



Leq'a'mel First Nation  
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October 9, 2019

British Columbia Utilities Commission  
Suite 140, 900 Howe Street  
Vancouver, BC V6Z 2N3

**Attention: Patrick Wruck,**  
Commission Secretary and Manager, Regulatory Services

Dear Mr. Wruck:

**Re: British Columbia Utilities Commission ("BCUC") - Indigenous Utilities Regulation Inquiry –  
Project No. 1598998 – Leq'a'mel First Nation– Final Argument**

Pursuant to Commission Order G-214-19, of which the filing date was extended for Leq'a'mel First Nation to Wednesday October 9, 2019, please find Leq'a'mel First Nation's Final Argument in respect of the above proceeding.

Yours truly,

Ellen Torng  
**General Manager**

Before the British Columbia Utilities Commission

Indigenous Utilities Inquiry

Order G-62-19

Project No. 1598998

Final Argument

Leq'á:mel First Nation

October 9, 2019

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## 1. Introduction

Leq'á:mel First Nation is appreciative of the process the Commission has conducted to date and of its efforts to involve all First Nations towards reaching its mandate as set out in Order In Council (OIC) No. 108.

We wish to first provide a description of the Leq'á:mel First Nation, its lands and activities, its governance structure and its involvement in the BC Treaty process. We believe this information will provide important context to the responses we have provided herein.

## 2. Leq'á:mel First Nation Overview

Leq'á:mel First Nation, formerly known as Lakahahmen First Nation, is located 22 kilometres east of Mission and has approximately 420 members of which are governed by Chief and Council through a Custom Election Code<sup>1</sup>. The Custom Election Code enables a First Nation to be removed from the section of the Indian Act that addresses elections for Chief and Council members. Once implemented, governance respecting elections resides with the Band.

Leq'á:mel First Nation is an original signatory to the Stó:lō Declaration (1977) which led to the creation of Stó:lō Nation, a tribal organization which currently has eleven members, including Leq'á:mel First Nation.

Leq'á:mel holds ten Indian Reserves; Yaalstick IR #1, Lackaway IR #2, Lakway Cemetery IR #3, Papekwatchin IR #4, Aylechootlook IR #5, Holachten IR #8, Zaitscullachan IR #9, Skweahm IR #10, Lakahahmen IR #11 and Sumas Cemetery IR #12. Leq'á:mel utilizes three of these reserves for residential use, two as cemeteries and the other five are variously under certificates of possession to members, leased for agricultural use, or set aside for future economic development.

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<sup>1</sup> [http://leqamel.ca/wp-content/uploads/2018/11/2018-05-28-Leqamel-Governance-Policy-APPROVED\\_0\\_Part1.pdf](http://leqamel.ca/wp-content/uploads/2018/11/2018-05-28-Leqamel-Governance-Policy-APPROVED_0_Part1.pdf)

Leq'á:mel First Nation is involved in many partnerships such as, the Advocates of Nicomen Ecological Watershed (ANEW) and the Fraser River Scientific Development and Selective Harvest Partnership (FRSD&SHP). Leq'á:mel First Nation was also one of many opponents against the proposed Sumas Energy 2 power project to be located in the Fraser Valley and in our traditional territory. Leq'á:mel First Nation believes that all of us must create an understanding of the environment and join as one in order to defeat the problems that we face today with pollution in our environment and the adverse effects of climate change.

“As First Nations we are unique to begin with, our cultures are practices at varying degrees (some just learning, some advanced in their knowledge). We are remote in terms of accessing services through Chilliwack, Mission, or Vancouver, so our needs are a bit more unique. We have no access to transit so we pretty much need services and programs delivered within our community. We need to build capacity within our community in order to provide a higher level of service and programs to our members.”<sup>2</sup>

### 3. BC Treaty Process

Leq'á:mel First Nation is a member of the Stó:lō Xwexwilmexw Treaty Association (“SXTA”) that is negotiating in the B.C. treaty process on behalf of 6 of the 11 bands in Stó:lō Nation.

