



## Dispute Resolution Implementation Feedback

Submitted to the Environmental Assessment Office on March 31, 2023

## **Background**

Following the end of facilitation services, the facilitator is required to collect feedback from the participants about their experience implementing dispute resolution and prepare a document containing the feedback including any recommendations or best practices for dispute resolution and/or the Interim Approach document.

On February 13, 2023, I met for 2 hours with the Ktunaxa Nation Council (“KNC”), Yaq̓it ᑭa·knuq̓i'it and the Environmental Assessment Agency (“EAO”) to collect feedback. This report incorporates that feedback as well as my own.

Two guiding questions were asked:

1. Did the objective of dispute resolution change throughout the process?
2. Is there anything we could have done differently to improve the dispute resolution process?

Many other themes came out of the guiding questions, and I have done my best to capture these themes in this report.

## **Feedback**

### ***1. Objective***

The parties agreed that at the start of the dispute resolution (“DR”) process the objective was to attempt to reach consensus on the Readiness Decision recommendation. However, from the start Yaq̓it ᑭa·knuq̓i'it felt that the EAO staff had already made its decision on its recommendation to the Chief Environmental Assessment Officer (“CEAO”) and did not see that the dispute resolution process could meet the objective.

It was apparent early in the dispute resolution process that consensus was likely not going to be achieved. It was agreed that the objective changed throughout the process to be more focused on obtaining a better understanding of perspectives, building trust, and building a better relationship. It was also made clear that attempting to build trust and a better relationship at the dispute resolution stage was too late. This trust and relationship building work should have been done at the earliest stages of engagement with the KNC/Yaq̓it ᑭa·knuq̓i'it before things became adversarial. The KNC/Yaq̓it ᑭa·knuq̓i'it were frustrated by discussions with Teck and the EAO in the early engagement phase because they did not feel heard. KNC/Yaq̓it ᑭa·knuq̓i'it felt that although the DR process did not ultimately resolve its issues with the proposed EAO recommendation, it was helpful in having their concerns heard and for building trust and a more positive relationship.

Based on this discussion, the parties felt that more time and effort could be spent at the early engagement phase to build trust and problem solve issues and that a facilitator could be valuable in supporting this early engagement process.

There was some discussion on the difference between obtaining consent at the consensus points identified in the EA process and seeking consensus at these stages of the EA process. I thought that this discussion was valuable as there may have been differing perspectives on this, which is important in understanding how the parties participated in this DR process. From my perspective, this understanding determines the objective of the DR process. In this case, consent was being withheld by KNC/Yaq̓it

ʔa·knuq̓i 'it at this Readiness Decision recommendation stage with an expectation that EAO staff would need to move to this same recommendation before making its recommendation on Readiness. However, as the process proceeded the objective changed from obtaining consent at this stage to that of consensus seeking which in turn meant the process became that of relationship building through the EA process. If the DR process is intended to build trust, understanding and a better relationship it should be made clear that this is the objective and Indigenous consent occurs at the end of the EA process.

This does, however, raise questions of the power imbalance between the Parties and whether the KNC/Yaᑕit ʔa·knuq̓i 'it will legitimately have an opportunity to implement its recommendation at the end of the process or not. Although there is opportunity for KNC/Yaᑕit ʔa·knuq̓i 'it laws to be considered in the EA process, the provincial laws are driving the EA process and are prioritized in decision-making. This power imbalance is ultimately reflected in the DR process and was a noticeable source of frustration for the KNC/Yaᑕit ʔa·knuq̓i 'it in the DR process. KNC/Yaᑕit ʔa·knuq̓i 'it suggested that the EA Act should be amended to recognize Indigenous nations as co-regulators as a potential solution to managing the power imbalance created through current provincial legislation.

