BRITISH COLUMBIA

EAO

Environmental Assessment Office

March 2024

ENVIRONMENTAL ASSESSMENT ACT
DISPUTE RESOLUTION REGULATION
WHAT WE HEARD AND SUMMARY OF ENGAGEMENT

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An Acknowledgement

The EAO thanks everyone who attended a meeting or workshop, either in-person or virtually, and to all those who contributed to the written submissions we received.

We sincerely appreciate the time, effort, and energy that went into taking part in this engagement process!

Artist's Statement: Andy Everson

The Indigenous art in this report was created by Andy Everson. "The design represents interconnectedness. The six hands represent the coming together of Indigenous peoples and representatives from the Province, as well as others who participate in environmental assessments, illustrating the necessity for relationship-building throughout the decision-making process. The six animals represent what is assessed in environmental assessment in B.C.: eagle (First Nations & their rights), salmon (environment), hummingbird (culture), beaver (economy), frog (health) and wolf (social). Within each animal are six coloured ribbons representing the strands of unity binding us together. The art style was chosen to be inclusive to all First Nations within the province."

The cover image was created by the EAO using the elements of Andy's design, with permission. The animals represent the diversity of First Nations in B.C., and their inward orientation toward the title represents the unique perspectives provided to the EAO, as reflected in this report.

Introduction

To support the reconciliation purpose of the Environmental Assessment Office (EAO), the Environmental Assessment Act (2018) (the Act) includes procedural rights for participating Indigenous nation[1], including the right to initiate dispute resolution at key decision points in the environmental assessment process (EA process). Dispute resolution is included under the Act to support consensus seeking between the provincial Crown and First Nations, providing an alternate path to resolve conflicts rather than through an adjudicative process, such as litigation or arbitration. When parties are unable to reach consensus on their own, under the dispute resolution process a third-party facilitator can be brought in to support the consensus-seeking effort.

Section 5 of the Act includes regulation making powers to prescribe the powers and duties of the dispute resolution facilitator. In the absence of the regulation, dispute resolution has been conducted under a draft administrative framework. After two dispute resolution processes were undertaken in 2022, the need to establish a regulation increased, leading the EAO to launch a dispute resolution regulation development process in spring 2023, centred on consultation and cooperation with First Nations in British Columbia (B.C.).

Given the requirement of the Declaration on the Rights of Indigenous Peoples Act (Declaration Act) to bring B.C.'s laws in alignment with the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration), the EAO followed the Interim Approach to Implement the Requirements of Section 3 of the Declaration on the Rights of Indigenous Peoples Act (Interim Approach) to design the consult and cooperate process. As such, the consult and cooperate process sought to provide: a range of options for First Nations to participate in the process; adequate capacity funding to reflect knowledge and time of the contributors; and workshops designed using a distinctions-based approach and with cultural safety in mind.

Engagement Statistics

- **4** In-person regional workshops
- **2** Virtual province-wide workshops
- **5** Government-to-government meetings
- **11** Written submissions from First Nations / their representatives

Considering the potential impact of the dispute resolution regulation on statutory decision-making, the EAO also engaged with industry representatives to get their perspectives on the regulatory framework. Three virtual workshops with industry associations were held and four written comments from industry were also received.

This report reflects the input received from more than 30 First Nations in B.C., Indigenous organizations, as well as representatives from B.C.'s industrial sector. Comments are categorized into two parts:

1. Key themes from consultation and cooperation sessions, including written submissions, with First Nations; and,
2. Key themes from engagement with Industry.

Each part is further divided by subsections of the regulation with input grouped thematically. Where necessary, additional context drawn from the Dispute Resolution Regulation Discussion Paper and/or workshop discussion topics is incorporated to support overall understanding.

While engagement on the dispute resolution regulation focused on the nature of the future dispute resolution, the EAO also solicited input on the associated policy, guidance and tools (see Figure 1) that will be essential to deliver an effective dispute resolution process. Given the emphasis on the regulation; however, this What We Heard Report presents input on the dispute resolution process at the top, followed by comments on the policy, guidance and tools respectively.

[1] The term 'participating Indigenous nation' is used in the Act to describe a First Nation with Section 35 rights, which has provided notice of their intent to participate in the assessment of a project (see Section 14(1) of the Act). Participating Indigenous nations are granted broad procedural rights under the Act, including access to dispute resolution.

Report Organization

With respect to the input received on the regulation itself, it is organized to reflect the structure of the regulation as per Section 5(4) of the Act (below):

5 (4)The Lieutenant Governor in Council may make regulations respecting the powers and duties of dispute resolution facilitators under this Act, including, without limitation, regulations respecting the following:

(a) qualifications of individuals who may be appointed under subsection (1);

(b) the powers and obligations of a dispute resolution facilitator to manage a referral made to the facilitator;

(c) matters that a dispute resolution facilitator must consider before making a report;

(d) referrals to a dispute resolution facilitator;

(e) the time by which a dispute resolution facilitator must complete a facilitation and provide a report.

It is important to note that the regulation can prescribe powers and duties of the facilitator and cannot regulate other parties, including the EAO, participating Indigenous nations, or the proponent.

To ensure the input presented throughout this report reflects the intent of the contributor, it is included verbatim, edited only when necessary for clarity. Finally, some contributors provided input on how the Section 5 of the Act should be amended. These comments are not included in this report but have been recorded for consideration as part of the upcoming 5-year Review of the Act which is required by legislation to commence prior to December 16, 2024.

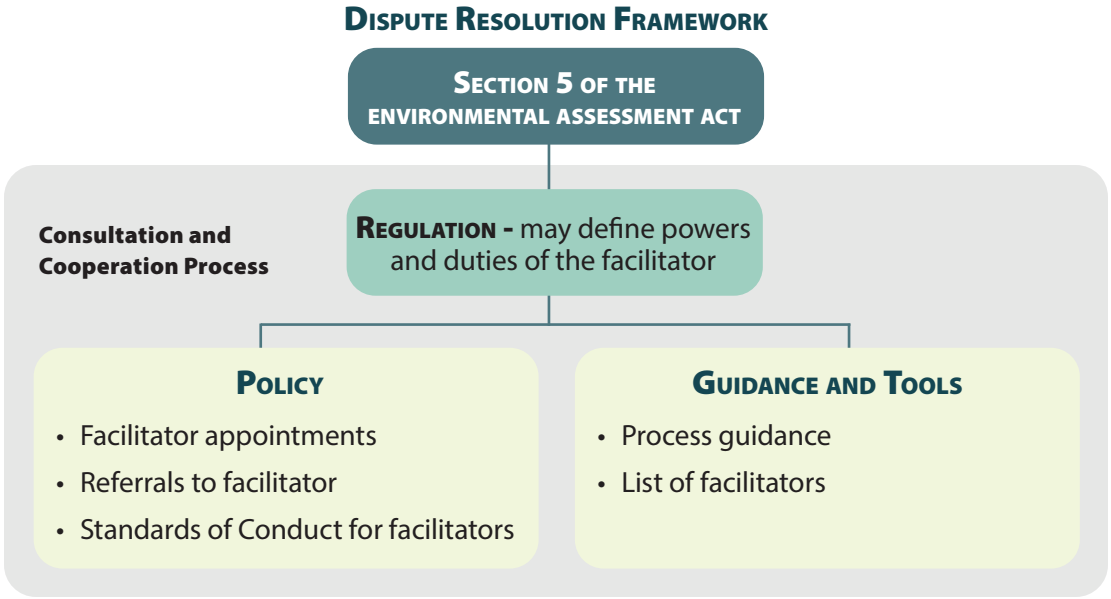

FIGURE 1: DISPUTE RESOLUTION FRAMEWORK

Key Themes From Consultation And Cooperation Sessions With First Nations

The overarching theme that emerged from the consult and cooperate process with First Nations is ongoing concern about the inherent power imbalance between the provincial crown and participating Indigenous nation in relation to the EA process, including dispute resolution.

Noting that the Province maintains ultimate decision-making authority, the First Nations Leadership Council (FNLC) maintains that the Act needs to be amended to align with the UN Declaration as required by the Declaration Act. In the FNLC's view, the consensus seeking approach to working with participating Indigenous nation under the Act does not require the EAO to obtain the free, prior and informed consent (FPIC) of First Nations before proceeding in the EA process or making a decision about whether to issue a proposed project an Environmental Assessment Certificate. FPIC is a key tenet of the UN Declaration as enshrined in Article 32.

Further, the use of Section 7 agreements in the Act – which implies that a First Nation's consent is only required if they have an agreement with the Province – is deemed to be inconsistent with the UN Declaration, as well.

Several Nations expressed that an alternative dispute resolution (ADR) process cannot level that power imbalance and, while the regulation may not, on its own, rectify the deficiencies with the Act, the regulation must not further entrench the 'consensus-seeking' approach and must meaningfully reflect the consent standard in the context of dispute resolution.

