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March 30, 2023

Impact Assessment Agency of Canada
160 Elgin Street, 22 Floor
Ottawa, ON K1A 0H3

Via Registered Mail

Attention: Impact Assessment Agency of Canada

**Re: GCT Deltaport Expansion – Berth Four
Reference Number: 81010**

As elected Chief of Tsartlip First Nation (“**Tsartlip**”), I am writing on behalf of Tsartlip regarding the Deltaport Expansion – Berth Four Project (the “**Project**”) to provide our comments and feedback related to the Draft Review Panel Terms of Reference dated February 28, 2023 (the “**Draft TOR**”) and the Draft Canada-British Columbia Cooperation Agreement on the Coordination of the Environmental and Impact Assessment Processes for the GCT Deltaport Expansion – Berth Four Project (the “**Cooperation Agreement**”).

Project Description

First, further to my letter of July 28, 2022, Tsartlip remains concerned about the lack of recognition of Tsartlip’s constitutionally protected and recognized fishing rights in the Joint Guidelines, as updated in September 2022 (the “**Joint Guidelines**”).

In that letter, I specifically requested that the Impact Assessment Agency of Canada (the “**Agency**”) and the BC Environmental Assessment Office (the “**EAO**”) amend the maps incorporated by reference into the Joint Guidelines, to ensure that the rights and areas protected by the North and South Saanich Douglas Treaties are adequately considered throughout the assessment process.

It remains Tsartlip’s position that the rights held by Tsartlip members and guaranteed by these Douglas Treaties are not adequately accounted for in the Joint Guidelines and the mapping produced therein.

I therefore reiterate my request that the Project Description, Figure 3 on page 201 of the Joint Guidelines, any other applicable maps, and the Project Description as contained within the Draft TOR be amended to consider the Douglas Treaties and areas protected therein, in recognition of the constitutionally protected Aboriginal and treaty rights held by Tsartlip members as W̱SÁNEĆ people, and that future mapping efforts undertaken as part of the assessment process be mandated to reflect areas of significance under the Douglas Treaties. This is important to ensure that the assessment by the Review Panel adequately understands the potential impacts of the Project on the rights of Tsartlip members and areas in need of protection.

The Draft TOR

Principles of Engagement and Participation & Impacts on Indigenous Interests

The rights of Indigenous peoples affected by a proposed project in their territory must be acknowledged and considered in assessing the impacts of any such development, as is reflected in sections 3.17 – 3.25 of the Draft TOR which specifically reference the *Constitution Act, 1982* at footnote 3.

However, the *Constitution Act, 1982* and the jurisprudence of Canadian courts are not the only components of law that impact how an assessment in Indigenous territory must be conducted.

The *UN Declaration on the Rights of Indigenous Peoples* (the “**UN Declaration**”) recognizes the inherent rights of Indigenous peoples in colonized countries; these rights must be considered key principles of engagement and participation in any impact assessment process, as is reflected by the Government of Canada’s decision to adopt the *UN Declaration* through the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (the “**UNDRIP Act**”) and the Province of British Columbia’s enactment of the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 (“**DRIPPA**”), making the rights enshrined therein enforceable principles of Canadian law.

The rights recognized by the UN Declaration, DRIPPA, and the UNDRIP Act are therefore foundational principles to be applied by the Review Panel during the assessment process, and should be reflected as such by the explicit addition of the UN Declaration, DRIPPA, and the UNDRIP Act as “Principles of Engagement and Participation.”

Similarly, the rights enshrined by the UN Declaration, DRIPPA, and the UNDRIP Act are rights that must be considered in the Draft TOR section “Impacts on Indigenous Interests.”

Specifically, section 3.19(c) of the Draft TOR states that the Review Panel must invite Indigenous Nations to provide information about the potential impacts of the Project on their

interests, including impacts on Aboriginal and Treaty rights. This section should be amended to specifically recognize the rights recognized by the UN Declaration, DRIPPA, and the UNDRIP Act.

Review Panel Appointment

The Project, if it proceeds, will be built on and through Indigenous traditional territories, including those of Tsartlip and the other WSÁNEĆ Nations that hold established rights in areas affected by the proposed Project. It will have impacts on the rights of many Indigenous peoples, who will experience those impacts in ways that are different from the impacts that will be experienced by settlers in the affected territories – rights that go to the core of Indigenous peoples' identities in ways that settlers cannot adequately understand in assessing the impact of the proposed Project.

