iv) satisfies the requirements of section 2.06.

If the current Trustee expects, acting reasonably, that it will cease to satisfy the requirements to hold office as Trustee at any time, it shall forthwith notify the Company and the Company shall remove the current Trustee in accordance with section 3.04.

3.03 Resignation

If the Trustee desires to resign:

- (a) it shall notify the Company in writing thereof not less than one hundred and twenty (120) days prior to the intended resignation date and, during this period the Company shall appoint a successor Trustee, subject to the written approval of the Tribunal as provided in section 3.01; and
- (b) if a successor Trustee is not appointed within sixty (60) days of receipt of the written notice of resignation, the Trustee, at the expense of the Fund, shall have the right to

seek appointment of a successor Trustee from the Tribunal or a court of competent jurisdiction.

3.04 Removal

- (a) If the Company delivers a written notice (“**Company’s Notice of Termination**”) to the Trustee specifying the intent to terminate the appointment of the Trustee hereunder for any reason, such appointment shall terminate on the thirtieth (30th) day following the date that the Company’s Notice of Termination is issued.
- (b) The Trustee shall cease to hold the office of Trustee if convicted of an offence involving dishonest conduct, becomes insolvent with the appointment of a receiver or is in bankruptcy proceedings, or becomes a corporation that is dissolved or in liquidation.
- (c) If the Trustee ceases to hold office pursuant to the foregoing, with the approval of the Tribunal, the Company shall appoint a successor Trustee meeting the requirements of section 3.02.

3.05 Obligations upon Resignation or Removal

Following the resignation or removal of the Trustee and subject to its rights hereunder, the Trustee:

- (a) shall continue to hold in trust the: (i) Fund; and (ii) all documents, information, and books and records created, received or maintained by the Trustee which relate to or arise or have arisen in connection with the performance by the Trustee of its duties hereunder (collectively with the Fund, the “**Fund Property**”);
- (b) upon receipt of payment for any outstanding amount for its services and expenses then unpaid, shall transfer, deliver and pay over to the successor trustee, the Fund and all Fund Property on deposit with or in the possession of the Trustee;
- (c) shall have no duties, responsibilities or liability with respect to the acts or omissions of the successor trustee.

The successor Trustee shall, in its capacity as Trustee, take title to the Fund and possession of the Fund Property, secure the same and receive all accretions to the Fund (including contributions), and shall have no duties, responsibilities or liability with respect to the acts or omissions of any predecessor Trustee and shall hold and invest the Fund and be subject to all duties applicable to, and have all powers of, the Trustee under this Agreement.

ARTICLE 4 THE DUTIES AND POWERS OF THE TRUSTEE

4.01 Responsibilities of the Trustee

The powers, duties and obligations of the Trustee shall be determined solely by Applicable Law and the provisions of this Agreement, and accordingly, the Trustee shall be responsible only for the performance of such powers, duties and obligations.

4.02 Trustee Receipt of Funds

- (a) All accretions to the Fund (including contributions) delivered to, and received by, the Trustee from time to time shall form part of the Fund, shall be held in trust upon the terms and conditions herein set forth, and shall only be disbursed or dealt with in accordance with the terms hereof.
- (b) The Trustee shall be solely responsible for all funds and other property delivered to it that form part of the Fund.

4.03 Investment of Fund

- (a) Subject to maintaining its status as a QET for the duration of the Trust, the Trustee shall invest the Fund in, and maintain the Fund invested in, Qualified Investments in accordance with a Statement of Investment Policies and Procedures received by the Trustee from time to time.
- (b) The Trustee shall have and be vested with the power to retain, invest or reinvest any assets constituting the whole or any part of the Fund in Qualified Investments, in accordance with the Statement of Investment Policies and Procedures, that the Trustee shall consider advisable including any Qualified Investments that are deposits, investment products or obligations issued or administered by the Trustee or its Affiliates, or by any one of more of its Affiliates or subsidiaries, notwithstanding that such investments may not be investments authorized by law for trustees.
- (c) All interest and other returns generated by the investment of the Fund shall be credited to, and shall become part of, the Fund (and any losses on such investments shall be debited to the Fund).
- (d) Subject to the Standard of Care, the Trustee shall have no liability for any investment losses resulting from investments made in accordance with the terms of this Agreement, including any losses on any investment required to be liquidated prior to maturity in order to make a payment required pursuant to the terms of this Agreement, and any losses resulting from a loss of opportunity. The Trustee shall have no liability to any person should it be unable to invest all or any portion of the Fund as aforesaid for any period of time, subject to the Standard of Care.

4.04 Funds to be Used for Reclamation

Except as otherwise expressly provided herein, the Trustee may only make distributions from the Fund for the sole purpose of funding the discharge of the Reclamation Obligations of the Beneficiaries of the Trust. For greater certainty, access to the Fund, including the precise amount of the Fund to be released for payment of amounts required to satisfy the Reclamation Obligations of the Beneficiaries, is subject to the Tribunal's written approval.