Finally, we heard that the regulation must meaningfully reflect First Nations' consent to, or influence over, the design of the dispute resolution process in each case. The regulation must provide the opportunity and flexibility for First Nations to incorporate and reflect their own dispute resolution and decision-making approaches in accordance with their own values, traditions, laws, legal orders and world views.

Dispute Resolution Regulation

Qualifications

As per Section 5(4)(a), the dispute resolution regulation may set the qualifications of facilitators. To understand what qualifications may be necessary for individuals to provide dispute resolution facilitation services under the Act, the EAO asked a number of related questions in workshops and through the Discussion Paper, for example "What knowledge do facilitators need to be able to facilitate disputes in the context of assessments?"

A theme that emerged on this topic is the importance of facilitators being able to "walk in both worlds", meaning they should understand both Indigenous and western worldviews and ways of knowing. Further, acknowledging available facilitators will have a broad range of experience, we heard support for the option of team or co-facilitation to ensure the full complement of knowledge and experience is met. We also heard strong support for facilitators needing to bring a UN Declaration and rights-based lens to the process. The following presents the range of views provided on the knowledge, qualifications or experience facilitators should have to be effective in this context.

Questions: What knowledge do facilitators need to be able to facilitate disputes in the context of assessments? What qualifications or experience should be required? Are there factors or circumstances where a facilitator should be ineligible to facilitate a dispute?

What we heard

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- The qualifications and expertise of facilitators in the context of environmental assessments should reflect a combination of formal training, practical experience, cultural sensitivity, and knowledge of relevant legal and ecological frameworks. The goal is to ensure that facilitators can navigate complex disputes while upholding Indigenous knowledge and practices, fostering inclusivity, and maintaining transparency throughout the assessment process.
- ADR professionals are trained to build constructive engagement; they [should] also [be] proficient with Indigenous inherent jurisdiction and rights and Indigenous perspectives on land and resource management. This also speaks to the need for a serious consideration of the power imbalance that is created when the province retains final decision-making. An ADR process cannot level that power imbalance.
- [Qualifications]: should not overly rely on formal requirements or credentials to avoid creating barriers:
  - An individual's personal knowledge and experience should be primary consideration rather than academic or professional;
  - Indigenous peoples have been managing conflict forever, the Province should look to how Nations have been doing it and not discount experience;
  - A combination of formal education and lived experience can contribute to a well-rounded facilitator;
  - Making the facilitator a lawyer leads to a quasi-judicial process; and,
  - Should not exclude Elders or Youth.
- Cautious of putting the onus on the Nation to provide their Nation-specific knowledge to the facilitator – facilitators should have foundational knowledge.

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The following table presents additional details and considerations we heard regarding the knowledge and experience facilitators should possess, as well as factors that would make individuals ineligible to facilitate a dispute resolution process.

Knowledge and Experience

- Understanding of both Indigenous and western worldviews
- Demonstrate cultural competence/safety
- Prior experience working with Indigenous communities:
  - Previous facilitation of engagement activities between First Nations and the Provincial/Federal government;
  - Previous mediation experience involving Indigenous nations and the provincial/federal government;
  - Experience being employed directly by a Nation;
  - Experience working as a consultant or legal counsel for a Nation;
  - Previous mediation experience in disputes between Indigenous communities; and,
- Deep understanding and respect for Indigenous rights, customs, and traditions. Steeped in culture and traditional knowledge base of First Nation involved (i.e., Nation-specific knowledge).
- Understanding of the Act and EA process (or environmental regulatory regimes generally)
- Extensive experience in mediation and dispute resolution
- Preference for Indigenous facilitators
- Technical knowledge and skill in the matters under dispute.
- Possess knowledge of the UN Declaration and have a rights-based lens
- Knowledge of ecological and social impacts; cumulative effects; environmental issues
- Have undertaken trauma-informed training
- Understanding of the ongoing process of colonization and the realities Indigenous communities face
- Understanding of reports and recommendations related to reconciliation (e.g., Truth and Reconciliation Commission's Final Report and Calls to Action, Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls)
- Community input to reflect community preferences and needs
- Language proficiency

Ineligibilities

- Real or perceived conflict of interest:
  - They or a family member have a direct financial interest in the project.
  - They are a family member or close friend to someone at the EAO, the Indigenous nation involved in the dispute, or any other relevant party (e.g.., the proponent).
  - Have previously been employed within the last six months or are currently employed by the proponent or the parties involved in the dispute, and/or the EAO.
- Personal interest should be clarified. Being a member of a Nation that has initiated dispute resolution is not an automatic conflict of interest.
- Chief and council when their Nation is potentially affected by the project
- Some more concerned about conflicts of interest with the project and proponent rather than Nation or EAO.
- Trying to ensure objectivity with facilitators may be challenging. Could be an interest in bringing jobs from industry to the area.

Table 1. Knowledge, experience, and ineligibility factors for facilitators.

Co-facilitators or Team Facilitation

Many different people may offer facilitation or dispute resolution services with a range of experience. Some may have formal training or practice as professionals, such as lawyers or mediators, while others may have a wealth of experience and knowledge outside of these designations. It may be appropriate in some cases to recommend a team of facilitators, who together meet the qualifications and have capacity in both Indigenous and western dispute resolution practices.

To tackle the possibility of team facilitation, the EAO asked, "Are there specific contexts or criteria for the use of team facilitators?" and heard a range of input, including:

What we heard

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- Can build capacity. Finding someone that meets all the requirements will be challenging;
- Beneficial in situations where a dispute arises regarding a particularly technical matter (one expert in the topic and one expert in mediation);
- Can ensure a more holistic and balanced approach. Teams may help facilitators remain independent;
- To be co-facilitators, they should have worked together before or are confident that they will work well together;
- Could pair someone with lived experience with someone with formal training; and,
- Could be helpful for disputes between Indigenous nations – a panel could be used with one from each Nation and neutral third party.

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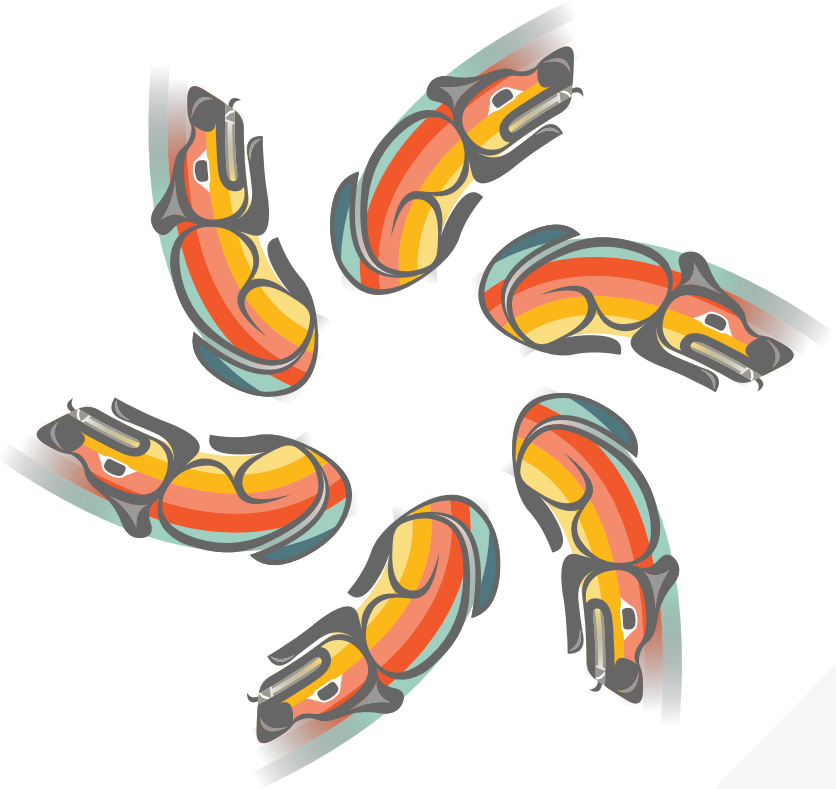

Powers and Obligations

As per Section 5(4)(b), the regulation may define the powers and obligation of a facilitator to manage a referral. One of the powers that the EAO proposed in the Discussion Paper is the power to end the dispute resolution process under prescribed circumstances. This particular proposal generated significant discussion, and while there was a general consensus that it could be beneficial for the facilitator to be empowered to end a dispute resolution process, participants cautioned that clear parameters must be built into the regulation (discussed in more detail below) for when this power can be used and how.

The following captures both the feedback on the various proposals providing by the EAO and additional direction on the nature of the powers and obligations of the facilitator.

Question: What powers should the facilitator have to be able to manage a dispute resolution process?