Leq'á:mel is in Stage 5 of the treaty process - negotiations to finalize a treaty. As a Nation, Leq'á:mel is focused on its future and building a sustainable economy for its community through its right of self-determination and self-government as protected under section 35 of the Constitution Act 1982<sup>3</sup>. The following is from the Province of British Columbia’s website in the document titled “Draft Principles that Guide the Province of British Columbia’s Relationship with Indigenous peoples”<sup>4</sup> section 4:

***4. The Government of Canada recognizes that Indigenous self-government is part of Canada’s evolving system of cooperative federalism and distinct orders of government.***

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<sup>2</sup> <http://leqamel.ca/discover-leqamel/about-leqamel/>

<sup>3</sup> Part II – Rights of the Aboriginal Peoples of Canada. <https://laws-lois.justice.gc.ca/eng/const/page-16.html#h-52>

<sup>4</sup> [https://www2.gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft\\_principles.pdf](https://www2.gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft_principles.pdf).

*This Principle affirms the inherent right of self-government as an existing Aboriginal right within section 35. Recognition of the inherent jurisdiction and legal orders of Indigenous nations is therefore the starting point of discussions aimed at interactions between federal, provincial, territorial, and Indigenous jurisdictions and laws.*

*As informed by the UN Declaration, Indigenous peoples have a unique connection to and constitutionally protected interest in their lands, including decision-making, governance, jurisdiction, legal traditions, and fiscal relations associated with those lands.*

*Government-to-government relationships, including treaty relationships, therefore include:*

- a. developing mechanisms and designing processes which recognize that Indigenous peoples are foundational to Canada's constitutional framework;*
- b. involving Indigenous peoples in the effective decision-making and governance of our shared home;*
- c. putting in place effective mechanisms to support the transition away from colonial systems of administration and governance; and*
- d. ensuring, based on recognition of rights, the space for the operation of Indigenous jurisdictions and laws.*

## 4. Land Code

### FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT

The Framework Agreement on First Nation Land Management (Framework Agreement) is a government-to-government agreement implemented in 1996 that enables First Nations to opt-out of 40 provisions of the *Indian Act* respecting the management of land, environment and resources<sup>5</sup> upon the development and enactment of a Land Code. Once enacted the Land Code grants First Nations the authority to take over the governance and management control of their First Nation Land and natural resources. Leq'á:mel First Nation's Land Code came into force on February 1, 2010.

### TAKING CONTROL OF LAND GOVERNANCE

The specific steps to developing the Land Code are set out in the Framework Agreement:

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<sup>5</sup> First Nations and Management. <https://www.aadnc-aandc.gc.ca/eng/1327090675492/1327090738973>

The Land Code, once approved by the community, becomes the basic land law of the First Nation. Approximately 40 sections of the Indian Act no longer apply, and Canada is no longer involved in the land governance of the First Nation's land and resources. The Land Code does not have to be approved by the Minister or any federal department.

In accordance with the Framework Agreement, the Land Code is drafted by each First Nation and will make provision for the following<sup>6</sup>:

- (a) Identification of the lands to be governed by the First Nation under its Land Code, called First Nation Land (means reserve land or lands set aside in the Yukon that are described in a Land Code);
- (b) General rules and procedures for the use and occupation of these lands by First Nation members and others;
- (c) Financial accountability for revenues from the lands (except oil and gas revenues, which continue under the Indian Oil and Gas Act);
- (d) Procedures for making and publishing First Nation laws;
- (e) Conflict of interest rules;
- (f) Community process to develop rules and procedures applicable to land on the breakdown of a marriage;
- (g) Dispute resolution process;
- (h) Procedures by which the First Nation can grant interests in land or acquire lands for community purposes;
- (i) Delegation of certain land management responsibilities;
- (j) Procedure for amending the Land Code; and
- (k) Any other matter respecting the governance of First Nation Land and natural resources.

