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Court File No. _____

FEDERAL COURT

BETWEEN:

LUMMI NATION

Applicant

AND:

**ATTORNEY GENERAL OF CANADA,
MINISTER OF THE ENVIRONMENT
VANCOUVER FRASER PORT AUTHORITY**

Respondents

APPLICATION UNDER *FEDERAL COURTS ACT* SECTION 18.1

Notice of Application

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the [Federal Courts Rules](#) and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the [*Federal Courts Rules*](#), information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date _____

Issued by: *(Registry Officer)*

Address of local office:

Pacific Centre
P.O. Box 10065
701 West Georgia Street
Vancouver, BC
V7Y 1B6

TO: Attorney General of Canada
284 Wellington Street,
Ottawa, ON K1A 0H8

AND TO: Minister of the Environment
Les Terrasses de la Chaudiere,
10 Wellington Street, 28th Floor,
Gatineau, QC K1A 0H3

AND TO: Vancouver Fraser Port Authority
999 Canada Place,
Vancouver, BC V6C 3T4

APPLICATION:

1. This is an application for judicial review in respect of the Governor in Council's decision (the "Decision"), confirmed by way of Order in Council P.C. 2023-0330 issued April 19, 2023.
2. The Decision, which was based on the recommendation of the Minister of the Environment (the "Minister") and made under subsection 52(4) of the *Canadian Environmental Assessment Act, 2012* ("CEAA 2012"), states that the significant adverse environmental effects that the Roberts Bank Terminal 2 Project (the "Project") is likely to cause, are justified in the circumstances, and that consultation in respect of the Project has been fulfilled.
3. The Applicant was informed of the Decision on April 20, 2023.

THE APPLICANT MAKES APPLICATION FOR:

1. An order in the nature of *certiorari* quashing the Decision and remitting the matter back to the Governor in Council and the Minister for redetermination in accordance with this Court's reasons;
2. A declaration that the Government of Canada ("Canada") has a duty to consult owed to Lummi Nation ("Lummi") with respect to the Decision;
3. A declaration that Canada failed to discharge its duty to consult and accommodate Lummi with regard to the potential adverse impacts of the Decision on Lummi's Aboriginal rights and title;
4. An order for costs of this application; and
5. Such further and other relief as this Court may deem appropriate and just.

THE GROUNDS FOR THE APPLICATION ARE:

1. Lummi is:
 - a. a federally recognized Native American tribe in the United States, with a reservation located in Washington State, approximately 30 kilometres from the US-Canada border and 40 kilometres from the Project; and
 - b. an Aboriginal people of Canada within the meaning of s. 35 of the *Constitution Act, 1982*.

2. Lummi's traditional territory includes the Point Roberts peninsula and the surrounding marine areas, where the Lummi have harvested and fished from time immemorial for Fraser River salmon and other fish species.
3. Lummi holds and asserts Aboriginal title and rights in and around the Point Roberts peninsula area, including in respect of the lands and water that will be directly or indirectly affected by the proposed Project.

The Roberts Bank Terminal 2 Project

4. The Vancouver Fraser Port Authority (the "Port Authority") is the federal agency responsible for the lands and waters that make up the Port of Vancouver. The Port Authority proposes to construct and operate the Project — a new three-berth marine container terminal at Roberts Bank in Delta, British Columbia.
5. The Project will involve the construction and operation of the marine terminal, a widened causeway for road and rail infrastructure, and an expanded tug basin. The Project would provide an additional 2.4 million twenty-foot equivalent units (TEU) of container capacity per year at Roberts Bank and would result in increased marine shipping activity in the Project area.
6. The Project and associated marine shipping lanes are located within Lummi traditional territory.

The Assessment Process

7. In September 2013, the Port Authority filed a Project Description with the Canadian Environmental Assessment Agency (now the Impact Assessment Agency; the "Agency"). In November 2013, the Agency determined that the Project required a federal environmental assessment pursuant to *CEAA 2012*, and in January 2014, the Minister of the Environment referred the federal environmental assessment of the Project to an independent review panel (the "Review Panel").
8. The Review Panel was established in May 2016 and submitted its report (the "Panel Report") to the former Minister of the Environment for consideration by the Government of Canada ("Canada") in March 2020. The Review Panel concluded that the Project would likely cause significant adverse environmental effects and adverse effects on several Indigenous Nations whose territories overlap the Project area.