4.05 Release of Funds to a Beneficiary

- (a) Subject to section 2.03, the Trustee shall release monies from the Fund to a Beneficiary to pay any costs proposed to be incurred by the Beneficiary to discharge Reclamation Obligations on presentation by the Beneficiary of the following to the Trustee:

- (i) a written direction or an order from the Tribunal confirming the amount to be disbursed from the Fund, the timing of the disbursement and the identity of the Beneficiary to receive the funds; and
 - (ii) a certificate of an officer of the Beneficiary stating that, to the best of the officer's knowledge, the Beneficiary has not (1) ceased to carry on business; (2) become insolvent or committed any act of bankruptcy; (3) filed a petition for bankruptcy, or suffered a petition for bankruptcy being filed, against it; (4) made any proposal to or sought arrangement with its creditors; (5) made an assignment for the benefit of creditors; (6) appointed or suffered the appointment of a receiver in respect of its property and/or assets; or (7) had or suffered proceedings being commenced (voluntarily or involuntarily) for the liquidation, dissolution or winding up of itself (any one or more of the foregoing events, a "**Default**"), and that to the best of the officer's knowledge, no events or circumstances have occurred in the past three (3) months related to the business, operations or financial condition of the Beneficiary which would reasonably be expected to result in a Default within the one (1) year period after the certificate is issued.
- (b) Subject to section 2.03, the Trustee shall release monies from the Fund to a Beneficiary to reimburse or pay any costs previously incurred by the Beneficiary to discharge Reclamation Obligations on presentation by the Beneficiary of a written direction or an order from the Tribunal confirming the amount to be disbursed from the Fund, the timing of the disbursement and the identity of the Beneficiary to receive the funds, and without other certification.

4.06 Release of Funds to a Third Party

The provisions of section 4.05 shall apply *mutatis mutandis* to the disbursement of funds to a third party on behalf of a Beneficiary in payment of amounts payable to the third party in respect of work or services provided by such third party to such Beneficiary in the discharge of Reclamation Obligations of that Beneficiary, except that the requirement under section 4.05(a)(ii) will not be applicable.

4.07 Duties of the Trustee Regarding Release of the Requested Funds

- (a) Except as otherwise expressly provided herein, the Trustee shall only draw on the Fund for the purpose of paying or reimbursing payment of the costs incurred to discharge Reclamation Obligations as and when required by section 4.05 and 4.06 and, then, only in accordance with the applicable direction or order from the Tribunal.
- (b) The Trustee shall consult with the Beneficiary prior to calling in or redeeming Fund investments for the purpose of making a payment in accordance with sections 4.05 or 4.06.

4.08 Books, Records and Accounts

- (a) The Trustee shall maintain proper and accurate books, records and accounts of all transactions affected or controlled by the Trustee hereunder including the receipt,

investment, reinvestment and disbursement of monies from the Fund, and shall provide to the Company:

- (i) on or before the fifteenth (15th) Business Day following the last day of each month, a statement of account setting forth the account balance and all contributions paid to the Trustee and all relevant information concerning the funds held by the Trustee including information detailing all investments made, reinvestment undertaken, investment income earned, and disbursement of funds, during the immediately preceding month;
 - (ii) on or before the fifteenth (15th) Business Day following the end of each fiscal year of the Trust or such other period as may be agreed upon between the Trustee and the Company, a statement of account setting forth the account balance and all contributions paid to the Trustee and all relevant information concerning the funds held by the Trustee including information detailing all investments made, reinvestment undertaken, investment income earned, and disbursement of funds, during such fiscal period or such other period so agreed upon;
 - (iii) on or before the fifteenth (15th) Business Day after the removal or resignation of the Trustee or termination of the Trust, a statement of account setting forth the account balance and all contributions paid to the Trustee and all relevant information concerning the funds held by the Trustee including information detailing all investments made, reinvestment undertaken, investment income earned, and disbursement of funds, during the period commencing on the end of the period referred to in (ii) and ending on the date of such removal or resignation of the Trustee or termination of the Trust; and
 - (iv) any other report or information reasonably requested by the Tribunal, a Beneficiary, or the Company, or required by Applicable Law, including accounting and financial reports and an internal control report.
- (b) The Trustee shall, on reasonable prior notice and during normal business hours, make available to and permit the officers, employees and authorized agents of the Tribunal, the Company and the auditors of the Company to inspect, at an office of the Trustee located in the province of Alberta, all books, records and accounts, required to be maintained by the Trustee, in connection with this Agreement or as required by Applicable Law.
 - (c) At the end of each calendar year during which the Trustee has held the Fund, the Trustee shall cause to be issued to the Company a form T-5, or other form as appropriate pursuant to the Tax Act, in respect of any interest, dividend, capital gains or other earnings or losses on the Fund.

4.09 Standard of Care

- (a) In the exercise and discharge of its obligations and duties at law or hereunder, the Trustee shall:

- (i) act honestly and in good faith;
- (ii) exercise that degree of care, diligence and skill that a reasonably prudent institutional trustee acting in like capacity would exercise in comparable circumstances; and
- (iii) comply with the terms of this Agreement and Applicable Law, rules and regulations in respect of the Trustee's dealing with, or handling of the Fund pursuant to the terms hereof

(collectively, the “**Standard of Care**”).

- (b) The Trustee shall be responsible for loss occasioned by reason of the failure of the Trustee to comply with its obligations at law or duties under this Trust, or its negligence or willful misconduct on the part of itself, its employees, officers or agents.