The benefits of the Land Code are the greater potential for economic development due to the transparency and enforceability of regulations and laws within the Code that enables First Nations to deal directly with municipalities and industry on matters related to the use of their

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<sup>6</sup> Section 6 of the First Nation Land Management Act. <https://laws-lois.justice.gc.ca/eng/acts/f-11.8/FullText.html>

land such as zoning , subdivision and use. This autonomy related to land is a step closer to self-government and self determination.

In addition to the Land Code, Leq'a'mel has its custom environmental plan; its governance code and its own Financial Act that meets regulatory compliance. It also has a Taxation law in which it collects taxes from Non-First Nations (IE Property Tax) and has just applied for the First Nation GST accounting.

## 5. Economic Interests

Leq'a'mel First Nation through its development company, Leq'a'mel Development Corporation, owns and operates a number of businesses including the following:

- a Gas Station, Store and Restaurant just off the Lougheed Highway, near Deroche,
- three mobile trailer parks,
- a transfer station/landfill and
- 131 acres of land purchased in July 2015 for agri-tourism and other opportunities.

The administration of these activities is carried out under the Land Code, where applicable, and through the establishment of companies under the Leq'a'mel Development Corporation.

Leq'a'mel First Nation is also examining the purchase of additional lands that would be used for the development of housing, commercial activities and light industrial. This potential venture is part of Leq'a'mel's larger plan for economic growth that will be associated with the successful culmination of a Treaty. With these new lands and associated economic benefits guided by a transparent and enforceable governance structure, Leq'a'mel's aim is to generate a stream of funds for current and future Leq'a'mel members. This revenue stream would significantly contribute to a number of services that Leq'a'mel currently provides to its community.

One of the mobile trailer parks consisting of approximately 150 tenants is provided with electricity from BC Hydro. Of note, Leq'a'mel First Nation constructed and paid for the initial

distribution components of this electrical system in 1983-84 and currently operates and maintains these assets at its cost. BC Hydro provides electrical power to Leq'á:mel First Nation lands where it is then distributed on Leq'á:mel First Nation owned electrical lines and ultimately sold to the residential tenants through BC Hydro owned meters. BC Hydro collects all monies from this activity; Leq'á:mel First Nation receives no compensation for the use and maintenance of its electrical facilities.

Leq'á:mel First Nation is examining the prospect of assuming the metering and billing function in part as a means to recover its sunk cost and as avenue to generate revenue for its community. Should Leq'á:mel First Nation be successful in this initiative, the electrical infrastructure and its operation would be an "indigenous utility" pursuant to Commission Order No. 108 within the definition "meaning a public utility that is owned or operated in full or in part by an indigenous nation."

## 6. Inquiry Scope Questions

### A. Nature of Ownership and Operation of indigenous utilities

In Exhibit A-5, additional scope questions were provided by the Commission, which Leq'á:mel First Nation wishes to address.

*"Respecting the ownership and operation of indigenous utilities".*

It is clear from earlier submissions that there are not many examples of indigenous utilities or a clear picture of how such utilities would be administratively structured within a First Nation. Leq'á:mel currently manages its business development projects through Leq'a:mel Development Corporation, which it controls.. Individual projects are more often operated through a subsidiary of the parent corporation. In essence, projects are managed through business units that are ultimate tied to its development corporation. In this respect, the Land Code and its pertinent conditions can apply to various undertakings and be supplemented by additional rules or regulations specific to that undertaking. Leq'á:mel is of the view that this arrangement provides the appropriate governance and legal structure as well as the business clarity that a partner, tenant or customer requires.

On the question of ownership, Leq'á:mel First Nation is of the position that "control" and not ownership is the deciding factor when determining the ownership and operation of an indigenous utility as the ownership can be easily structured to have a subordinated and non influencing role. Further, Leq'á:mel First Nation governance structure can easily applied and tailored to a specific activity carried out by a Leqamel controlled subsidiary; this is Leq'á:mel First Nation's adopted approach for management and operating efficiency.

There has been some discussion on Limited Partnership structures. These structures are partnerships and as such there is no legal entity the partners own. A Limited Partnership is managed solely by its General Partner; should its limited partners engage in management of the Limited Partnership such partners risk losing their limited liability status. The result is that limited partners fall into a passive role.

