



LUMMI INDIAN BUSINESS COUNCIL

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DEPARTMENT _____ DIRECT NO. _____

July 17, 2019

The Honourable Chrystia Freeland
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The Honourable Chrystia Freeland

The Lummi Business Council of the Lummi Nation presents its compliments to her Excellency the Minister of Foreign Affairs of Canada and has the honor to refer to the United Nations Declaration on the Rights of Indigenous People (UNDRIP), to customary principles of international law, and to the waters shared between the Canadian province of British Columbia and the Usual and Customary territory of the Lummi Nation.

The Lummi Nation is a self-governing Nation situated within the United States of America, with Usual and Accustomed territorial waters in the Salish Sea that includes but is not limited to the Strait of Juan de Fuca, the Haro Strait and Rosario Strait northward to Boundary Bay and the northern Strait of Georgia. From the mean high water line at the northern municipal boundary of Blaine, Washington westward to the midpoint of the Georgia Strait, and southward along the midpoint of Haro Strait and the midpoint of the Strait of Juan de Fuca the Usual and Accustomed territorial waters of the Lummi Nation directly abut Canadian territorial waters. Accordingly, activities undertaken in Canadian territory in or near these waters affect the territorial waters and associated inherent rights and treaty rights of the Lummi Nation.

The Lummi Nation, through its designated authorities (the Lummi Indian Business Council), has the sovereign responsibility under the Constitution and By-Laws of the Lummi Nation and under international law to protect its people, respect, protect and promote their individual and collective rights, and maintain the integrity of their culture, natural resources and environment, including the cultural and natural resources of the tribe's Usual and Accustomed territorial waters. Salmon, qwe'lhol'mechen (resident Salish Sea killer whales) and the overall health and vitality of the Salish Sea are inextricably bound to Lummi Nation spirituality, culture, economies, general welfare, Sovereignty and Treaty rights.

Having regard to UNDRIP, particularly Articles 3, 4, 19, 25, 29, and 32(2), to customary international law including the prohibition against transboundary environmental harm, and to established principles of international human rights, the Lummi Nation wishes to notify Canada as follows:

The Lummi Nation considers a dispute to currently exist between itself and Canada regarding the application of international law, including UNDRIP and the aforementioned prohibition against transboundary environmental harm, and consistent with relevant principles of international law indicates its readiness to resolve that dispute through negotiation or other peaceful means.

The Lummi Nation considers this dispute to exist with respect to the application by Canada of UNDRIP, which serves as a comprehensive international instrument on indigenous peoples' rights, setting forth the inherent rights of indigenous peoples and providing minimum standards to ensure these rights are respected. Under Article 25 of UNDRIP, indigenous peoples have the "right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas" for both themselves and future generations. Additionally, Article 29 specifies that indigenous peoples have the "right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources." With respect to these Articles, the Lummi Nation considers that Canada has not acted sufficiently and in a manner that is consistent with respecting these rights in the assessment of projects that will result in unavoidable, irreversible and unacceptable transboundary harm to the Lummi Nation's Usual and Accustomed territorial waters in the Salish Sea.

Projects such as the Trans Mountain Pipeline Expansion Project and Roberts Bank Terminal Two Project and activities associated with their construction and operation will cause substantial harm to the environment and resources of the Lummi Nation in the Salish Sea contrary to the collective rights of the Nation and the individual rights of its people and in contravention of international law.

For example, increased traffic in shipping lanes will impact usual and accustomed fishing areas. These impacts are compounded by the elevated risk of devastating environmental damage caused by oil spills from either the associated terminals or tankers traveling to or from the terminals. In addition, the assessment processes evaluate projects in isolation from each other and fail to consider the collective, cumulative impacts of all existing or proposed terminals and associated developments on the Usual and Accustomed territory waters of the Lummi Nation. Furthermore, these evaluative processes utilize an analytical framework that does not incorporate indigenous traditional ecological knowledge in identifying and assessing impacts on Native Nations.

In addition to direct as well as indirect impacts on tribal fishing rights, these projects pose an unacceptable risk to the Southern Resident Killer Whales ("orcas") which comprise an essential element of Lummi cultural patrimony, cultural identity, and spiritual practices. For the Lummi people, the orcas of the Salish Sea are "qwe lhol mechen"—the people that live under the water. The lives and the fate of the Lummi and the orca have been bound since time immemorial, and the Nation has a Xa xalh Xechnging (a "sacred obligation") to protect and safeguard the Southern Resident Killer Whale population. The heightened risk of ship strikes, noise pollution and oil spills threaten this population with extinction. In the view of the Lummi Nation, this threat constitutes a manifest and serious violation of both article 25 and article 29 of UNDRIP.