4.10 Appointment of Advisors

- (a) The Trustee shall not enter into, amend, terminate or waive performance under contracts or agreements for service with a third party, including investment management, custodian and advisory entities, unless the Trustee has first consulted with the Beneficiaries in regard thereto.
- (b) Subject to the Standard of Care and sections 2.06 and 4.10(a), the Trustee may appoint or retain such legal counsel, accountants, financial advisors, appraisers or other experts or advisors as may be reasonably required for the purpose of discharging its duties hereunder and shall not be responsible for any loss occasioned by, or misconduct on the part of, any of them. The Trustee may pay out of the Fund reasonable remuneration for all services performed for it by such advisors in the discharge of its duties hereunder without taxation for costs or fees of any counsel, solicitor or attorney, including solicitor fees on a solicitor and own client basis. The Trustee shall be responsible for holding such advisors to a commercially reasonable standard of care under their contract of appointment. Where such advisor has caused a loss to the Trust, the Trustee agrees, upon written request by the Beneficiaries that the Trustee will pursue commercially reasonable remedies on behalf of the Trust against the advisor. If the Beneficiaries have requested the Trustee to take such action and the Trustee is not doing so promptly or is not diligently pursuing such action, the Beneficiaries may pursue any remedy against such advisor in the name of, and on behalf of, the Trust for the benefit, and at the expense, of the Trust.
- (c) Subject to the Standard of Care and sections 2.06 and 4.10(a), the Trustee may obtain and act on the opinion or advice of, or information obtained from, any solicitor, accountant, financial advisor, broker, auctioneer, surveyor, valuator, life or fire insurance advisor or other expert without diminution of compensation as Trustee and the Trustee shall not be responsible for any loss occasioned by so acting or not acting, as the case may be, in relation to any matter arising in the performance of its duties under this Agreement, and the Trustee, subject to the Standard of Care, shall not be responsible for any loss occasioned by so acting or not acting, as the case may be.

- (d) Subject to the Standard of Care and sections 2.06 and 4.10(a), the Trustee is authorized to obtain investment management advice from investment managers or advisors to assist the Trustee with and to provide the Trustee with advice with respect to: (i) the investment and/or reinvestment of the assets of the Fund, and (ii) the exercise of any powers or functions relating to the investment and/or reinvestment of such assets. Such managers or advisors shall have such powers as the Trustee shall specify in writing, which may include the power at any time and from time to time to choose, acquire, dispose of or change any such investment or reinvestment of assets of the Fund. Notwithstanding the foregoing, the Trustee must consult with the Beneficiary with respect to the amount of monies to be invested or reinvested by each investment manager engaged to assist or advise the Trustee.
- (e) For the purposes of section 4.10(d), the Trustee may appoint and retain any Person for such purpose, including any of its Affiliates or any successors thereof, or any corporation with which any of these may amalgamate or become part thereof as a result of any reorganization, and it is acknowledged that such appointment may be made by the Trustee irrespective of any such relationship between them. All charges for such services shall be paid out of income or capital of the Fund as seems appropriate to the Trustees notwithstanding any association which may exist between the Trustee and any Person so employed. The fees and remuneration of any Person shall be an expense of the Fund and shall be in addition to the compensation payable to the Trustee. The Trustee may authorize any such Person to deposit any cash in or invest in or purchase securities, products and services of related and connected issuers of the Trustee or its Affiliates, notwithstanding that the Trustee, its Affiliates, any related and connected issuers, its agents and/or advisors may benefit therefrom. Neither the Trustee nor any Affiliate, related and connected issuer, agent or advisor shall be required to account for, or to give up, any such benefit.

4.11 Safekeeping of Funds

So far as is allowed by Applicable Law, the Trustee shall control and hold in trust, in such form and manner as may be necessary to impress a trust thereon as against any creditor or creditors of the Beneficiaries, all funds held pursuant to the terms hereof until such funds are disbursed or otherwise dealt with in accordance with the terms and conditions of this Agreement.

4.12 Acceptance of Obligations

The Trustee hereby accepts the covenants and obligations set out in this Agreement and agrees to discharge the same upon the terms and conditions herein set forth, and to hold and exercise the rights, privileges and benefits conferred upon it by this Agreement for the purposes of the Trust.

4.13 Decision to Act or Not Act

The Trustee shall retain the right not to act and shall not be held liable for refusing to act unless it has received clear documentation which complies with the terms of this Agreement. The Trustee shall not retain the right not to act and shall be held liable for refusing to act where documentation which complies with the terms of this Agreement requires the exercise of any discretion or independent judgment on the part of the Trustee.

4.14 Trustee Not to Expend Own Funds or Borrow

None of the provisions contained in this Agreement shall require the Trustee to expend or risk its own funds or otherwise incur personal financial liability in the performance of any of its duties or in the exercise of any of its rights or powers.

The Trustee shall not, at any time, loan funds to, or borrow any funds for or on behalf of, the Trust.

4.15 Other Powers and Duties of the Trustee

For greater certainty, subject to the Standard of Care and sections 2.06 and 4.10(a), in administering the Trust and investing the Fund, the Trustee shall be specifically authorized to:

- (a) **Appoint Custodians.** Appoint or cause to be appointed domestic custodians, including Affiliates of the Trustee, as to part or all of the Fund Property, provided the Trustee shall not be responsible or liable for any losses or damages suffered by the Trust arising as a result of the insolvency of any such custodian, except to the extent the Trustee failed to adhere to the Standard of Care in the selection, appointment, supervision or continued retention of such custodian. The Trustee shall be responsible for holding its custodians to a commercially reasonable standard of care under their contract of appointment. Upon request by the Beneficiaries, the Trustee shall provide the Beneficiaries with a list of its current custodians. Where a custodian has caused a loss to the Trust, the Trustee agrees, upon written request by the Beneficiaries that the Trustee will pursue commercially reasonable remedies on behalf of the Trust against any such custodian. If the Beneficiaries have requested the Trustee to take such action and the Trustee is not doing so promptly or is not diligently pursuing such action, the Beneficiaries may pursue any remedy against such custodian in the name of, and on behalf of, the Trust for the benefit, and at the expense, of the Trust.
- (b) **Hold Investments.** Hold, or cause to be held, the Fund Property in nominee name, in bearer form, or in book entry form, in a clearinghouse corporation or in a depository (including an Affiliate of the Trustee, notwithstanding that the Trustee, its Affiliates, any related and connected issuers, their agents and/or advisors may benefit therefrom), provided that the Trustee's records clearly indicate that the assets held are a part of the Fund Property and provided that, subject to the Standard of Care, the Trustee shall not be responsible for any losses resulting from the deposit or maintenance of the Fund Property (in accordance with market practice, custom or regulation) with any recognized foreign or domestic clearing facility, book entry system, centralized custodial depository, or similar organization.
- (c) **Purchase and Sell Property.** Purchase and sell and engage in other transactions, including receipts and deliveries, exchanges, exercises, conversions, subscriptions, and other voluntary corporate actions, with respect to the Fund Property.
- (d) **Exercise Owner's Rights.** Deal with any securities, shares, obligations or other interests of or in any organization, company or corporation included in the Fund from time to time; take up new or further shares, rights, obligations or other interests; join in plans for reconstruction or reorganization; exchange shares, rights, obligations, or other interests; give, receive and accept and exercise options; pay out of the Fund any