It is essential that the perspectives of Indigenous peoples affected by the Project can be understood adequately by the Review Panel – that the Panel can interpret and understand the gravity of the Project's potential impacts on the rights of affected Indigenous peoples, and how such impacts will affect not only the exercise of those rights themselves, but have corresponding impacts on Indigenous communities and their health.

This cannot happen if the Review Panel is constituted solely of Panel Members of settler origin.

We therefore strongly recommend that the Draft TOR specifically mandate that the Review Panel will include a qualified Panel Member who is Indigenous, and that the Review Panel will strive specifically to appoint a Panel Member from one of the many affected Indigenous Nations.

Only if such a Panel Member cannot be found after reasonable sincere efforts should the Review Panel be permitted to stray from this requirement. In that case, the Draft TOR should require that the Review Panel shall specifically hire Indigenous specialist advisors under Part 6 of the Draft TOR to advise the Review Panel on the impacts of the proposed Project on Indigenous rights, health and interests, and to provide guidance to the Review Panel in understanding and responding to the concerns raised by participating Indigenous Nations.

The Cooperation Agreement

Preamble & Definitions

As described above, the Government of Canada and the Province of British Columbia have each committed to recognizing and respecting the rights of Indigenous peoples enshrined in the UN Declaration. As a foundational principle, this should be incorporated into the Preamble of the

Cooperation Agreement to guide its interpretation and establish the importance of those rights in guiding Crown actions and decisions thereunder.

Similarly, the definition of “Indigenous interests” should include not only those rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, but also explicitly include those rights recognized by the UN Declaration, DRIPPA, and the UNDRIP Act.

Engagement and Consultation

Section 6.1 of the Cooperation Agreement commits both Parties to engaging and consulting with Indigenous Nations, and recognizes that the Agreement does not supersede “the Crown’s duty to consult, or the CEOs’ or provincial Ministers’ obligations related to Consensus-seeking under the B.C. Act.” In addition to not superseding the Crown’s duty to consult, the Cooperation Agreement should also recognize that nothing contained therein supersedes the rights of Indigenous peoples as recognized by the UN Declaration, DRIPPA, and the UNDRIP Act, including the right of Indigenous peoples to exercise – or withhold – free, prior and informed consent to a development within their territory.

Further, section 6.1 states that the “Crown’s work with Indigenous nations may include co-drafting key assessment documents... where possible” (emphasis added). This does not create an enforceable obligation. We respectfully request that the section be amended to state that the Crown’s work shall include co-drafting key assessment documents relating to each Nations’ interests.

Coordination of the Assessment Process: Decision-Making Phase

Section 7.34 of the Cooperation Agreement notes that provincial Ministers must offer to meet if the CEO’s recommendation is contrary to the consent or lack of consent of participating Indigenous Nations. Section 7.35 then states that once such decisions are rendered – seemingly regardless of such consent or lack thereof - the Parties will continue to engage with Indigenous Nations to inform them of the decisions and provide them with information about the next steps. This excludes Indigenous Nations from the actual decision-making process.

While these sections do not explicitly discuss the ultimate effect of a decision that is contrary to the consent position of an affected Indigenous Nation, Tsartlip wishes to remind the governments of Canada and British Columbia that Article 32.2 of the UN Declaration states that:

*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to **obtain** their free and informed consent prior to the approval of any project affecting their lands or territories and other*

resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. (emphasis added).

This Article is adopted, and therefore enforceable, in both federal and provincial legislation that incorporated the UN Declaration into Canadian and provincial law. This obligation – to respect the consent or the withholding of consent by an Indigenous Nation when considering a project affecting its territory and resources – requires the inclusion of affected Indigenous Nations in the actual decision-making regarding that project, rather than just consultation and accommodation. The Article requires obtaining those Nations' consent, not merely considering it. This should be reflected in the Cooperation Agreement.

Conclusion

Thank you for considering Tsartlip's feedback on the Draft TOR and Cooperation Agreement. As holders of recognized and potentially-affected Indigenous rights, including and in addition to the Aboriginal and treaty rights recognized and affirmed by the *Constitution Act, 1982*, Tsartlip remains focused on the explicit recognition of those rights throughout the assessment process, and their consideration as foundational principles guiding the work of the Review Panel, the Government of Canada, and the Province of British Columbia.

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<Original signed by>

Don Tom, Chief of Tsartlip First Nation