## ***2. Process***

The DR process agreed to under the Engagement Protocol was structured as a typical mediation would be structured with some flexibility to include Indigenous process and the inclusion of other stakeholders. The parties expressed that they liked how the process was structured and that the time spent on developing the process was time well spent. It was stressed that an Engagement Protocol should have flexibility built into it to address time, funding, etc.

The meeting on the land with the KNC/Yaᑕit ʔa·knuq̓i 'it leadership and knowledge holders was scheduled for the end of the process and in hindsight it was agreed by the Parties that it should have occurred earlier in the process to have the KNC/Yaᑕit ʔa·knuq̓i 'it perspectives and laws guiding the overall DR process. This is an important point and is reflected in the principles of the DR process outlined in the Interim Approach, namely:

- Inclusion of unique legal traditions and customs of Indigenous nations and communities.
- Facilitators will incorporate Indigenous laws and practices into the process, where possible.

### ***Role of facilitator***

Based on its earlier frustrations in attempting to seek consensus on the Readiness Decision, KNC seemed to want the DR process to have a more adjudicatory function, meaning the facilitator would have a bigger role in making a decision for the Parties. This idea seemed to change as the process moved forward and there was the understanding that the facilitator was participating to support the discussions between the Parties only. During the debrief, the parties did not see a need to change the role of the facilitator.

### ***Information***

An interesting discussion during the development of the Engagement Protocol was about the information required for the DR process. There was much back and forth on what should be included and not included and in the end the outcome was to not include a definitive list in the Engagement Protocol and to address this issue once the DR process started. During the first in-person sessions, it was

clear that there was a disconnect between the parties on what information should be considered and how it should be packaged. This was a source of frustration for KNC/Yaᑭit ᑭa·knuᑭi 'it as it was of the view that all the information required for the EAO to make its recommendation to the CEAO was available to them and KNC/Yaᑭit ᑭa·knuᑭi 'it had submitted and discussed this information with the EAO in the past.

Although frustrated, the KNC/Yaᑭit ᑭa·knuᑭi 'it developed its recommendation report (“Recommendation Report”) on the Readiness Decision for discussion in the DR process. In my opinion, this Recommendation Report changed the DR process and the parties moved closer together in terms of what a joint recommendation on the Readiness Decision could be.

The lesson learned is that some serious thought should go toward how the information to be discussed in the DR process is packaged for a successful DR Process to occur and that this should be done prior to the DR process starting.

### ***Timelines***

KNC made clear that the 60-day timeline was not appropriate for the scale of work that needed to be done in the DR process. The timeline is associated with the objective and with the objective changing during this DR process the timeline required several extensions. The CEAO provided these extensions as the parties were actively seeking consensus but more importantly were developing a positive relationship.

It is likely that a more realistic timeline will need to be developed that is better aligned with the objective of the process.

### ***Parties and Participants***

This was a tricky piece. The party initiating the DR process was KNC and the Engagement Protocol included the individual Ktunaxa Nations and the KNC. However, not all the individual Ktunaxa Nations participated in the DR process. Further, the Yaᑭit ᑭa·knuᑭi 'it had a prominent role in the DR process in terms of ensuring its specific interests were being considered. The parties were able to navigate the complexities of Ktunaxa governance throughout the DR process, but ideally the appropriate representative Indigenous party would be more clearly identified at the stage of initiating the dispute.

The Parties found the “Other Participants” section of the Engagement Protocol useful as it defined the level of participation of these stakeholders to ensure all Parties were comfortable with such stakeholder participation and procedural fairness would be respected.

Teck’s participation was limited to updates from the facilitator and the opportunity to comment on the KNC recommendation report. The parties felt that this level of participation was appropriate but there may have been space to invite Teck to the meeting on the land and possibly community meetings as well.

### ***Procedural Fairness***

As the facilitator I struggled with this issue. My key concern was that the proponent’s procedural rights were going to influence the process in a way where the EAO could not have open and candid discussions and entertain creative solutions for fear of impacting on Teck’s procedural rights. In other words, the proponent’s procedural rights being unintentionally prioritized over the rights of KNC/Yaᑭit ᑭa·knuᑭi 'it.