monies which may be necessary for any of these purposes; and generally exercise any of the powers of an owner with respect to all assets held as part of the Fund Property.

- (e) **Deposit Cash.** Deposit, and comingle with other trust funds held by the Trustee from time to time, cash in interest bearing accounts in the deposit department of the Trustee, or any banking affiliate of the Trustee.
- (f) **Nominate Directors.** Nominate members of the boards of directors of corporations, and appoint representatives or trustees in connection with investments of the Trust whenever or wherever such right of nomination or appointment is available.
- (g) **Deal with Claims.** Settle, compromise or submit to arbitration any claims, debts or damages due or owing to or from the Trust and commence or defend suits or legal or administrative proceedings and represent the Trust in all suits and legal and administrative proceedings in any court or before any other body or tribunal as the Trustee shall deem necessary to protect the Trust, provided that the Trustee shall not be obligated to do so until it has first been indemnified by the Beneficiaries to its reasonable satisfaction against any fees and expenses or liabilities which it may incur as a result thereof.
- (h) **Collect Income and Proceeds.** Collect income payable to and distributions due to the Trust and sign on behalf of the Trust any declarations, affidavits, certificates of ownership and other documents required to collect income and other payments, including tax reclamations, rebates and other withheld amounts and collect proceeds in respect of Fund Property that mature, provided that whenever an issuer of a Fund Property offers the Trustee the option of receiving dividends in shares or cash, the Trustee may elect to receive shares or cash as it determines in its sole discretion.
- (i) **Redeem Securities.** Present for redemption or exchange any Fund Property which may be called, redeemed, withdrawn or retired.
- (j) **Execute Instruments.** Make, execute and deliver any and all documents, agreements or other instruments as are necessary or desirable for the accomplishment of any of the powers and duties in this Agreement.
- (k) **Determine Value.** Determine the fair market value of the Fund Property not less frequently than quarterly and as at December 31 of each fiscal year, in accordance with methods consistently followed and uniformly applied and in accordance with the Statement of Investment Policies and Procedures.
- (l) **Power to do any Necessary Act.** Generally take all action, whether or not expressly authorized, which the Trustee may deem necessary or desirable, acting in accordance with the Standard of Care, for the fulfillment of its duties hereunder.
- (m) **Self Dealing.** Deal with any Person which is an Affiliate of the Trustee, in which event neither the Trustee nor the Affiliate shall be accountable for any profit earned in the course of such dealing, provided that when the Trustee directly retains or appoints a Person at the expense of the Trust who is an Affiliate, the terms of such appointment,

retainer, or other dealing shall be on a commercially reasonable basis and consistent with the Standard of Care.

ARTICLE 5 REMUNERATION AND EXPENSES OF THE TRUSTEE

5.01 Trustee's Fees and Expenses of the Trustee

- (a) The Trustee shall be paid out of the Fund, as compensation for acting as Trustee, the fees, reimbursement and other compensation in the amount and manner set out in the Compensation Agreement – Trust Administration dated _____, 20__, and any accompanying appendix (“**Compensation Agreement**”) which is annexed to this Agreement, which Compensation Agreement and any appendix are hereby incorporated by reference into this Agreement, each as amended from time to time.
- (b) Such remuneration and all reasonable expenses, disbursements and advances incurred or made by the Trustee in the administration of its duties hereunder (including legal fees and expenses on a solicitor and own client basis, investment expenses, including management and advisory expenses, and the reasonable compensation and disbursements of all other advisers, agents or experts employed or retained pursuant to this Agreement) shall be paid from the Fund.

5.02 Payment of Trustee Fees

In the event the Trust created under this Agreement becomes liable to or subject to any fees or other amounts due to the Trustee pursuant to section 5.01 hereof, the Trustee shall be expressly authorized and entitled to draw from the Fund to pay such fees or other expenses without prior approval or instruction of the Tribunal.

5.03 Tax Filings and Payment of Taxes by the Trustee

Subject to section 2.01:

- (a) The Trustee shall, after consultation with the Beneficiary, prepare and file or issue, on a timely basis, all income tax returns, elections and other forms which, by virtue of the Tax Act and applicable provincial tax legislation, must be filed or issued in respect of the Trust, and such other returns or forms as the Trustee, in consultation with the Beneficiary, determines to be necessary. In so doing, the Trustee may make any elections, determinations and designations under the Tax Act or any other taxing statute which the Trustee, in consultation with the Beneficiary, deems advisable.
- (b) If the Trustee or the Beneficiary determines that an income tax return, election or other form previously filed or issued in respect of the Trust under the Tax Act or other taxing statute should be amended, such return, election or form shall be amended if the Trustee determines, in consultation with the Beneficiary, that such amendment complies with the provisions of the Tax Act or applicable taxing statute.