What we heard

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- Access to information:
  - Force disclosure of certain reports and information in relation to the project;
  - Request information from parties or proponent; and,
  - Seek technical advice or studies.
- Create binding conditions and/or decisions on the parties, the statutory decision-maker, or the proponent:
  - Strengthens the influence and implementation of the recommendations in the report.
- Guide the process:
  - Set agenda, manage timelines;
  - Establish terms of reference/ground rules with the parties;
  - Suggest solutions to help consider alternatives; and,
  - Alter process in an ongoing way to ensure cultural safety.
- Engage the proponent or other parties, with the consent of the parties;
- Alter or extend timelines to accommodate the needs and capacities of the parties or to address current events;
- Require participation from other decision-makers or teams within government to avoid siloed decision-making; A distinctions-based approach in the design and implementation of dispute resolution processes is required to reflect the unique title and rights of First Nations in their territories. A distinctions-based dispute resolution model would require flexibility and iterative engagement between the EAO and First Nations to avoid a "one size fits all" approach;
- Power to end a facilitation prematurely, with boundaries, makes sense to include but the facilitator should not have unilateral power to do so; and,
- Need guidance around "have you tried the following yet" before making the decision to end.

"

Powers – Ending a facilitation in certain circumstances

Question: Under what circumstances should a facilitator consider ending a dispute resolution process?

What we heard

- General agreement with the proposals in the Discussion Paper, with the exception of concern over ending a facilitation due to "substance of a dispute is better considered during another phase":
  - Urge caution as this is a subjective decision and may be directly contrary to the interests of Indigenous nations who may want to take a proactive approach, start necessary studies and work early, or identify potential solutions to reaching acceptable accommodation agreements with proponents;
  - Concern that issues will be lost – if a matter is better considered in another phase, it should be clear what subsequent phase of the EA the dispute resolution process will be and should be automatically re-triggered;
  - Nations are often told by the EAO that issues are out of scope or 'we will deal with this later' and sometimes that is not true. Do not agree with the facilitator being able to end the process on this rationale; and,
  - A facilitator should not be able to end a dispute resolution process simply because the EAO is "alive" to the issues raised by the Indigenous nation and that the issues raised will be addressed later in the assessment process.
- Facilitator cannot end the dispute resolution process until they are reasonably satisfied that meaningful and effective discussion has occurred between the parties and that the parties have found a resolution or common ground;
- Detailed list of reasons should be provided as to why this determination is made;
- Ample notice should be given to parties before making a decision. Facilitator should not be able to exercise power unilaterally but discuss with the parties before making that decision;
- One or both parties are no longer operating in good faith when:
  - There is a lack of willingness – looks like uncooperative, unwilling to engage or acting in bad faith;
  - Consensus is no longer likely; and,
  - Believe that no meaningful discussion will occur despite several meetings and documented efforts by the facilitator.
- A Nation's deep opposition to a project should not be equated with bad faith:
  - "In some cases, it will be obvious to an Indigenous nation from a very early stage that a project poses a serious if not existential threat to its territory, rights, and wellbeing (often because of the project's proposed location and/or existing cumulative effects that are already compromising food security and cultural security). Moreover, unless an Indigenous nation secures final decision-making authority on whether a project proceeds through a consent agreement under s. 7 of the EA Act, nations who are deeply concerned about a project need to communicate this view as early and forcefully as they can to the people who hold the power to decide the project's fate, i.e., EAO and Ministers. Nations in that position should have the opportunity to share this perspective with the EAO in the DR process, which may foster more honest, powerful conversations than the regular EA Process, especially if supported by Indigenous ceremony and done on the land." – *Lake Babine Nation*;
- Good faith is better language than 'meaningfully participate' because there is a legal test of good faith;
- Either party wishes to withdraw or the First Nation wishes to withdraw;
- Project withdraws from EA process;
- Parties could develop circumstances where facilitator may end the facilitation when developing the custom process;
- Ending a dispute resolution process should be a last resort;
- Would hope that the parties agree to end the process. Better for the facilitator to end the process than the EAO; and,
- "Placing such significant authority to a single facilitator may not align with these principles [Article 27 and 40 of the UN Declaration], as it could undermine Indigenous participants' ability to shape the process and outcomes in a manner consistent with their cultural values." – *Tsleil-Waututh Nation.*

Question: What should the facilitator be obligated to do?

What we heard

Obligations

- Remain unbiased/neutral;
- Guide discussions and support the parties through the process – keep on topic and ensure everyone is heard;
- Make recommendations, if needed and appropriate;
- Draft the Facilitator's Report summarizing the dispute resolution process;
- Document the outcomes of the process including any points of consensus or any points of disagreement;
- Ensure that both parties have been adequately heard regarding the issue in dispute and have been responsive to the concerns raised by the other side;
- Ensure both sides are prepared and willing to reach consensus and assist the parties in reaching consensus;
- Promote fairness;
- Encourage good faith participation;
- Consider the needs and capacity of First Nations, including current events affecting the Nation, in creating or extending timelines;
- Integrate Indigenous decision-making and dispute resolution practices to the extent they desire and consider appropriate;
- Escalate the dispute resolution process to provincial officials with higher levels of decision making authority at the request of the Indigenous nation; and,
- Take a human-rights and UN Declaration based lens to facilitation:
  - Consider the Indigenous laws that apply to the project or valued component, rather than only considering the colonial legal framework;
  - Recognize the self-governance rights of Nations and how that does or does not align with the decision in dispute; and,
  - Distinctions-based approach.

Obligations – Information management

- Be mindful of information shared by a Nation – check-in often or when there is uncertainty whether information is sensitive or confidential – to build and maintain trust adhere to confidentiality requirements, especially concerning Indigenous knowledge; and,
- Keep any information provided by a First Nation in a confidential memo and be prevented from releasing such information.

Matters That a Facilitator Must Consider Before Making a Report

The Act requires the facilitator to provide a report to the parties and decision-makers upon completion of the facilitator. Per Section 5(4)(c), the dispute resolution regulation may prescribe the matters that a facilitator must consider before making a report. The facilitator's report is posted on the EAO's Project Information Centre (EPIC), a public web portal. While dispute resolution is a non-binding process, the facilitator's report is considered by the statutory decision-maker in their decision-making process, and as such, the facilitator's report should capture the nature of the disputed matter and outcomes of the facilitation.

The following presents the input gathered on what a facilitator must and may consider in their report:

"

General comments on the report development process

- Any template for a report should be optional;
- Need for further collaboration with Indigenous participants in shaping report's content and providing clear guidelines to the facilitator;
- Nations should be able to verify the report before it is finalized to ensure any sensitive information is not shared;
- Report is the record. All aspects should be reported (e.g., process information, culture), unless a First Nation requests something is not included;
- Up to Nations to define how values are articulated in the report. Requested changes should be generally accommodated with very few exceptions;
- Respect the views of Nations on what information they do or do not wish to be included in the facilitator's report with very little exceptions; and,
- Elephant in the room is that we are seeking consensus and not consent.

"

Question: What should a facilitator be required to consider in their report?

What we heard

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- Facts;
- Any submissions made or any materials co-developed by the parties;
- Be clear on all the information they have considered in the report;
- Provide all the information they considered in the report;
- Substance of discussions and process;
- Context of the EA process;
- Legal and regulatory framework;
- Perspectives of the parties;
- Positions of the parties and changes in those positions;
- Focus should not solely be on the outcome – why was the dispute resolution process important to the community in the first place. Need to underline the values of the community that led to the process;
- Consensus means a compromise – need to understand what has been given up;
- Indigenous nation's perspective on the technical matters;
- First Nations' inherent, constitutional, and human rights, including title and jurisdiction;
- First Nations' perspectives and knowledge;
- Support for reconciliation, as a listed purpose of the EAO;
- Any requirements or considerations set out in an agreement;
- Confidentiality requirements around Indigenous knowledge (Section 75), balanced with transparency;
- Nation's relationship with the proponent;
- Alternatives or solutions, including feasibility and implications of each;
- What solutions or options were considered, whether they were stated to meet each party's needs and why or why not;
- Concerns of the Nations and whether the proposed solution addresses those concerns;
- How the Indigenous nation's rights and interests are affected by the outcome;
- Reflect Indigenous laws, traditions, customs, and legal systems; and,
- Where concerns of Nation cannot be address due to lack of jurisdiction, lack of authority, or considered out of scope by the Province, identify potential jurisdictional gaps & guide the Nation in future efforts relating to their concerns.

"

Question: What else should a facilitator consider in their report?

What we heard

- Should reflect the facilitator's impartiality;
- Procedural fairness (related to the parties);
- Past precedents;
- Public interest (e.g., societal values and long-term sustainability);
- Long-term relationship between the parties (i.e., the potential impact of the chosen resolution on the ongoing relationships between parties and others involved in the EA); and,
- Whether the parties were acting in good faith or adhered to the terms of reference.