The Parties agreed that having Teck attend the facilitated sessions would likely have changed the dynamic and closed off more open discussion. By not having Teck participate as a Party or as a participant that participated in a fulsome way, I found that there was some space for the EAO and KNC/Yaᑭit ᑭa-knuᑭi 'it to have open discussions while still respecting the proponent's procedural rights. However, I still found that the EAO participated at times in an overly cautious way to avoid any perceptions of breaching procedural fairness rules.

I recognize the importance of the proponent's procedural rights, but my view is that provincial procedure should not effectively restrict the ability of a First Nation to make a decision based on its laws. Obviously, this issue is bigger than the DR process and a proponent's procedural rights but is one factor that speaks to the power imbalance inherent in the DR process. Exploration of ways to balance power in the DR process is recommended, potentially including an off-ramp to resolve issues outside of the EA Act procedure on a government-to government basis to avoid potential judicial review of provincial decisions based on procedural rights.

### ***Confidentiality***

This issue is partly related to the procedural fairness issue discussed above. My suggestion was to limit much of what was going to be discussed in order for the Parties to feel safe in having open discussions. Provincial access to information laws guided the Parties' development of the confidentiality terms in the Engagement Protocol. Although I had concerns with how information could be shared beyond the DR process, the Parties were comfortable with the confidentiality terms in the Engagement Protocol and information was not shared beyond what was agreed between the Parties to be shared.

### ***Decision-making***

There was not much detail included on how the Parties would be making decisions internal to each party. There were some complexities on the KNC/Yaᑭit ᑭa-knuᑭi 'it side at the end of the process. A suggestion is to clearly determine the decision-making process and bodies within the Engagement Protocol.

### ***Funding***

As this was the first DR process to be initiated, there were uncertainties on the time and resources required for the process. KNC/Yaᑭit ᑭa-knuᑭi 'it explained that it had used most, if not all, of the funding provided to it for the DR process developing the Engagement Protocol. It was made clear by KNC/Yaᑭit ᑭa-knuᑭi 'it that significantly more funding is needed to participate in the DR process. Now that this process and other DR processes are underway, it is likely that a better estimate of funding required can be determined.

### ***Termination***

The termination terms under the Engagement Protocol were the same as provided in the Interim Approach Document. As facilitator, I raised termination with the Parties on three occasions. All three times, the Parties wished to continue with the DR process. In theory, I likely should have terminated the DR process based on the termination criteria despite the willingness of the parties to continue. From my perspective, my decision to not terminate was reflective of the objective changing to be more focused on relationship and trust building. The termination criteria as set out in the Interim Approach may need

to be revised to include opportunities to continue if the Parties are developing a positive relationship despite there not being a realistic success to reach consensus.

### **Final Thoughts**

The debrief session identified that if the EAO and Teck took a different approach at the earliest engagement stage it is likely that the DR process may not have been needed to resolve the issue that triggered the DR process. My view is that retaining a facilitator at the earliest stages of engagement may have been useful as KNC/Yaǰit ʔa·knuǰi 'it did not feel heard during those earliest engagements and this was a factor in KNC/Yaǰit ʔa·knuǰi 'it initiating the DR process. If the objective of the DR process is to seek consensus by building trust and a better relationship, the current timelines and funding under the Interim Approach restrict the opportunity to accomplish this. The Recommendation Report developed by KNC/Yaǰit ʔa·knuǰi 'it was key to changing the discussions between the parties and the form of report developed by KNC/Yaǰit ʔa·knuǰi 'it could be considered as a template information tool for use in future DR processes. The biggest challenge with the current DR process is the inherent power imbalance in favour of the province and project proponent as provincial laws drive the process and are prioritized in decision-making. This issue goes beyond the DR process but should be considered when determining the utility of the DR process.