- (c) The Trustee shall be entitled to make payment of all applicable taxes payable by the Trust under Applicable Law out of the Fund to the appropriate taxing authority without prior approval or instruction of the Tribunal.
- (d) The Trustee shall give written notice to the Beneficiaries of, and provide the Beneficiaries the opportunity to dispute, material obligations of the Trust, such as tax assessments, including interest or penalties levied or assessed in respect of the Trust, and environmental assessments levied or assessed against the Trust, within fifteen (15) Business Days of receiving notice of such assessment. If, in the opinion of the Beneficiaries, such tax assessment or environmental assessment is not lawfully assessed or exigible, the Trustee agrees, upon written request by the Beneficiaries that the Trustee will contest, on a commercially reasonable basis, the validity of such tax obligation or environmental assessment. If the Beneficiaries have requested the Trustee to contest the validity of such tax obligation or environmental assessment and the Trustee is not doing so promptly or is not diligently pursuing such action, the Beneficiaries may contest the validity of such tax obligation or environmental assessment in the name of, and on behalf of, the Trust for the benefit, and at the expense, of the Trust.

5.04 Business Continuity

The Trustee shall, at all times that this Agreement is in force, maintain a commercially reasonable Business Continuity Plan.

ARTICLE 6 AMENDMENT AND TERMINATION OF THE TRUST

6.01 Amendment

Subject to section 6.02, the Trustee may, by agreement with all of the Beneficiaries, amend the terms of the Trust, including the terms of this Agreement. No amendment to the terms of the Trust or the terms of this Agreement will be binding or effective unless the Tribunal approves the amendment. No such amendment will be effective to the extent such amendment causes the Trust not to be a Qualifying Environmental Trust.

For greater certainty, it is anticipated that, upon the Tribunal's direction or order approving the sale, assignment, transfer or other disposition of the Pipeline or a portion thereof from the Beneficiary to another Person pursuant to paragraphs 74(1)(a), (b) and (c) of the NEB Act, one or more other trusts may be established for the same purpose as the Trust as set out in section 2.01.

6.02 Trust Irrevocable

The Trust and the schedules hereto, which are hereby incorporated into the Trust, may not be revoked by the Company, Beneficiaries or any of them, or the Trustee, except that the Tribunal in its total discretion may direct a termination of the Trust, and order such successive arrangements as are appropriate.

ARTICLE 7 NOTICES

7.01 Acting on Written Notice

The Trustee shall not incur liability for acting in reliance on any written notice, request, consent, certificate, receipt, affidavit, statutory declaration or other paper or document furnished to it by or on behalf of any Person authorized to do so by the terms of this Agreement, not only as to its due execution and the validity and effectiveness of its provisions but also as to the verity of any information therein contained, provided the Trustee's reliance thereon is in accordance with the Standard of Care.

7.02 Mode of Giving Notice

Any notice or other document required to be given or delivered hereunder will be valid and effective if given by registered letter (postage prepaid), courier, by personal delivery, by email or by fax addressed by the party to whom such notice is to be given, and will be deemed to have been effectively delivered on:

- (a) the date of actual delivery, if couriered or personally delivered during normal business hours of the party to whom such notice is delivered (and if not, on the next following Business Day);
- (b) the first Business Day following the date of the fax, if faxed;
- (c) on the fifth Business Day after effectual posting, if sent by mail; or
- (d) the first Business Day following the date of the email, if emailed.

7.03 Addresses of the Parties

The addresses of the parties for purposes of this section shall be as follows, but may be changed by any party by the delivery of notice of such change in accordance with the notice requirements hereof:

TransCanada Keystone Pipeline GP Ltd.
450 - 1st Street S.W.
Calgary, Alberta, T2P 5H1
Fax: **[to be provided]**
Email: **[to be provided]**

Attention: **[to be provided]**

CIBC Trust Corporation
301 - 8th Avenue S.W. - 3rd Floor
Hollingsworth Building
Calgary Alberta , T2P 1C5
Fax: **[to be provided]**
Email: **[to be provided]**

Attention: **[to be provided]**

or to any other address notified by any party to the other parties.

7.04 Address of the Tribunal

Any notice or other document required to be given or delivered to the Tribunal shall be addressed to:

Secretary
National Energy Board
517 - 10th Avenue S.W.
Calgary, Alberta, T2R 0A8

ARTICLE 8 MISCELLANEOUS

8.01 Assignment and Enurement

This Agreement shall:

- (a) be binding upon the parties hereto and their respective successors and permitted assigns;
- (b) enure to the benefit of and be enforceable by any Beneficiary and its successors and permitted assigns; and
- (c) be enforceable against the Trustee by the Tribunal or Her Majesty in right of Canada.

No party may assign this Agreement or any benefits or obligations hereunder without the approval of the Tribunal.

8.02 Applicable Law

This Agreement (and any amendments hereto) shall be governed by the law of the Province of Alberta and the laws of Canada applicable therein.

8.03 Residence

Each of the Beneficiary and the Trustee represents that it is, respectively, a resident of Canada within the meaning of the Tax Act.

8.04 Severability

In the event that any provision hereof shall be determined to be invalid or unenforceable in any respect, such determination, so far as permitted under Applicable Law, shall not affect such provision in any other respect or any other provisions hereof, all of which shall remain in full force and effect.

In the event that any provision hereof shall be determined to cause the Trust not to be a Qualifying Environmental Trust for any reason, such provision shall be deemed null and void so far as permitted under Applicable Law, but this Agreement shall remain in force in all other respects.