Time By Which the Facilitator Must Complete the Facilitation and Provide a Report

Per Section 5(4)(e), the dispute resolution regulation may establish a legislated time limit for the facilitator to provide their report. There are multiple considerations in establishing a time limit for dispute resolution. Balancing elements such as timeliness and predictability with the capacity of Nations must be carefully contemplated. Across the board, we heard from Nations that the 60 days recommended time limit in the Interim Approach was insufficient and that the complexity of the matter under dispute should be taken into account.

Questions: What should the time limit be? What are the challenges and benefits of having a time limit? Are there any other mechanisms that could be built into the process to keep the dispute resolution timely?

What We Heard

Proposed time limits

- Time limit for each process is co-developed by the parties when designing the process:
  - Activities and schedules can vary throughout the year, with different considerations. Will be a range of experiences from weeks to months. Will be context dependent;
  - If parties can't agree on a time limit, then the facilitator should have the power to set the time limit; and,
  - Facilitator must consider:
    - Complexity of the matter in dispute;
    - Funding availability to the Indigenous nation; and,
    - Capacity of the Indigenous nation (i.e., resource constraints).
- Minimum 90 days:
  - 60 days is unrealistic, but 90 days may be more consistently achievable; and,
  - 60 days seems short. Depends on capacity, complexity, and compiling information.
    - Would only work if everything went exactly right.
- Based on experience in the process, 60- or 90-days does not feel like enough. Does not allow enough time for leadership to be briefed;
- Need sufficient time to meaningfully co-develop the process:
  - Regulation should clarify that a 60-day time limit is the minimum period to co-develop the process, with extensions of time if requested by the Nation;
  - Could legislate a time limit for terms of reference to be developed. Co-development should not take up the entire time limit;
  - Co-development could be completed within three weeks, although there are circumstances where more time may be needed;
  - Co-development requires a significant portion of time that takes away from resolving the dispute;
  - Depends on complexity of the dispute, number of parties involved and the willingness of those parties to collaborate;
  - Rushing through co-development can lead to misunderstandings or unsatisfactory outcomes; and,
  - Co-development is important in building trust in the process as a solid foundation for successful dispute resolution.
- Any time limit must be subject to extensions.

Extensions

- If any time limit set is in the regulation, the facilitator must have the discretion to extend timelines where this will support meaningful process and meaningful participation by the Indigenous nation.
  - Since the EAO is a party to the dispute resolution, putting the Chief Executive Assessment Officer (CEAO) in charge of time extensions for dispute resolution would be problematic. Facilitators should have discretion to extend time themselves, and Section 5(4)(c) of the Act allows B.C. to grant facilitators this discretion.
- Circumstances for an extension:
  - Where more time could help lead to a consensus outcome or help the parties strengthen their working relationship (which could be beneficial later in the EA process);
  - Where the proponent and Indigenous nation request more time to try and solve the dispute;
  - Where the Indigenous nation reasonably requires more time to:
    - Seek direction on the dispute resolution process or potential solutions from representatives not participating in the dispute resolution process (e.g., full leadership, elders, community members).
  - Accommodate intensive harvesting periods, holiday office closures, or periods of extreme demands on communities from deaths, pandemics, wildfires, or other emergencies.
    - Accommodate leadership election periods (or any other type of leadership election process) if leadership involvement is required & impossible during that period.

Challenges/barriers to having a time limit

- Timelines may not be adequate for:
  - Indigenous decision-making processes;
  - Unforeseen delays caused by external factors (governance obligations, other processes like consultation or litigation, infrastructure shortages, staff shortages, public health crises, natural disasters);
  - Time needed to check-in and validate (with Elders, youth, community members, council meetings, etc.);
  - May need to hire experts or additional human resources;
  - Incorporating Indigenous calendars (holiday closures, harvesting seasons);
  - Many council meetings are booked way out in advance; and,
  - Competing issues and priorities, projects and community-based events or practices.
- Constrained timelines place First Nations in disadvantaged position;
- Pressure of time limit can aggravate the dispute and be counterproductive;
- Not enough time to gather evidence, consult experts or fully prepare arguments;
- May hinder procedural fairness for those with limited resources;
- Burdensome process to participate in;
- Might be unreasonable in complex situations;
- Dependant on the nature and complexity of the dispute;
- Regarding EA process generally, consultation by email is not sufficient. Notifications about important things like time limits or pending decisions are happening via email but these can be missed. Where is the follow-up? We expect the Crown to be following up on timelines. It is about relationships;
- Consider the difference between resources – the crown needs to take responsibility for this relationship;
- Capacity challenges for Nations to participate; and,
- Talking about time at the leadership level is often disrespectful.

Benefits of having a time limit

- Keeps parties on task – drives efficiency;
- Timeliness within regulatory process;
- Predictability to help manage resources and plan participation; and,
- Accountability.

Other mechanisms to keep dispute resolution process timely

- Capacity funding;
- Dedicated dispute resolution case manager or coordinator;
- Time for parties to develop their referral before starting the time limit;
- Regular updates and communication between the parties to manage expectations and prevent surprises;
- Introduce mediation earlier outside of formal dispute resolution;
- Intake meetings with the facilitator and each party to understand each party's process needs, substantive concerns, goals and interests and barriers to active participation; and,
- Following referral, have a pre-mediation conference with the parties. To create a shared understanding of the process, different roles, etc. so that when the mediation begins, fear, apprehension and misconception is released before the process starts.

Prescribed Matters

Section 5(2) of the Act lists the various matters pending decision for which a referral to dispute resolution facilitator can be made but allows for additional matters to be prescribed. The following presents comments from written submissions regarding other prescribed matters to be included in the regulation:

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Acceptance of revised application (s.27(5))

- **Kitselas**: Achieving consensus or resolving a dispute at this step is important to the success of the rest of the assessment. Once the decision is made to accept an application and proceed to the effects assessment, there is time pressure (150-day period) to complete the effects assessment and referral package for decision makers. Ensuring that the Application is complete from the perspective of the Indigenous Nations should be required to enable free, prior and informed consent (FPIC) decisions at the end of the effects assessment. If Kitselas disagrees with EAO that the application is acceptable to advance (consensus is not achieved on the decision to move ahead), then it seems as beneficial to the process to use [dispute resolution] here as it does anywhere else in the process. The alternative is to ignore or defer resolution of conflict, which does not align with the intentions of the Act and hinders FPIC. We feel it is important to note that we requested dispute resolution at this stage of the process during negotiation of our s.41 agreement and the EAO was not willing to adopt the provision. Nevertheless, we have recently come to understand that Tahltan Nation's s.41 agreement has included this provision.

Certificate amendments (s.32)

- **Kitselas:** amendments, particularly a complex amendment, can be as complicated, impactful, and prone to conflict as a new project assessment. It would be an oversight if the dispute resolution process did not apply to complex amendment assessments, as these processes seek consensus around key decision points (i.e., amendment procedures, adequacy of amendment application, amendment decision, etc.) and seek to apply FPIC.
- **Lake Babine Nation:** Amendments require the CEAO to seek consensus.

Certificate extension (s.31(5))

- **Lake Babine Nation:** Extension decisions require the CEAO to seek consensus.

Other

- **Lake Babine Nation:** Dispute resolution should apply to EAO capacity funding decisions.
- **First Nations Leadership Council**
  - The Regulation must not narrow the availability of dispute resolution from what is already set out in the Act.
  - Needs to address that dispute resolution processes may be required at various stages of an environmental assessment process beyond what is specified in the Act, to accord with processes in consent agreements referenced in section 7 of the Act.
  - Should explicitly make clear that dispute resolution is available with respect to any matter pending decision under section 29 of the Act. The Regulations should provide for participation of the Minister in dispute resolution in relevant circumstances (such as under S.29).

"

Disputes Between First Nations

Dispute resolution is available under the Act between First Nations about a Nation's participation in the assessment. During Early Engagement, a First Nation may provide notice (under Section 14(1) of the Act) that it intends to participate in the EA as a participating Indigenous nation. A First Nation may choose to pursue facilitated dispute resolution with another Nation during the Early Engagement phase to assist in resolving a disagreement about the Nation's participation as a participating Indigenous nation.

Question: Respecting disputes between First Nations about participation in the assessment, are there specific principles that are needed for this type of dispute?

What we heard

- Best worked out at the Nation-to-Nation level;
- Regarding appointment and qualifications of the facilitator:
  - Needs to have a deep understanding of specific cultural,historical, and political contexts of First Nations involved; and,
  - Preference for Indigenous facilitators or deep connection to communities (Elder, knowledge keeper, or other leader respected by both Nations).
- Recognize that such disputes may arise as the result of perceived scarcity of resources for all affected Indigenous communities;
- Need adequate and equitable funding;
- Support for local processes – some First Nations might have their own internal dispute resolution mechanisms;
- Co-development should be respected and attempt to align these processes, where applicable;
- Must involve the affected parties in defining the objectives for restoring and maintaining peace, and the methods to ensure the process is consistent with their own legal traditions and appropriate to the situation; and,
- Further information is required about how the dispute resolution process under the Act integrates with other existing dispute resolution processes, including those under treaty or agreements.