If Leq'á:mel First Nation were to structure a Limited Partnership to form a utility or other line of business it would assume the General Partner position (possibly in the form of a corporation to limit liability) to ensure it had control of any undertaking and its subsequent operation. The point being made is that Leq'á:mel would control the partnership notwithstanding its ownership structure. Furthermore, Leq'á:mel First Nation governance structure and laws can be easily applied and enforced in partnership structures.

#### **B. the types of services provided by Indigenous utilities,**

Leq'á:mel First Nation has existing water, sewer and energy infrastructure in place and operating on its land. These are essential services that are required to make lands suitable for a number of uses, including residential, commercial and other. Additional services include vegetation control, road maintenance and snow removal.

As stated above Leq'á:mel First Nation plans to develop its reserve lands, land that it purchases as well as land acquired through the Treaty process. This development will not be immediate but will occur over many years resulting in ongoing benefits to Leq'á:mel community.

To derive these benefits, Leq'á:mel will have to provide certain infrastructure that may extend beyond basic utilities to roads, fire safety and other. These infrastructure additions will be paid, possibly, through a combination of upfront fees upon tenancy and ongoing user fees from services that have associated variable costs such as for electricity and natural gas. The infrastructure improvements to the land could be bundled or segregated from a service perspective and rates would be set accordingly.

It is important to note that Leq'á:mel does not have a defined picture of what utilities will be constructed on its lands, what forms of energy will be provided and distributed and how rates will be set to recover the related costs. The setting of rates will be challenging as large upfront capital investments must occur before cost recovery begins. The timing and methods for such cost recovery are unknown and in this respect sets the characteristics and services offered by indigenous utilities apart from the large established utilities in the province.

As mentioned in Section 5 above, Leq'á:mel First Nation is exploring the prospect of purchasing electricity from BC Hydro at its property boundary and reselling this electricity to the existing mobile trailer tenants. The resultant arrangement would give rise to a utility in which the energy source would be purchased electricity, the customers would be both band and non-band members and the service area would be confined, initially, to one of Leq'á:mel First Nation reserves. It's probable that future utilities will have different underlying characteristics from the one just described, however, there is no certainty as to what those characteristics will be.

Also, there may be instances where conditions warrant construction of a separate stand-alone utility that provides its own source of power if the underlying costs of such a utility make economic sense. For example, some First Nations due to geographic location may have comparative advantages related to solar power, geothermal energy or abundant underground water that could be used for geothermal heat pump energy. Spirit Bay Utilities would, in

part, be an example of this case in that a portion of its energy source would be from low level ocean heat.

Considerable discussion, through submissions and information responses, has been framed by the FortisBC and BC Hydro utility structure. These entities are large, established, and have readily available access to capital in order to raise funds for ongoing and new investments. Their captive markets are large and diverse and offer a low degree of risk to their investors. These attributes can be viewed as positive benefits to the utility model. There is little comparison, however, between these existing utilities and indigenous utilities, especially during the early stages of entry by indigenous utilities into the utility field – which we maintain is unclear and speculative. More importantly, indigenous utilities carry considerably more risk than the aforementioned existing utilities and regulation is not condition that would lower risk (provide a benefit) for utility operations on reserve lands and conversely, could increase risk by providing uncertainty to underlying investors required for project funding.

#### C. the persons to whom services are provided by Indigenous utilities, and

As explained in Section 5, Leq'á:mel First Nation has both band members and non band members that reside on its reserve lands in the mobile trailer parks. Currently all residents – both Band and non-Band members - enjoy the same amenities, including all utility services at the same rates. Lease rates across all tenants are the same and are non-discriminatory. Leq'á:mel First Nation's governance, laws and regulations apply equally to all groups. Complaints are handled by a dispute resolution process that is available to all parties in order to provide equitable treatment.