8.05 Entire Agreement and Amendment

For greater certainty, this Agreement represents the entire agreement amongst the parties respecting the Trust and supersedes all prior discussions, agreements and understandings of every kind and nature amongst them.

8.06 Right to Disclose

The Trustee shall have the right to disclose any information disclosed or released to it if, in the opinion of the Trustee or its legal counsel, it is required to disclose under any Applicable Law, court order or administrative directions. The Trustee shall not be responsible or liable to any party for any loss or damage arising out of or in any way sustained or incurred relating to such disclosure.

8.07 Successor Trustee

Any company with which the Trustee may be amalgamated will become the successor Trustee hereunder without any further action on the part of the Trustee.

8.08 Review of Agreement

It is acknowledged that this Agreement shall be reviewed by the Trustee, the Company and the Tribunal at least every five (5) years, or earlier if directed by the Tribunal.

[This space intentionally left blank; execution page to follow.]

IN WITNESS WHEREOF the parties hereto have executed this Agreement as of the day and year first set forth above.

TRANSCANADA KEYSTONE PIPELINE GP LTD.

Per:

Per:

CIBC TRUST CORPORATION

Per:

Per:

Schedule “A” – The Pipeline

The Keystone Pipeline System is a crude-oil transmission system extending from Alberta, Canada to markets in Illinois and Oklahoma, United States. The Canadian portion of the Keystone Pipeline System extends from Hardisty, Alberta to the Canada/US border at or near Haskett, Manitoba, and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio and other equipment and facilities used in connection with such pipeline, whether real or personal property, immovable or movable, including any real property rights and interests upon which such equipment and facilities are situated, and all intangible assets, rights and interests used primarily in the operation of such pipeline.

The Canadian portion of the Keystone Pipeline System is owned and operated pursuant to the authority granted under NEB Certificate No. OC-51.

Schedule “B” – Qualified Investments

The relevant paragraphs of the definition of “qualified investment” in section 204 currently read as follows:

- (a) money (other than money the fair market value of which exceeds its stated value as legal tender in the country of issuance or money that is held for its numismatic value) and deposits (within the meaning assigned by the *Canada Deposit Insurance Corporation Act* or with a branch in Canada of a bank) of such money standing to the credit of the trust,

- (b) debt obligations described in paragraph (a) of the definition “fully exempt interest” in subsection 212(3) [*being a bond, debenture, note, mortgage, hypothecary claim or similar debt obligation*]
 - (i) *of, or guaranteed (otherwise than by being insured by the Canada Deposit Insurance Corporation) by, the Government of Canada,*

 - (ii) *of the government of a province,*

 - (iii) *of an agent of a province,*

 - (iv) *of a municipality in Canada or a municipal or public body performing a function of government in Canada,*

 - (v) *of a corporation, commission or association to which any of paragraphs 149(1)(d) to (d.6)¹ applies or of an educational institution or a hospital if repayment of the*

¹ The relevant paragraphs read as follows:

(d) **[corporations owned by the Crown]** – a corporation, commission or association all of the shares (except directors’ qualifying shares) or of the capital of which was owned by one or more persons each of which is Her Majesty in right of Canada or Her Majesty in right of a province;

(d.1) **[corporations 90% owned by the Crown]** – a corporation, commission or association not less than 90% of the shares (except directors’ qualifying shares) or of the capital of which was owned by one or more persons each of which is Her Majesty in right of Canada or Her Majesty in right of a Province;

(d.2) **[wholly-owned [by Crown corporation] corporations]** – a corporation all of the shares (except directors’ qualifying shares) or of the capital of which was owned by one or more persons each of which is a corporation, commission or association to which this paragraph or paragraph (d) applies for the period;

(d.3) **[90% [Crown] owned corporations]** -- a corporation, commission or association not less than 90% of the shares (except directors’ qualifying shares) or of the capital of which was owned by:

- (i) one or more persons each of which is Her Majesty in right of Canada or a Province or a person to which paragraph (d) or (d.2) applies for the period, or

principal amount of the obligation and payment of the interest is to be made, or is guaranteed, assured or otherwise specifically provided for or secured by the government of a province],

(c) debt obligations issued by

- (i) a corporation, mutual fund trust or limited partnership the shares or units of which are listed on a designated stock exchange in Canada,²
- (ii) a corporation the shares of which are listed on a designated stock exchange outside Canada,³ or
- (iii) an authorized foreign bank⁴ and payable at a branch in Canada of the bank,

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- (ii) one or more municipalities in Canada in combination with one or more persons each of which is Her Majesty in right of Canada or a Province or a person to which paragraph (d) or (d.2) applies for the period;

(d.4) **[combined [Crown] ownership]** -- a corporation all of the shares (except directors' qualifying shares) or of the capital of which was owned by one or more persons each of which is a corporation, commission or association to which this paragraph or any of paragraphs (d) to (d.3) applies for the period;

(d.5) **[[municipally-owned corporation earning] income with boundaries of entities]** – subject to subsections (1.2) and (1.3), a corporation, commission or association not less than 90% of the capital of which was owned by one or more entities each of which is a municipality in Canada, or a municipal or public body performing a function of government in Canada, if the income for the period of the corporation, commission or association from activities carried on outside the geographical boundaries of the municipalities does not exceed 10% of its income for the period;

(d.6) **[subsidiaries of municipal corporations]** -- subject to subsections (1.2) and (1.3), a particular corporation all of the shares (except directors' qualifying shares) or of the capital of which was owned by one or more entities (referred to in this paragraph as "qualifying owners") each of which is a corporation, commission or association to which paragraph (d.5) applies, a corporation to which this paragraph applies, a municipality in Canada, or a municipal or public body performing a function of government in Canada, if no more than 10% of the particular corporation's income for the period is from activities carried on outside

(i) if a qualifying owner is a municipality in Canada, or a municipal or public body performing a function of government in Canada, the geographical boundaries of each such qualifying owner,

(ii) if paragraph (d.5) applies to a qualifying owner, the geographical boundaries of the municipality, or municipal or public body, referred to in that paragraph in its application to each such qualifying owner, and

(iii) if this paragraph applies to a qualifying owner, the geographical boundaries of the municipality, or municipal or public body, referred to in subparagraph (i) or paragraph (d.5), as the case may be, in their respective applications to each such qualifying owner.