Policy

Appointments

Section 5(1) of the Act notes that the minister may, after considering any recommendations from an Indigenous nation, appoint individuals to facilitate the resolution of disputes. The process for procuring (i.e., finding, acquiring, and paying for services from) and appointing a trusted facilitator that is suited to the needs of the parties is critically important for making the dispute-resolution process meaningful and effective. The Province will be responsible for the related procurement and pays for the services of the facilitator.

The analysis of what we heard from First Nations through the consult and cooperate process suggests broad agreement with the various considerations on the facilitator appointment process presented in the Discussion Paper, such as the need to remove barriers for Indigenous facilitators, etc. Further, any facilitator appointment process must be distinctions-based with specific requirements of participating First Nations reflected in the appointment process. Additionally, there must be a process for removing a facilitator who is incompetent or has lost trust.

The following presents the range of views on how the appointment of the facilitator should proceed. Paraphrasing of comments have been kept to a minimum to retain the context and substance as much as possible:

Questions: What are important considerations to guide facilitator appointments? What barriers exist for participating in provincial procurement processes?

What We Heard

Perceptions of bias and conflicts of interest

The comments below reflect concerns that giving the Minister the power to appoint dispute resolution facilitators gives the Crown an unfair advantage in the process.

- "Neutral" facilitator favours power imbalance. Perception is that because facilitator relies on EAO for administrative things such as booking meeting space, etc., the facilitator works for the EAO;
- Concern around the Minister as the decision-maker on facilitator appointments (i.e., the Minister has discretion to not appoint the individual recommended by the First Nation);
- The regulation must provide that First Nation consent is required in relation to who is appointed as a facilitator; and,
- Goal is consent (or agreement by both parties) on the facilitator.

Appointment procedure

- First Nation involvement in the evaluation of potential facilitators (particularly in relation to knowledge of the Nation involved);
- Administration of process should be outside of EAO project team to reduce bias;
- Process must include disclosure of any conflict of interest [see table under Qualifications];
- Continued consultation required when developing procurement process and evaluating qualifications;
- Proposed process:
  - Each party submits their own list of three potential facilitators;
  - Each party then reviews the list of the other party and then has the ability to oppose/veto one of the other party's facilitator recommendations;
  - The lists are then revised if there is an opposition/veto; and,
  - The Minister then appoints a facilitator based on the recommendation lists and must provide written reasons on why they chose that facilitator.
- If there is no screening of a meritless dispute by the Minister, the facilitator needs to be ready at the start of any dispute initiation;
- Barriers that Indigenous peoples may face in participating in procurement:
  - Access to information about/knowledge of procurement opportunities and processes;
  - Resource constraints: some First Nations might lack resources needed to navigate complex procurement processes;
  - Potential geographic isolation of facilitators who live in isolated communities;
  - Language and communication barriers; and,
  - BC Bid is very complicated.
- Avoid large firms monopolizing on procurement opportunities.

Development of a list or roster of pre-qualified facilitators

There was significant discussion around the concept of developing a list or roster of pre-vetted facilitators. The following table outlines the potential benefits and challenges of such an approach.

Benefits of a List/Roster	Challenges of a List/Roster
• Could help with the capacity constraints faced by many Nations to reduce the research burden of finding a facilitator. But list should not be the only option. • Roster should evolve over time, with new names being added or removed, if a facilitator develops a negative track record. While this can help Nations who do not have a facilitator in mind, First Nations and the EAO should always be free to propose someone who is qualified but not on the roster.	• Pan-Indigenous approach the Province often takes is problematic – roster should not put the onus on First Nations to explain their culture. • List may get stagnant or unable to keep pace with changes (i.e., facilitator availability; chief and council changes every two years). • Use of a pre-selected roster should be avoided to better support the appointment of a culturally appropriate facilitator on a Nation-by-Nation basis. • May be administratively burdensome to maintain a list.

Table 2. Benefits and challenges of a list or roster of pre-qualified facilitators.

Third party involvement in procurement (i.e., managing a roster)

• Some comfort with administration outside of the EAO but more comfortable with having Nations involved in the creation and management of any list. But capacity constraints are a barrier; and,

• Relationship is with the Crown, not a third party. The Crown has the duty to First Nations.

Referrals To a Facilitator

Whereas the Act states that a matter may be referred to a facilitator, it does not define a process for how this referral is made. Participants were clear the process for First Nations to request dispute resolution should not be overly onerous, legalistic, or time-consuming. While a templated document was seen as a potentially helpful tool, it was noted that this should not be a strict gatekeeping mechanism. The following presents the input gathered on how the referral should be initiated and what information should be included:

Question: How should initiation occur so that it is accessible?

What We Heard

- Respect a distinctions-based approach:
  - Respect the cultural, linguistic, and geographical diversity of First Nations communities; and,
  - Culturally sensitive to each Nation's customs, transitions, protocols, needs and preferences.
- Translation and interpretation to enhance accessibility for those who may face language barriers;
- Undertake community outreach and education initiatives to ensure parties/communities are aware of the process;
- Process: Written referral; EAO has a chance to respond; start facilitator selection; and,
- Two or more Nations should be free to request dispute resolution with the EAO together (consolidate disputes).

Question: What information should be provided to initiate a referral to a facilitator?

What We Heard

Required information

- Template for referral with key information;
- Names of parties, contact information, date, matter under dispute, description of issues/dispute;
- Issue description and context – clear and concise overview of dispute and issue including its background and key points of contention. Ideally the position and clear rationale from both sides is outlined;
- Local points of contact or liaison with community;
- Cultural consideration and documentation – highlight relevant cultural sensitivities, customs, or traditions that may impact the dispute. Additionally, offer supporting documentation such as agreements, historical context, or evidence to provide a comprehensive understanding of the situation;
- Desired outcome/resolution/remedy;
- Rights that may be affected by dispute;
- Whether there are any other relevant dispute resolution processes that a Nation has in place to ensure integration of dispute resolution processes (like in a Treaty, agreement, or Section 7 agreement);
- Referral could include names of trusted facilitators to streamline the process; and
- Takes time to draft a referral because it must go through leadership. Should be about starting the process rather than making the Nation's case on the issues. A Nation should not be required to provide their "case" in a referral – that comes later during the facilitation.

Caution over including the remedy

- Referral should contain broad information, not the solution/remedy sought.
  - Can be limiting – prevents the discovery of other solutions/remedies;
  - If the remedy is outside the purview of the EAO/EA process, can get too mired down and be unproductive; and,
  - Concern that it would bind the Nation and preclude them from seeking other remedies/solutions.
- Lack of a (shared) definition of consensus, naming the remedy feels like a pre-determined resolution. Should identify the reasons and understand needing to identify a path but the whole idea of dispute resolution is to be open to finding ways/solutions to move forward.

Notice of pending decisions – to address current uncertainty around the timing of decisions

- The Act provides that a dispute may only be initiated before a provincial decision is made on the matter under dispute. However, Indigenous nations are often unaware and there is a lack of clarity around when a pending decision will be made. – *First Nations Leadership Council*
- Consider a provision that would require British Columbia to provide participating Indigenous nations notice of anticipated decisions under the Act, with sufficient detail and time to resolve the matter informally or initiate a dispute resolution process. – *Maa-nulth Treaty Society*
- Recommend a provision for EAO to provide at least one week's notice to Indigenous nations before the date on which it plans to render a decision. – *Gitga'at First Nation*
  - Further, regulation could specify a deadline for when a DR can be initiated (e.g., no later than one day before the EAO releases its decision on the matter).

Notice of a DR referral

- EAO should provide notice to other participating Indigenous nations when a DR referral is made.

Other Regulation Proposals

Maa-nulth treaty society:

- Inclusion of a provision that would require BC to provide Maa-nulth notice of a DR process that could impact that rights and interests of Maa-nulth;
- Inclusion of a provision that would provide Maa-nulth with standing to participate in a DR process, upon request;
- Inclusion of a provision that would require a proponent to participate, upon request by BC, a participating Indigenous nation, or the facilitator.

First nations leadership council:

- Include a process to refer a dispute to other relevant government-to-government processes that will support the consent standard, as appropriate;
- The Regulation must specify that the proponent may only participate in the dispute resolution process if the participating First Nation(s) consent;
- The Regulation should provide for participation of the Minister in dispute resolution in relevant circumstance.