#### D. the geographic areas served by Indigenous utilities.

There has been considerable discussion in submissions about the application of regulation to reserve and non-reserve lands. It should be noted in the case of Leq'á:mel First Nation that it holds a number of reserve lands that are not connected, as is the case with many other First Nations in the Province. When defining the geographic areas served or that will be served by

indigenous utilities one most look to a wider area consisting of a Band's reserves as well as adjacent land to each reserve such that the area of this discussion becomes broader and continuous. From a commercial perspective there is merit to this concept as utility infrastructure could connect multiple reserves as well as serve non-band members due to cost considerations and economies of scale. Leq'á:mel is not suggesting that utility service could or should be supplied over undefined areas beyond reserve lands absent regulation but is suggesting that the underlying commercial elements of an indigenous utility might provide the best and most efficient means to providing utility service to non-reserve lands. In this instance, we don't feel there would be a need for regulation to non-reserve users if rates were set on a non-discriminatory basis subject to transparent rules and conditions.

## 7. Leq'á:mel First Nation Position - Inquiry Questions

### **i. Should indigenous utilities be regulated under the UCA or under another mechanism, or be unregulated?**

Leq'á:mel First Nation submits that indigenous utilities should not be regulated.

Regulation exists to prevent an abuse of power by a seller that would harm consumers.

Leq'á:mel First Nation has pointed out that there are safeguards in its governance standards that provide recourse to consumers who contest its laws, regulations and Code.

Services provided to non-band members are provided on the same terms (without discrimination) as to band members and all customers/tenants have access to the same dispute resolution process, which is a required provision of a First Nation's Land Code. This latter aspects is similar to consumer recourse under the UCA. A tenant/custom of Leq'á:mel's would also have access to the courts as would any customer of BC Hydro's or FortisBC's should a dispute not be remedied through the BCUC.

Removing indigenous utilities from the UCA will reinforce the recognition of First Nation rights of self determination and self government and the right to choose how lands and resources are used on their lands.

Indigenous utilities should be exempted under the Act or have similar status under the Act as municipalities and regional districts.

- ii. **If it is appropriate to regulate indigenous utilities under the UCA, is there any matter under the Act in respect of which indigenous utilities should be regulated differently from other public utilities, and, if so, how should that matter be regulated?**

As stated in Section 6 above, it is difficult to point to examples of indigenous utilities and foresee how these undertakings will evolve over time. At present, however, indigenous utilities are miniscule compared to the existing large public utilities in the Province and as Leq'á:mel has stated there are measures within First Nation governance structures to address what might be perceived as unfair practices or service.

In respect of First Nation Land Management the adoption of a Land Code is viewed as a constructive, fair and efficient way to manage First Nation lands. Moreover, this approach aligns with self-determination and self-government pursuits. Possibly a similar approach could be taken with respect to indigenous utility regulation wherein provisions of the UCA could be embodied in the Land Code or other appropriate documents in a similar fashion. Leq'á:mel First Nation would be open to reviewing this aspect at a later time.

Leq'á:mel First Nation submits that non-indigenous utilities should remain under regulation in respect of activities carried out on reserve land. We see no compelling reason to alter this structure.

- iii. **If it is not appropriate to regulate indigenous utilities under the UCA but is appropriate to regulate indigenous utilities in some manner, how should indigenous utilities be regulated?**

Please see Leq'á:mel First Nation's response to the foregoing question.

- iv. **If an indigenous utility is not regulated under the Act, would the utility become subject to the Act on ceasing to be an indigenous utility, and, if not, what transitional and other mechanisms are required to ensure that the utility is subject to the Act on ceasing to be an indigenous utility?**

Leq'á:mel First Nation supports regulation, presumably under the UCA, in the event that an indigenous utility becomes a non-indigenous or public. Certain operating rules would be required once First Nation ones no longer applied.

**v. Safety and Reliability Issues**

Leq'á:mel First Nation is concerned about safety and recognizes that this element must be an integral part of indigenous utilities. Leq'á:mel First Nation would be open to working with other First Nations and the BCUC towards safety standard measures and their means for standardization and implementation.