² A "designated stock exchange" is defined in subsection 248(1) of the Tax Act as a stock exchange, or that part of a stock exchange, for which a designation by the Minister of Finance under Section 262 of the Tax Act is in effect. Section 262 gives the Minister the authority to designate a stock exchange or part thereof for the purposes of the Act. Pursuant to subsection 262(4) of the Tax Act, the Minister of Finance is required to post on the internet website of the Department of Finance or by any other means considered appropriate, the names of the stock exchanges or parts thereof that are designated under Section 262. The current list can be found at <http://www.fin.gc.ca/act/fim-imf/dse-bvd-eng.asp>. In Canada, the designated stock exchanges include the Canadian National Stock Exchange (CNSX), the Montreal Exchange, the TSX Venture Exchange (Tiers 1 and 2) and the Toronto Stock Exchange.

³ *Ibid.* The Department of Finance website referred to also includes the list of designated stock exchanges outside Canada.

⁴ An "authorized foreign bank" is defined in subsection 248(1) of the Tax Act as having the meaning in Section 2 of the *Bank Act* (Canada), being "a foreign bank that is the subject of an order under subsection 524(1)". Subsection 524(1) states that on application by a foreign bank, the Minister may make an order permitting the foreign bank to establish a branch in Canada to carry on business in Canada under Part XII .1 of the *Bank Act* (Canada). The definition of "foreign bank" is found in Section 2 of the *Bank Act*. It reads:

"foreign bank", subject to Section 12, means an entity incorporated or formed by or under the laws of a country other than Canada that is a bank according to the laws of any foreign country where it carries on business, (b) carries on a business in any foreign country that, if carried on in Canada, would be, wholly or to a significant extent, the business of banking, (c) engages, directly or indirectly, in the business of providing financial services and employs, to identify or describe its business, a name that includes the word "bank", "banque", "banking" or "bancaire", either alone or in combination with other words, or any word or words in any language other than English or French corresponding generally thereto, (d) engages in the business of lending money and accepting deposit liabilities transferable by cheque or other instrument, (e) engages, directly or indirectly, in the business of providing financial services and is affiliated with another foreign bank, (f) controls another foreign bank, or (g) is a foreign institution,

- (c.1) debt obligations that meet the following criteria, namely,
- (i) any of
 - (A) the debt obligations had, at the time of acquisition by the trust, an investment grade rating with a prescribed credit rating agency,⁵
 - (B) the debt obligations have an investment grade rating with a prescribed credit rating agency,⁶ or,
 - (C) the debt obligations were acquired by the trust in exchange for debt obligations that satisfied the condition in clause (A) and as part of a proposal to, or an arrangement with, the creditors of the issuer of the debt obligations that has been approved by a court under the *Bankruptcy and Insolvency Act* or the *Companies' Creditors Arrangement Act*, and
 - (ii) either
 - (A) the debt obligations were issued as part of a single issue of debt of at least \$25 million, or,
 - (B) in the case of debt obligations that are issued on a continuous basis under a debt issuance program, the issuer of the debt obligations had issued and outstanding debt under the program of at least \$25 million,
 - (d) securities (other than futures contracts or other derivative instruments in respect of which the holder's risk of loss may exceed the holder's cost) that are listed on a designated stock exchange,⁷ and
 - (f) guaranteed investment certificates issued by a trust company incorporated under the laws of Canada or of a province.

other than a foreign bank within the meaning of any of paragraphs (a) to (f), that controls a bank incorporated or formed under this Act, but does not include a subsidiary of a bank named in Schedule I as that Schedule read immediately before the day section 184 of the *Financial Consumer Agency of Canada Act* comes into force, unless the Minister has specified that subsection 378(1) no longer applies to the bank.

⁵ Pursuant to regulation 4900(2) of the *Income Tax Regulations* (Canada), the following are prescribed credit rating agencies for the purposes of section 204: A.M. Best Company Inc.; DBRS Limited; Fitch, Inc.; Moody's Investors Service Inc.; and Standard & Poor's Financial Services LLC.

⁶ *Ibid.*

⁷ *Supra* note 2.

The definition of “prohibited investment” in subsection 211.6(1) reads as follows:

“prohibited investment”, of a trust at any time, means a property that

- (a) at the time it was acquired by the trust, was described by any of paragraphs (c), (c.1) or (d) of the definition “qualified investment” in section 204; and
- (b) was issued by
 - (i) a person or partnership that has contributed property to, or that is a beneficiary under, the trust,
 - (ii) a person that is related to, or a partnership that is affiliated with, a person or partnership that has contributed property to, or that is a beneficiary under, the trust, or
 - (iii) a particular person or partnership if
 - (A) another person or partnership holds significant interest (within the meaning assigned by subsection 207.01 (4) with any modifications that the circumstances require)⁸ in the particular person or partnership, and
 - (B) the holder of that significant interest has contributed property to, or is a beneficiary under, the trust.