Guidance and Tools

Co-Development

The EAO heard, during past engagement when developing the Act, the importance of each dispute resolution process being customized within a flexible regulatory framework. One way to achieve this is for individual dispute resolution processes to be co-developed by the parties. During the consult and cooperate process, time was allocated to discuss what co-development of a dispute resolution process could look like and what issues need to be addressed during co-development. The following presents the input gathered:

"

- Maintain a database of dispute resolution process agreements/templates for Indigenous nations to draw from. At the same time, the EAO should remain open to new process or variations;
- Co-development should occur through the facilitation by the facilitator and the facilitator should ensure that the Indigenous nation's legal traditions and perspectives are reflected in the custom dispute resolution process;
- The dispute resolution process should be customized and tailored to the dispute in question and to the Indigenous nation's needs. This can involve allowing the Indigenous nation to incorporate their own dispute resolution methods into the process. It can also involve the Indigenous nation choosing where meetings should take place (i.e., on the land, in the Indigenous community, etc.);
- Both parties need to agree with and be satisfied with the custom co-developed dispute resolution process. Co-development is foundational to the success of dispute resolution. Ensures the process is culturally sensitive, inclusive, and tailored to specific needs, interests and legal traditions of Nations. Establishes a sense of ownership, promotes collaboration, and fosters trust.
- Co-development is essential to prevent the common mistake of inaccurately capturing relevant information and failing to apply an Indigenous lens when conducting and reporting on studies for the environmental assessment. It must include an accurate characterization of Indigenous rights, interests and knowledge and a plan for conducting the assessment in a way that places the information in an Indigenous context;
- Should integrate Nation-specific processes to the extent desired and considered appropriate by the Nation;
- Co-development is a trust building exercise in itself, depending on the status of the relationship;
- How we build trust and constructive engagement:
  - Transparency about the process, objectives, and expectations;
  - Ensure that all parties understand their roles;
  - Active listening so all can express their concerns and perspectives;
  - Show respect for cultural differences and traditions;
  - Ensure confidentiality is protected to share openly without fear of repercussions; and,
  - Inclusive to all relevant parties to promote a sense of ownership and shared responsibilities.
- Importance of neutral facilitation by the facilitator to create an environment of safety and respect;
- Must be clear from the outset that the Province is actually open to changing its decision;
- Crown representatives should have actual decision-making authority necessary to achieve and implement a consensus-based outcome – otherwise indicated disrespect to a Nation's leadership or give the impression the Province is not truly committed to addressing their concerns;
- Chief Executive Assessment Officer participation is important and respectful. Missing a decision maker at the table that does not hear all of this feedback can be very frustrating and just passing the information along makes it lose the impact once it has reached the decision-maker;
- Co-development is a challenge – so many times, we bring up concerns but are told they are outside the jurisdiction of the EAO. Dispute resolution could illuminate what other processes could help resolve issues;

- The Crown must demonstrate willingness to seek understanding about all of the Nation's concerns — even those that may seem unrelated to the environmental assessment and related decisions but are connected from the perspective of the Indigenous Nation, such as seeking accommodations other than environmental mitigation measures or addressing other impacts on their Aboriginal rights and title to offset new potential impacts;
- Support for moving the process onto the land (like in the Fording River Extension example);
- Proponent would benefit from participating in meetings on the land (to take First Nations' values seriously);
- Ceremony and meetings on the land should help participants approach it with the right frame of mind and help EAO and any third parties better understand what the dispute is about from the Indigenous perspectives, what is at stake for the Nation and how to discuss the matter in a way that respects the Indigenous nation's culture and deep connection to the land;
- Regarding other parties taking part:
    - On request, the proponent may be involved if both parties agree. This can save time rather than 'broken telephone' discussions;
    - How are other nations able to participate if they have a right or interest that may be impacted or if they share an interest with the Nation that initiated dispute resolution?
    - Other folks, such as Technical Advisory Committee members, may be involved in an observer capacity or to offer technical advice.
- Regarding the concerns that issues are 'out of scope' of the EA/EAO – Other relevant ministries should attend and participate to demonstrate a willingness of the Province to take concerns seriously, address concerns and to avoid siloed decision-making or perceived avoidance of responsibility;
- Accessibility of the process – offer both online and offline options to participate in the process; and,
- Must accommodate scheduling with cultural activities, such as seasonal availability due to harvesting.

Terms of Reference

A part of the co-development process, the value of establishing a Terms of Reference was also discussed. Input gathered is presented below:

- Terms of Reference are an important tool to establish the process;
- Will be specific to each Nation in terms of what they want to include;
- Regulation should cover what is required at a minimum to streamline the negotiation cycle;
- Should include:
    - Goal/objective of the process;
    - Desired outcome;
    - Defining what consensus seeking means to each party;
    - Ceremonial aspects of the process, based on the laws and customs of the participating Nation;
    - Guiding principles;
    - How others participate;
    - Process mapping; and,
    - Confidentiality guidelines.
- Should try to avoid back and forth of version sharing to have room to get into the substance of the issues; and,
- Need to consider how the process of co-development can be weaponised to draw out time.

Principles

As stated in the Discussion Paper, there is strong interest in establishing a set of principles to ensure meaningful implementation of dispute resolution under the Act. During the consult and cooperate process, significant discussion was had to inform these guiding principles. The following represents the input gathered:

"

- Distinctions-based approach:
  - Provide the opportunity and flexibility for First Nations to incorporate and reflect their own dispute resolution and decision-making approaches in accordance with their own values, traditions, laws, legal orders, and world views, including in own language.
- No pan-Indigenous approach;
- Acknowledge and respect inherent rights and title of First Nations to their traditional territories;
- Reflect the need for First Nations to consent to the design of the dispute resolution process in each instance rather than merely collaborating with, or providing recommendations to the EAO or the facilitator;
- Recognition that, ultimately, B.C. government is final decision-maker – not Nations' leadership;
- Understanding that the right of self-government necessarily means that provincial decision-making affecting Indigenous traditional territories and the resources thereon is an adverse impact on that Aboriginal right, separate from the existence and extent of environmental effects;
- Must be premised on the understanding that Indigenous nations have the rights set out in Articles 26, 29 and 32 of the UN Declaration that reflect their right to govern their lands and resources;
- Presumption should be that Indigenous nations that assert they will be impacted are correct;
- Consider any requirements or considerations set out in an agreement;
- Recognition that there is more than one way of knowing. Not only western view;
- Tied to the issue presented at initiation/referral;
- For disputes between First Nations, specific principles are needed to respect the principle of self-determination and autonomy of each Nation. It is essential to avoid external influences or pressures from other parties that may interfere with a First Nation's right to decide its level of involvement in the assessment;
- Mediation and facilitation can play a crucial role in helping to bridge gaps between First Nations in dispute, providing a neutral and supportive space for dialogue and negotiation;
- Transparency, predictability, and procedural rights should not be sacrificed in service of the goal of achieving consensus;
- Those affected by decisions, including other Nations' rights and interests, require procedural fairness; and,
- Additional comments are included in the table below.

Principles	
• Not be overly onerous, legalistic, or time-consuming	• Discussed a lot about procedural fairness for the proponent, but what about fairness for Nations
• Collaboration	• Reconciliation
• Clear timelines and milestones for all parties	• Focus on relationship building
• Creativity/Flexibility	• Curiosity and open-mindedness
• Including proponent where/ when appropriate	• Outcomes-based, towards consensus
• Respect	• In-person meetings whenever possible/meeting on the land
• Balance efficiency with a meaningful process	• Transparency
• Good faith	
• Recognition	

Table 3. Additional comments regarding principles of dispute resolution under the Act.

"

Confidentiality

The topic of confidentiality in dispute resolution was addressed in multiple ways, such as whether the dispute resolution process itself is confidential given it takes place with a public assessment process, as well as how confidential Indigenous knowledge, if provided, is managed. The following presents the various inputs gathered:

- Confidentiality is necessary in situations where Indigenous rights and interests are concerned. Protocol should clearly define what can and cannot be shared;
- Recognize Indigenous sovereignty over their own data to create more trust and accountability in the process and strengthen the nation-to-nation relationship as meaningful partners;
- Confidentiality can be necessary to encourage parties to share openly, particularly when discussing sensitive information. It can foster more genuine and candid discussions, leading to more productive outcomes. However, confidentiality needs to be balanced with transparency, especially when decisions might impact multiple stakeholders or the public;
- Confidentiality and "without prejudice" should be the presumption for all dispute resolution processes, subject to a mutual decision by the parties to confirm that some or all of the verbal and/or written exchanges will be 'on the record';
- Limits on confidentiality include where the parties share those same comments or documents in the regular EA process without making them confidential;
- Communications need to be without prejudice to the Nation's rights and interests;
- Should be explicit that the report is concluded without prejudice, to the extent they incorporate information about the Nation's rights and title, or concerns of a sensitive or political nature;
- Requirements for open sharing/protecting confidentiality:
  - Facilitator's neutrality and impartiality to create space where parties feel like they can openly share without fear of bias or judgement;
  - Establishing clear ground rules at the beginning of the process can set expectations for respectful communication and behaviour, helping to create safety; and,
  - Facilitator should work to build trust among parties through active listening, empathy and creating an atmosphere of collaboration rather than confrontation.
- Provide settings that help the parties feel comfortable sharing sensitive information;
- Recognize and respect the diversity of perspectives and experiences to encourage an environment where different views are valued;
- Clear confidentiality guidelines to ensure that everyone understands what information will remain confidential and why;
- Regarding confidential Indigenous knowledge:
  - Obtain informed consent from knowledge holders;
  - Cultural sensitivity – well versed in protocols and sensitivities related to Indigenous knowledge, including understanding the significance of the information and treating it with respect;
  - Limited circulation – as agreed upon by the parties; and,
  - Secure storage – protected from unauthorised access or disclosure.
- Appropriate use – used solely for the purpose for which it was shared and not for other purposes without explicit consent;
- Disposal of information – work with the parties to determine appropriate disposal; and,
- Long-term impact – consider potential long-term impact of handling Indigenous knowledge.

