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August 21, 2023

Sent via email

Attention:

Tara Narwani (she/her)
Director, Strategic Initiatives and Effectiveness
Environmental Assessment Office
EAO.DisputeResolution@gov.bc.ca

Reference: ***BC Environmental Assessment – Dispute Resolution Discussion Paper***

Doig River First Nation submits our comments and perspectives on the Discussion Paper herein.

BC has taken meaningful steps toward Indigenous reconciliation and UNDRIP implementation, including changes to the *Environmental Assessment Act* in an effort to create space for a more fulsome inclusion of First Nation(s) legal traditions, treaty, and Indigenous rights. In addition to the potential intrinsic value of the many steps BC has and is taking to advance the place of Indigenous peoples in this province, these measures will also improve the regime of land and resource management for all British Columbians.

We are providing this formal submission to contribute to the development of an effective dispute-resolution mechanism, and to outline continuing concerns around key aspects of the proposed dispute resolution process. Our responsibility to manage our lands, waters, and resources, and protect and restore ecosystems is instrumental to the meaningful exercise of our treaty rights.

Central to the province's rationale for developing the revitalized BC Environmental Assessment Act was the province's desire to create a predictable and stable investment climate. When BC introduced the legislation creating the new EAA, the Minister of Environment and Climate Change Strategy emphasized the effect of advancing Indigenous reconciliation on reducing uncertainty and risk of assessments being overturned due to ongoing infringements of Indigenous rights.

An effective dispute resolution process that offers a viable and superior alternative to judicial review is essential to achieving the improved performance in the EA process that the province seeks. The dispute resolution process proposed in the Discussion Paper lacks the establishment of an independent body, such as a Reconciliation Commission, to oversee the process. Without an institution that houses expertise and resources to oversee dispute resolution, we are unlikely to achieve a substantive departure from the status

quo in seeking court rulings on the duty to consult and accommodate.

A superior alternative to judicial review must ensure the policy and regulatory framework of the government of British Columbia includes access to workable and credible methods for resolving disputes that meet the standards of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the objectives of BC's Declaration Action Plan and the recommendations of the Environmental Assessment Advisory Committee.

Doig River Fist Nation acknowledges the commitments of this government to advance Indigenous reconciliation in recent years. The effective and appropriate design of dispute resolution mechanisms is a fundamental element of incorporating Indigenous rights and perspectives in the environmental assessment process that can reduce barriers to achieving success with these commitments.

We look forward to seeing a commitment to establishing an independent body to oversee the EA dispute resolution process, and to working with you to achieve the necessary outcomes.

Regards,

Shona Nelson, Band Manager
Doig River First Nation

cc. Ruby Sarkar, EAO

Doig River First Nation's Submission

The EAO, in describing the purpose of the Dispute Resolution Discussion Paper, notes:

> *The paper lays the foundation for all the topics we intend to address throughout the consult and cooperate process, including, for example:*
>
> - *How the dispute resolution process can be customized to reflect First Nations legal orders and cultural traditions; and*
> - *That dispute resolution facilitators should have knowledge and expertise of Indigenous approaches to conflict resolution.*

Indigenous Consent

The EAO describes Indigenous consent in terms of a series of 'consensus-seeking' activities. However, this fails to meet the UNDRIP FPIC standard of ascribing decision-making authority to Indigenous nations, and therefore it does not achieve the meaningful reconciliation BC seeks. Rather, it perpetuates the sovereign-to-subject relationship between the Crown and Indigenous peoples.

Without a balancing of Crown and inherent Indigenous jurisdiction, the Crown retains sole decision-making authority, and the standard for decision-making remains the question of whether it has discharged the duty to consult and accommodate.

> *Attempts to resolve a dispute of this magnitude when the Agency and Crown have final decision-making authority creates a power imbalance that likely cannot be levelled through negotiation, mediation, or facilitation alone. … The fear from a First Nations perspective is that a facilitated or mediated dispute resolution process in IA is only facilitating the discharge of the Crown's duty to consult.*[1]

Hayden King and Shiri Pasternak, writing for the Yellowhead Institute, developed an FPIC standard based on case studies that incorporates an Indigenous perspective and is applicable in the Canadian context.[2] This is intended to demonstrate a practical approach to shifting from assumptions of colonial legal systems toward those which can realize reconciliation.

The standard contains four elements:

1. Restorative: promoting the active and intentional centering of Indigenous models of governance and law.
2. Epistemic: accepting Indigenous knowledge frameworks and languages for understanding relationships to the land.
3. Reciprocal: ensuring that Indigenous people are not merely being asked to grant consent, but are determining the terms of consent. … This is less a process of governments obtaining consent, but an active maintenance of Indigenous authority.
4. Legitimate: decisions about granting or withholding consent generally require representatives perceived as legitimate by the community.

[1] Bruce, 2021, p. 46
[2] Hayden and Pasternak, 2019, p. 20

Cooperatively Established Institutions and Processes

Dispute resolution objectives are included in the BC Declaration Action Plan 2022-2027: Title and Rights of Indigenous Peoples:

> Dispute-resolution and relationship-building with Indigenous Peoples are supported through cooperatively established institutions and processes that are fair, just and accessible, integrate Indigenous laws and protocols, and use the court system only as a last resort. (p. 14)

This suggests the establishment of an independent institution that would be competent to oversee a dispute resolution process which recognizes and incorporates Indigenous inherent jurisdiction and rights, and Indigenous perspectives on land and resource management.