The Lummi Nation further considers that Canada has failed to act in a manner consistent with articles 19 and 32(2) of UNDRIP. These articles state that States shall obtain the free, prior, and informed consent of indigenous peoples related to legislative or administrative matters and projects, respectively, that may impact indigenous peoples or their lands, territories, or resources. In lieu of communicating directly with the Lummi regarding the impacts of the Trans Mountain Expansion and the Roberts Bank Two projects on Lummi waters, resources and culture, Canada has solicited input on its decision through domestic administrative procedures undertaken by its National Energy Board and the Canadian Environmental Assessment Agency. The Lummi Nation communicated its grave concerns with these projects through public statements and written arguments submitted in the NEB and CEAA processes. Regrettably, and notwithstanding its commitments under UNDRIP to engage with indigenous Nations on a Sovereign to Sovereign basis, Canada has thus far dismissed the Lummi Nation's concerns with respect to the Trans Mountain Expansion proposal, and shows no sign of acting differently with respect to the Roberts Bank Terminal Two proposal.

For the foregoing reasons, the Lummi Nation also considers Canada's ongoing actions to be in contravention of customary international law. Canada is under a customary law obligation to prevent transboundary environmental harm. This obligation dates back to the *Trail Smelter Arbitration*, which held Canada responsible for air pollution affecting the territory of the United States at distances more removed from Canada than much of the Lummi waters affected by Trans Mountain or Roberts Bank. This principle has been reaffirmed in numerous international instruments and decisions starting with the Stockholm Declaration in 1972, which acknowledged in Principle 21 that States have the sovereign right to exploit their own resources, but in so doing have "the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."¹

The prohibition against transboundary harm was again reaffirmed in Principle 2 of the Rio Declaration on Environment and Development, acknowledging that states have both the sovereign right to exploit their resources and the responsibility to ensure that they do not do so in a way that causes transboundary environmental harm.² The International Court of Justice has affirmed that "the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now a part of the corpus on international law relating to the environment."³

More recently, the Inter-American Court of Human Rights (IACtHR) issued a 2017 Advisory Opinion on Human Rights and the Environment, which, among other things, recognized States' obligations to prevent significant transboundary harm.⁴ The Lummi Nation recognizes that Canada is not party to the American Convention on Human Rights, but considers that the opinion affirms the relationship between environmental protection and the realization of other human

¹ Stockholm Declaration

² Rio Declaration

³ *Legal Opinion on the Legality of Nuclear Weapons*, para. 30

⁴ IACtHR advisory opinion

rights, including those to which Canada has committed under numerous other international human rights treaties.

In the view of the Lummi Nation, the Canadian government has violated its duty and threatens severe damage to the environment, natural resources and human rights on both sides of the U.S.-Canada border including in the Salish Sea.

The Lummi Nation has a duty to preserve the environment and cultural heritage of its own people. In accordance with articles 3 and 4 of the UNDRIP on self-determination and self-government, the Lummi Nation is here acting as a sovereign nation to protect the rights of its citizens, including their right to a healthy environment. Both its own constitution and applicable international law obligate the Lummi Nation, through the Lummi Business Council and other tribal mechanisms, to protect and promote the full and effective enjoyment of these rights among the Lummi People. The present Note is communicated in furtherance of meeting that obligation. The Lummi Nation believes that the aforementioned projects threaten these rights given the direct, indirect, and cumulative impacts to the Salish Sea.

In view of these concerns, the Lummi Nation respects and accepts Canada's commitment to good faith, rule of law, democracy, equality, non-discrimination and respect for human rights in its relationships with indigenous peoples. The Lummi welcomes the unilateral undertaking, set forth in the *Principles respecting the Government of Canada's relationship with Indigenous Peoples*, to conduct such relations Nation-to-Nation, on the basis of respect for self-government and self-determination. And it shares and emphasizes the Government of Canada's recognition that any such meaningful engagement must aim to secure the free prior and informed consent of indigenous peoples when Canada proposes to take actions which affect them and their rights, including their lands, territories and resources

For the foregoing reasons, the Lummi Nation considers that a dispute exists between our Nations with respect to these matters.

In consequence thereof, the Lummi Nation respectfully requests that Canada formally acknowledge its responsibility under international law.

Additionally, the Lummi Nation respectfully requests that Canada stop further actions that threaten transboundary harm until the consultations are complete.

In consequence thereof, the Lummi Nation requests Canada to enter into formal negotiations to achieve a peaceful settlement of this dispute.

Hy'shqe,



Lawrence Solomon
Secretary for the Lummi Nation