⁸ Subsection 207.01(4) reads:

(4) [**Significant interest**] – An individual has a significant interest in a corporation, partnership or trust at any time if

(a) in the case of a corporation, the individual is a specified shareholder of the corporation at that time [...];

(b) in the case of a partnership, the individual, or the individual together with persons and partnerships with which the individual does not deal at arm’s length, holds at that time interests as a member of the partnership that have a fair market value of 10% or more of the fair market value of the interests of all members in the partnership; and

(c) in the case of a trust, the individual, or the individual together with persons and partnerships with which the individual does not deal at arm’s length, holds at that time interests as a beneficiary (in this paragraph, as defined in subsection 108(1)) under the trust that have a fair market value of 10% or more of the fair market value of the interests of all beneficiaries under the trust.

Schedule “C” – Residence, Situs, Mind and Management of the Trust

A. Governance Structure

1. Trust Officer: An employee of the Trustee will be designated as the relationship manager (the “**Trust Officer**”) for the Trust.
 - (a) Selection and Removal: The Discretionary Committee (as defined below) shall have exclusive authority over the selection, appointment and replacement of the Trust Officer in the capacity of relationship manager for the Trust.
 - (b) Qualification: The Trust Officer must be resident in Alberta and employed full-time out of the Trustee’s Calgary office (the “**Calgary Office**”).
 - (c) Powers and Responsibilities: The Trust Officer shall have sole responsibility for managing and maintaining the client relationship between the Trustee and Company. All actions and decisions of the Trust Officer must be conducted exclusively out of the Calgary Office.
2. Discretionary Committee:
 - (a) Powers and Responsibilities: All powers and discretionary authority granted to the Trustee under the Trust Agreement shall be exclusively exercised by a committee (the “**Discretionary Committee**”) and only upon affirmative approval by a majority of the members at a properly constituted meeting of the Discretionary Committee. In addition and without limiting the generality of the foregoing, the Discretionary Committee shall:
 - (i) Trust Investments: meet and review the investments of the Trust and all other important decisions concerning the Trust at least once per quarter;
 - (ii) Advisors: have exclusive authority over the selection, control of the relationship with and the provision of instructions and directions to any advisors (including, investment, accounting and legal advisors) engaged by the Trust; and
 - (iii) Financial Statements: shall review and shall have exclusive authority to approve financial statements for the Trust.

Prior to exercising any of the discretionary powers or authorities held by the Discretionary Committee, the Discretionary Committee shall obtain and review all the information and materials required to make a fully informed decision.
 - (b) Selection and Removal: the Trustee shall have exclusive authority over the selection, appointment and replacement of members of the Discretionary Committee.

(c) Composition and Qualification:

- (i) The Discretionary Committee shall consist of three individuals, each of whom is resident and employed by the Trustee in Alberta and at least two of whom are employed out of the Calgary Office.
- (ii) An individual will automatically cease to be a member of the Discretionary Committee if he/she ceases to be resident in Alberta or if his/her employment with the Trustee is terminated. The Trustee shall appoint a replacement member to the Discretionary Committee as soon as reasonably practicable.

Members must possess the proper qualifications, knowledge, experience and competence to exercise the powers, duties and obligations granted to the Trustee under the Trust Agreement.

(d) Meetings of the Discretionary Committee shall be held at least quarterly and shall be governed by the following:

- (i) A meeting may be called by any member of the Discretionary Committee upon not less than 10 Business Days prior notice by sending a notice setting forth the matters to be considered at the meeting.
- (ii) All meetings must be held at the Calgary Office.
- (iii) A quorum for a meeting of the Discretionary Committee shall require the attendance of all members of the Discretionary Committee.
- (iv) At least a majority of the members of the Discretionary Committee must attend the meetings in person. Members who cannot attend in person may participate via telephone or videoconference provided that they are participating from a location within the Province of Alberta.
- (v) Written meeting minutes and/or resolutions shall be prepared and maintained in respect of all meetings of the Discretionary Committee, which set forth the matters considered, the decisions made and the considerations, information and materials upon which the decisions taken at the meeting were based. The meeting minutes and/or resolutions shall indicate the date of the meeting, the location of the meeting and the persons present and shall be retained in the Trust's minute book.

(e) Delegation of Discretionary Powers: The Discretionary Committee shall not delegate any of the discretionary powers and authorities granted under the Trust Agreement, except as expressly provided for in the Trust Agreement.

B. Trust Property

- (a) A separate trust account (the “**Trust Account**”) should be established for the Trust. The Trust Account shall be opened under the direction of the Trust Officer and the Trust Officer shall have signing authority with respect to the Trust Account.
- (b) The Trust Account shall be opened and maintained at the Calgary Office.
- (c) Any physical assets of the Trust, including the Settlement Property and all certificates and other evidence, if any, of ownership of shares, bonds, debentures and other securities or investments held by the Trust, shall be held in safekeeping in the Calgary Office and under the control of the Trust Officer in Calgary.
- (d) If the Discretionary Committee appoints one or more custodian(s) to administer the Trust Property, it shall appoint a custodian who can: (1) provide asset servicing and custody and (2) appoint a representative that is resident in Alberta that will act as the day-to-day contact for the Trustee out of Alberta.

C. Books, Records and Accounts

- (a) All books and records of the Trust must be held and maintained in the Calgary Office, including a minute book containing minutes of Discretionary Committee meetings, resolutions or other documentation of decisions of the Discretionary Committee.
- (b) A T3M trust return, even if it will be a nil return, shall be filed every year.