Future Policy Work

> - Continued consultation required when developing procurement process and evaluating qualifications; and,
> - A policy determining qualifications should be co-developed and a list of qualified facilitators should be approved jointly by the province and a representative Treaty 8 organization. – *Doig River First Nation*

Funding/Fees

> - Be clear that the EAO covers the costs of in-person meetings (room, food, travel), technology for virtual meetings (if those have a cost) and time of external advisors whom the Nation reasonably considers as necessary for some or all of the dispute resolution process;
> - Recommend setting a cap on the rates of different types of advisors so that professional fees do not balloon (e.g., maximum $350 per hour for legal fees and two or three tiers up to that maximum based on years of experience).

Key Themes From Engagement With Industry

Recognizing that dispute resolution, should it be initiated during the EA process, can be a factor in statutory decision making under the Act, the EAO engaged with industry representatives across various sectors to understand industry's interests and concern regarding the dispute resolution process. Views of industry – gathered from engagement sessions and from written submissions – broadly aligned with the input provided by First Nations, although there was additional discussion on the need for the EAO to fulfil its procedural fairness obligations to proponents during dispute resolution processes. The notes below capture the input provided by industry members with respect to the future dispute resolution regulation and associated policy. Note: contextual information for each section below has not been repeated to streamline this report; please visit the equivalent section for further explanation, if needed.

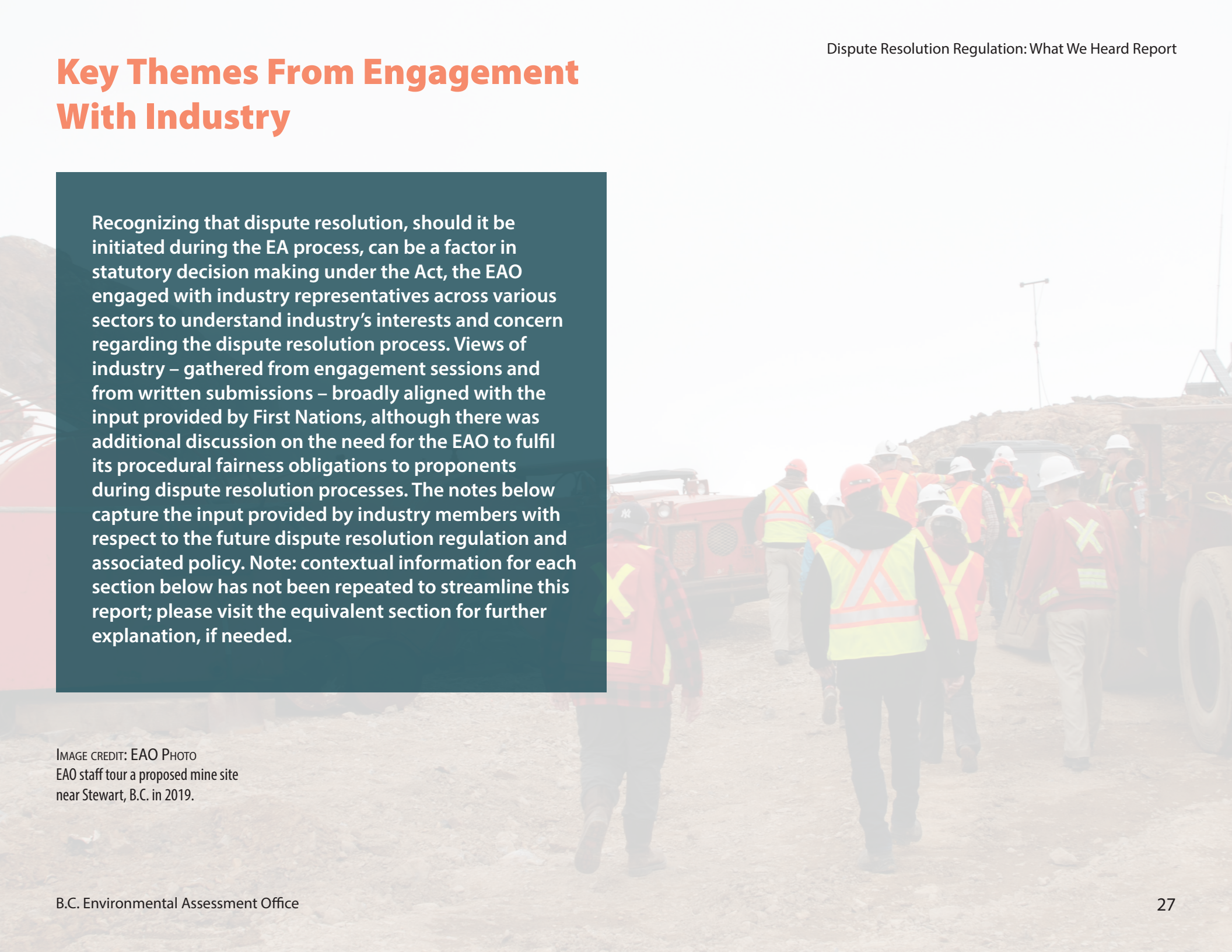

Image credit: EAO Photo
EAO staff tour a proposed mine site near Stewart, B.C. in 2019.

Dispute Resolution Regulation

Qualifications

Knowledge and Experience

- Knowledge of EA process
- Mediation or dispute resolution experience
- Trained in interest-based negotiation
- Experience working with First Nations
- Administrative fairness (both for the proponent and other participating Indigenous nations)
- Technical knowledge or experience working with technical experts
- Canadian laws
- Indigenous legal orders
- Knowledge of relevant industry is an asset.

Qualities

- Independent, neutral, and impartial
- Free from conflict of interests/ perception of bias
- Direct or indirect personal or financial interest
- Engaged by any participant in the EA (participating Indigenous nation, proponent, or other stakeholder)
- Prior statements about subject matter of the dispute indicating that the facilitator cannot be objective.

Qualifications (Continued)

- Team facilitation may be useful/helpful where:
  - Where parties are unable to agree on facilitator, regulation could set out process for a team of facilitators;
  - Where parties agree to a team approach; and,
  - Where desired facilitator does not meet all the prescribed criteria, a second facilitator could be appointed.
- Content knowledge maybe is not as important as mediation knowledge and experience; and,
- Some project/EA content knowledge is helpful to understand the impacts of decisions and understand proponent's point of view.

Table 4. Input from industry members with respect to the future dispute resolution regulation and associated policy.

Powers And Obligations

Powers

- Termination criteria should be established in the regulation rather than policy to provide greater certainty;
- Criteria for ending a dispute prematurely:
  - Support for content in Discussion Paper;
  - Abusive behaviour;
  - Misuse of dispute resolution; and,
  - If there is no common ground/consensus unlikely.
- Facilitator may conclude the process early if consensus is reached;
- Request legal or technical advice, if needed;
- Modify the process in certain circumstances;
- Extend the process in the event that progress is being made towards consensus; and,
- Co-development is beneficial to the success of dispute resolution and an earlier indication of the parties' willingness to resolve the dispute. However, if the parties are unable to reach agreement on the process, the facilitator should have the ability to impose a default process set out in regulation or end the facilitation.

Obligations

- Obligation to document outcomes in the report; and,
- Code of conduct for facilitators as well to operate in good faith.

Matters That a Facilitator Must Consider Before Making a Report

- Outcome – was consensus reached or not?
- The positions/perspectives of the parties;
- Documentation of the process (meeting notes, etc.);
- Information that was considered;
- How the parties reached their decision;
- Facts;
- Past engagement by the proponent on the issue;
- Any information considered related to a termination decision;
- Any information considered related to pausing or extending the time limit;
- Context within the EA process (i.e., clear on concerns under dispute and scope within EA process);
- Include a description of the process; and,
- Information respecting whether a party was participating in good faith.

