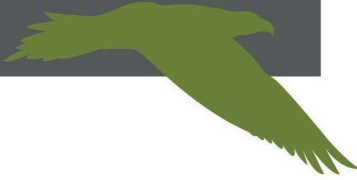


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March 30, 2023

Sent via email: [deltaport@iaac-aeic.gc.ca](mailto:deltaport@iaac-aeic.gc.ca)

Assessment of the GCT Deltaport Expansion - Berth Four Project  
c/o Impact Assessment Agency of Canada  
22nd Floor -160 Elgin Street  
Ottawa, Ontario K1A 0H3

**Attention: Canadian Impact Assessment Registry**

**Re: Review Panel Terms of Reference and BC/Canada Cooperation Agreement**

We write on behalf of Lummi Nation with respect to the Impact Assessment Agency (the “Agency”) and the Environmental Assessment Office’s (EAO) invitation for comments on the draft Review Panel [Terms of Reference](#) (TOR) and draft Canada-British Columbia Cooperation Agreement for the assessment of the GCT Deltaport Expansion - Berth Four Project (the “Project”).

In our letter to the EAO, dated February 22, 2023 (attached for reference), we outlined the importance of providing Lummi, at the very least, with the same rights and opportunities as other Indigenous nations being consulted on this project. However, based on the draft Terms of Reference and the [Joint Indigenous Engagement and Partnership Plan](#) (the JIEPP), the Review Panel will “consult” Indigenous nations listed in JIEPP section 4.1, but will only “engage” Lummi. This approach is inconsistent with the Supreme Court of Canada’s decisions in *Haida* and *Desautel* and must be amended — Lummi is an “Aboriginal people(s) of Canada” to whom the Crown owes a duty to consult prior to making decisions that might adversely affect Lummi’s Aboriginal and treaty rights, irrespective of whether these rights have been “proven” or “established”.<sup>1</sup>

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<sup>1</sup> *Haida Nation v. British Columbia*, 2004 SCC 73 [“*Haida*”]; *R. v. Desautel*, 2021 SCC 17 [*Desautel*].

Lummi intervened before the Supreme Court of Canada in *Desautel* in October 2020, and intervened again in the *Impact Assessment Act* Reference in March 2023. In granting Lummi leave to intervene, the Supreme Court of Canada recognized Lummi's direct interest in these proceedings. In the *Impact Assessment Act* Reference, Lummi intervened in support of Canada, arguing that the *Impact Assessment Act* is consistent with Canada's fiduciary responsibilities under section 91(24) of the *Constitution Act, 1867*, in particular with respect to the protective element of section 91(24).

To ensure that the impact assessment for this project facilitates, rather than limits, the involvement of Indigenous peoples, we suggest the following changes to the TOR:

- Section 3 of the TOR (Mandate of the Review Panel) should be revised to confirm: 1) that the Review Panel will respect the rights of the Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, in accordance with *Desautel*, and 2) that the definition of "Indigenous nations" (currently defined as "the First Nations and Métis peoples of British Columbia") will be interpreted in accordance with *Desautel*.<sup>2</sup> The Agency and EAO will also need to revise the JIEPP to ensure that Lummi is included on the Crown Consultation List of Indigenous Nations.
- Section 3 of the TOR should be revised to include other relevant aspects of UNDRIP. In addition to the right of Indigenous peoples to participate in the decision-making process, UNDRIP also recognizes the rights of Indigenous peoples to their lands, territories, and resources (see Articles 25-27), the right to conservation and environmental protection (Article 29), the right to determine development priorities and strategies (Article 32), and the requirement for States to obtain free, prior and informed consent (Article 19), all of which are engaged in the review of this project.

Respecting the timelines set out in section 1 of the TOR, we note that the Agency has proposed an overall time limit of only 600 days. Given this time limit, it is important that the Agency and EAO begin consulting Lummi (in accordance with the duty to consult and not as an "additional" Indigenous nation) at the earliest possible opportunity.

Finally, we note that for the *Impact Assessment Act* to empower Indigenous peoples, the federal Minister of Environment must enact a regulation pursuant to section 114(e) of the Act. Lummi would appreciate: 1) information from the Agency respecting the development of any such regulations, and 2) information from both the Agency and EAO respecting steps being taken to maximize the involvement of Indigenous peoples in the assessment process while such regulations are being developed.

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<sup>2</sup> See *Desautel*, para. 31. Lummi occupied what is now British Columbia at the time of European contact and, based on *Desautel*, is part of the "First Nations and Métis peoples of British Columbia".

# DEVLIN GAILUS WATSON

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We trust that this letter is of assistance. Should you have any questions or concerns, please feel welcome to contact the writer.

Yours truly,  
DEVLIN GAILUS WATSON

<Signature Removed>

~~John W. Gailus~~

<Contact Information Removed>

<Contact Information Removed>

JWG/caj

cc. Lummi Nation

encl: Letter from John Gailus, DGW Law, to Jessie Hannigan, EAO Project Assessment Director, dated February 22, 2023.