9. In August 2020, the former Minister of the Environment requested additional information from the Port Authority, which the Port Authority provided in September 2021. In January 2023, the Minister determined that the Port Authority had sufficiently responded to the information request.
10. In accordance with subsection 52(1) of *CEAA 2012*, after considering the Panel Report and additional supporting information, the Minister determined that the Project is likely to cause significant adverse environmental effects, as they are defined in section 5 of *CEAA 2012*. In accordance with subsection 52(2) of *CEAA 2012*, the Minister referred the matter of whether those effects are justified in the circumstances to the Governor in Council.
11. In accordance with subsection 52(4) of *CEAA 2012*, the Governor in Council determined that the significant adverse environmental effects that the Project is likely to cause are justified in the circumstances.
12. On April 19, 2023, the Governor in Council confirmed its determination by way of Order in Council 2023-0330. The Governor in Council also confirmed that it was satisfied that the Crown consultation process with Indigenous Nations is consistent with the honour of the Crown and that the potential impacts to Aboriginal rights have been appropriately accommodated.
13. On April 20, 2023, the Minister issued a decision statement under section 54 of *CEAA 2012*, in which he confirmed his determination that the Project is likely to cause significant adverse environmental effects. The Minister also confirmed that he is satisfied that the Crown consultation process with Indigenous Nations is consistent with the honour of the Crown and, with the conditions that the Minister has established, that the concerns and interests of Indigenous Nations have been appropriately accommodated.

Lummi's Concerns with the Project

14. Lummi has a number of concerns with the Project and the assessment process, including with respect the impacts to Lummi's unextinguished Aboriginal rights in Canada associated with the construction and operation of the terminal. Lummi's concerns include the irreparable impacts the terminal will cause to Lummi's usual and accustomed marine waters and the Fraser River estuary. The proposed construction and ongoing use of the new terminal will bring with it increased pollution and vessel traffic threatening multiple already endangered species and contribute to the cumulative effects of industrial development within Lummi's traditional territory.

15. Canada was advised as early as September 2016 of Lummi's interests in the Project area. None of the parties had the benefit of the Supreme Court of Canada's *R. v. Desautel*, 2021 SCC 17 [*Desautel*] decision until April, 2021, a case on which Lummi had intervened, at which time it should have been clear to Canada that Lummi may be an "Aboriginal peoples of Canada" to whom the Crown owes a duty to consult.
16. On October 29, 2021, Lummi formally sent a letter to the Honourable Steven Guilbeault, Minister of Environment and Climate Change, asking Canada to meaningfully consult Lummi on the impacts of the Project to Lummi's s. 35 rights, and requesting capacity funding to facilitate Lummi's participation in the consultation process. Lummi did not receive a response to this letter.
17. On January 14, 2022, Lummi sent a follow-up letter to Minister Guilbeault requesting consultation in respect of the Project. The Minister responded on February 10, 2022, and directed the Agency to meet with Lummi to discuss Lummi's concerns. After this preliminary meeting, which took place on March 28, 2023, Lummi submitted a preliminary overview of Lummi's strength of claim to the Project area (the "Strength of Claim Submission"). The Agency did not respond to the Strength of Claim Submission or decide to engage in meaningful consultation.

The Decision is Incorrect and Unreasonable

18. The Decision is incorrect and unreasonable because Canada failed to fulfil its duty to consult to Lummi.
19. In particular, Canada:
 - a. Determined that the duty to consult was not triggered and therefore refused to consult Lummi as an Aboriginal people of Canada;
 - b. Improperly determined that because environmental assessment processes are not rights determination processes, Canada was not required to formally consult and, if necessary, accommodate Lummi;
 - c. Improperly limited the scope of discussions with Lummi to exclude the impacts from the Project on Lummi's Aboriginal rights and title in Canada; and

d. Failed to meaningfully consider, engage with, or respond to the concerns raised by Lummi in respect of Lummi's Aboriginal rights in Canada.

20. The Minister and Governor in Council also failed to evaluate the adequacy of consultation in light of *Desautel* and erred in law in finding that consultation had been adequate, when in fact no meaningful consultation had taken place. As a result, the Minister and Governor in Council failed to evaluate the impacts of the Project on Lummi's terrestrial and marine Aboriginal rights in Canada.

21. The absence of meaningful consultation with Lummi also resulted in deficiencies with respect to the significance and justification determinations by Canada.

22. The Minister also failed to adequately assess the environmental effects set out under subsection 5(1) of *CEAA 2012*, including impacts on Lummi's physical and cultural heritage in Canada and sites in Canada that are of historical and archaeological significance to Lummi. As a result, the Governor in Council failed to consider these effects in assessing whether the significant adverse environmental effects are justified in the circumstances.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. The Affidavit of Chairman Anthony Hillaire; and
2. Such further and other affidavits and materials as counsel may advise.

THE APPLICANT REQUESTS THE MINISTER OF ENVIRONMENT TO SEND A CERTIFIED COPY OF THE FOLLOWING MATERIAL THAT IS NOT IN THE POSSESSION OF THE APPLICANT, BUT IS IN THE POSSESSION OF THE MINISTER OF ENVIRONMENT, TO THE APPLICANT AND TO THE REGISTRY:

1. All materials considered or created by the Minister, or by any person or entity acting on behalf of the Minister, and including all documentation and communication, pertaining to or relevant to the Decision herein.

Dated: May 18, 2023

A handwritten signature in black ink, appearing to read 'J. Gailus', is written over a horizontal line.

John W. Gailus
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Solicitor for the Applicant