Time By Which The Facilitator Must Complete The Facilitation and Provide a Report

- Zero days;
- 30 days to co-develop the process;
- Co-development should be subject to a prescribed time limit. Facilitator could either proceed with dispute resolution process or end on the basis of termination criteria;
- Co-development is a good goal but concerned about how much time it takes;
- 60 days seems tight but not unreasonable;
- 90 days;
- 100 days;
- Should be within regulatory timeline and not an off-ramp that adds more time;
- Given the five opportunities for dispute resolution, should not add 500 days to the clock;
- Standardizing a time limit runs the risk of many extensions;
- Concerns with the duration and transparency of the facilitation process and role of project proponents. It is important for the EAO to increase participation in the dispute resolution process with a clear line-of-sight to improving project review timelines;
- Could be context dependent on the complexity of the dispute;
- Could vary based on factors including what stage of the assessment the process is initiated at and the scope of the project being assessed (which could be based on similar considerations as the criteria used to define a reviewable project);
- Process should be defined and documented early in the process to allow all parties to set and manage expectations;
- Want to see a time limit that is short as possible;
- Facilitator to deliver the report within 10 days of the final meeting between parties;
- Forces the government to come to the table;
- Not unreasonable that the facilitator could extend process when appropriate;
- If a timeline extension is required, the EAO should consult with the proponent before the extension is made;
- Facilitator recommends to CEAO to extend time limit in the event that the parties are making progress towards consensus; and,
- CEAO should have the discretion to shorten the standard if merited by the scope and substance of the dispute.

Policy

Appointments

- Mutual agreement by parties on the appointed facilitator is a good approach;
- Have early conversations about preferences for dispute resolution process, including preferred facilitators;
- Retain facilitators well before the formal commencement to expedite process;
- Appoint a facilitator to serve in that role for all dispute resolution processes that arise throughout the EA;
- Support for idea of a list of pre-qualified facilitators;
- Consider adopting a process similar to Rule 8 of Vancouver Internal Arbitration Centres' Domestic Arbitration Rules: If parties [cannot] agree on a facilitator to recommend, body will provide each party with an identical list of [four] names and give the parties [two] days to provide a list of its order of preference. Body will also consider any selection criteria or qualifications provided by the parties while compiling their list of proposed arbitrators; and,
- If the parties cannot agree on a facilitator, the EAO should have the ability to appoint a facilitator.

Referrals To A Facilitator

- Concern over a non-substantive issue being used to frustrate the EA process;
  - Challenging to keep the scope narrow (e.g., cumulative effects and the proponent's ability to address);
- Should not be used for issues beyond the project or for the Crown to otherwise meets its constitutional obligations;
- Should be clear that dispute resolution is about interests rather than issues or positions – to avoid parties being positional;
- Initiating document should be made public;
- Balance not making it a burdensome process to initiate while also preparing for the process (helpful to have information about a Nation's laws, customs and traditions to inform the process); and,
- After receiving a referral, the EAO should develop recommendations, with input from the proponent, respecting:
  - The potential adverse effects of the dispute resolution process on the interests of proponents (and possibly other participating Indigenous nations) and measures to avoid or mitigate such effects; and,
  - Appropriate roles for proponents and other participating Indigenous nations in the dispute resolution process.

Terms of Reference

- Need some kind of consistency of process to be able to extract lessons learned;
- Discussions on confidentiality and where it is required in the Act and what is deemed confidential in the process and any limitations should be clearly discussed and understood;
- Role of the proponent should be a foundational discussion point; and,
- Assumption should not be that the proponent is not a participant.

Principles

- Timeliness;
- Efficiency;
- Transparency;
- Procedural fairness;
- Good faith – demonstrated by:
- A willingness to acknowledge potential outcomes that differ from their own position at the time dispute resolution was referred;
- Willingness to constructively participate in the co-development of the process;
- Responsiveness to requests from the facilitator, including in relation to scheduling; and,
- Conduct during the process, including allocating resources to facilitate meaningful and timely participation.
- Predictable;
- Open-mindedness;
- Flexibility to find consensus;
- Effectiveness;
- Clarity;
- Data-sharing integrity and evidence-based;
- Facilitate dispute resolution, not influence ultimate statutory decision-making;
- Administrative fairness for proponent includes:
- Attending all sessions in front of facilitator;
- Receiving submissions and correspondence from dispute resolution participants; and,
- Making oral and written submissions to the facilitator.
- A statutory decision maker should not delay making a decision pursuant to the Act, simply because consensus has not yet been achieved or condition its decision-making on consensus being achieved.

Information Requirements For Referral To Facilitator

- Support for content in Discussion Paper;
- Should include a clear description of the issue;
- Remedy sought/indication of alternatives or compromises to be considered;
- Overview of the initiating parties' position in relation to the dispute;
- Correspondence or documentation from the EA process that are relevant;
- Recommended or preferred facilitators;
- Description of resources that have been allocated for the duration of the process to ensure that Nations have the ability to participate in good faith. (This information should be provided by anyone participating in the dispute resolution process); and,
- Document efforts to work with the EAO (and the proponent, as applicable) to resolve the issue.

Guidance and Tools

Confidentiality

- A request for confidentiality should be carefully considered before granting the request (i.e., when it can harm a relationship or is culturally sensitive information). Given the context of an EA process that strives to be open and transparent; and,
- If required, the EAO could "redact" culturally sensitive information or information potentially harmful to government's relationship with Indigenous nations before sharing the information with proponents or other parties.

Role Of The Proponent

- It is essential to ensure that project proponents are aware of when a dispute resolution process has been initiated and are provided opportunities to participate and share their perspectives, if desired;
- The regulation must include a policy and/or protocol for informing proponents given they are not party to the dispute resolution process; and,
- Proponents should be afforded procedural safeguards:
  - A more active role for issues related to information or analysis where the proponent will often have expertise or project-specific information;
  - At a minimum, if new information or issue arise, the proponent should be provided with a timely opportunity to review and respond; and,
  - Proponents should be able to make formal requests to the EAO or facilitator about why their participation is warranted.

Tools/Training

- Training workshops for facilitators to proactively explain EA, including the role of reconciliation, describe different issues that could justify dispute resolution and to share best facilitation practices.

Funding

- The Crown must provide much greater assistance to Indigenous governing bodies to build the governance, administrative and technical capacity – on their terms – required to fully participate in government-to-government processes, including in dispute resolution.

Next Steps

This What We Heard report will inform the co-development of the dispute resolution regulation with interested First Nations and Indigenous organizations, with the goal of having an approved regulation by spring 2024. The following diagram depicts the roadmap of regulation development and our current stage in the process.

DISPUTE RESOLUTION REGULATION DEVELOPMENT PATHWAY

ENGAGEMENT DURING THE DEVELOPMENT OF ENVIRONMENTAL ASSESSMENT ACT

First Nations Consultation

- Direct engagements (Dec 2018-Dec 2019)

Implementation Committees

- Environmental Assessment Advisory Committee (March-April 2018)
- Indigenous Implementation Committee (June 2019-Feb 2020)
- Stakeholder Implementation Committee (April-Dec 2019)

EXPERIENCE USING DISPUTE RESOLUTION

The EAO developed a draft administrative framework ("Interim Approach") for dispute resolution to guide the process before a regulation is in place

DISPUTE RESOLUTION HAS BEEN USED BY FIRST NATIONS TWICE

- Related to the Readiness Decision for the Fording River Extension Project;
- Related to the Readiness Decision for the Ksi Lisims LNG Project.

RATIONALE FOR THE REGULATION

The purpose of the regulation is to clarify the powers and duties of facilitators to support collaborative and principled resolution of disputes between First Nations and the Province in the context of assessments.

Given that dispute resolution has already been used by some First Nations, a regulation is needed to support its implementation. The Province in consultation and cooperation with Indigenous peoples must take all measures necessary to ensure the regulation is consistent with the UN Declaration.

SPRING 2023

Publication of a Dispute Resolution Discussion Paper & engagement to support the development of a regulation

CONSULTATION & COOPERATION WITH FIRST NATIONS

The EAO wants to know First Nations' engagement preferences.

- Notification Webinars
- Government-to-Government meetings
- Regional Workshops
- Written Submissions

ENGAGEMENT WITH DISPUTE RESOLUTION AND INDIGENOUS LAW EXPERTS & PRACTITIONERS

- Written Submissions
- Workshops

ENGAGEMENT WITH INDUSTRY

- Notification Webinars
- Written Submissions
- Workshops

EARLY 2024

YOU ARE HERE

Publication of a What We Heard Report

Regulation co-development and targeted follow-up engagement

TARGET: SPRING 2024

Dispute Resolution Regulation comes into force

SUMMER 2024

Implementation of the regulation and continued engagement on a dispute resolution policy