The Government of Canada's Recognition and Implementation of Indigenous Rights Framework also proposed a new, co-developed institution for resolving disputes.[3]

In addition, the BC Environmental Assessment Advisory Committee in its final report recommended the creation of a Reconciliation Commission.

> 6.2 A RECONCILIATION COMMISSION
>
> **R2: The Province should establish a mechanism such as a Reconciliation Commission to provide constructive direction and support for reconciliation initiatives within the EA process and to address disputes arising from implementation of the UN Declaration within the EA revitalization initiative.**
>
> Implementation of the UN Declaration in the EA revitalization process will be a complex and lengthy matter that would benefit from a source of highly qualified and respected information and advice that is oriented to positive improvements in process. A Reconciliation Commission could promote consistency in the application of the UN Declaration principles and flexible use of facilitative alternative dispute resolution processes more in tune with traditional indigenous governance and laws. Issues of recognition, capacity funding, engagement in decision making, the interplay of scientific and indigenous information, independence of information verification, addressing of shared territories and regional sensitivity are among the areas of knowledge that will grow over time. [4]

The Advisory Committee distinguished between dispute resolution mechanisms operating within the EA process to manage "day-to-day issues for which the consensus proves to be difficult", and major issues, which should be referred to an independent Reconciliation Commission. This is an important distinction. Issues on points of technical matters, including methods, normally are explored jointly between the EAO and First Nations – either bilaterally or in the Working Group deliberations. However, some matters carry significant implications for Indigenous and treaty rights; it is these which, if not resolved within the EA process require independent dispute resolution that is competent to incorporate Indigenous rights and perspectives into the process.

EAO's proposal designating the province to appoint an external facilitator to oversee dispute resolution departs from the notion of "cooperatively established institutions and processes".

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[3] Government of Canada, Overview of a Recognition and Implementation of Indigenous Rights Framework https://www.rcaanc-cirnac.gc.ca/eng/1536350959665/1539959903708

[4] Environmental Assessment Advisory Committee Final Report, May 2018, p. 11.

To properly reflect the UNDRIP, the dispute resolution process should be designed with sufficient flexibility to reflect First Nations legal orders and cultural traditions. This is possible only if the process is built on a foundation which includes the self-determining rights of Indigenous nations. Without an independent body possessing the expertise and competency to incorporate Indigenous rights, legal orders and perspectives in dispute resolution processes, the province will achieve only marginal results in its objective of advancing Indigenous reconciliation.

Answers to Questions Posed by EAO

Principles and Goals for Successful Dispute Resolution Processes

The principles for the interim framework for dispute resolution were created with the Indigenous Implementation Committee:

- Be flexible to allow for co-development of the dispute resolution process with First Nations
- Respect the distinct customs, traditions, rules, and legal systems of First Nations
- Be timely and predictable, recognizing dispute resolution takes place within a regulatory process

1. What principles should guide dispute resolution?

The Discussion Paper, on page 16, references UNDRIP Articles 27 and 40, highlighting "the right to fair, just, impartial and transparent processes that give due recognition and consideration of the customs, traditions, rules, and legal systems of the Indigenous Peoples concerned". The words 'recognition' and 'consideration' denote active incorporation of the factors which shape Indigenous decision making into the dispute resolution process. The wording of the UNDRIP principles for successful dispute resolution processes should not be changed to "respect the distinct customs, traditions, rules, and legal systems of First Nations" as this is a passive term that does not compel tangible actions.

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

The imposition of colonial land regimes - laws, policies, and practices - are largely responsible for the issues of shared territory and overlaps that now burden many First Nations.

Indigenous dispute resolution seeks to ensure the communities' concerns are considered with the aim of restoring and maintaining peace.

Any alternative dispute resolution mechanism established for addressing disputes between First Nations about participation in the assessment 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.

Facilitator

3. How should initiation occur so that it is successful?

The regulation should both set the qualifications of facilitators and create a process for referrals to a facilitator.

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. The list should be made available to parties initiating a dispute resolution.

4. What information should be provided to initiate a referral to a facilitator?

The description of the Interim Framework for Dispute Resolution provided in this Discussion Paper should include information provided directly by the First Nations that have participated in the Interim

process to-date. Without this information, the description doesn't contain sufficient information for other First Nations to consider what is working and what is not from an Indigenous perspective.

Our initial observations:

- We agree that either a participating First Nation or the CEAO should refer a matter to a facilitator, and that the initiating document should provide a clear understanding of the issues as well as the remedy that the referring party is seeking. In addition, the document should include a summary of the First Nation(s) legal traditions, treaty and Indigenous rights that will shape the scope and substance of the dispute resolution process.

- The Discussion Paper contemplates options for a potential role of proponents in the dispute resolution process. The decision whether to provide the initiating document to proponents should be made jointly by the participating First Nation and the EAO, with express consideration of whether the information pertains solely to technical matters and/or those affecting Indigenous rights.

  While respecting that the province has a procedural fairness obligation to the proponent, there may be situations where the substantive nature of the dispute is based on Indigenous rights and jurisdiction, which will not normally benefit from the active participation of proponents. We agree that, where technical information from a proponent would assist the dispute resolution process, a limited opportunity to participate may be extended to the proponent.

Facilitator Qualifications

5. What knowledge do facilitators need to be able to facilitate disputes in the context of assessments?

In addition to the points made on page 18 of the Discussion Paper, facilitators should have:

- significant experience with environmental assessment and cumulative effects;
- a formal ADR designation;
- direct experience with Indigenous nations and demonstrated understanding of the relationships among the environment, cultural, social and health/wellbeing aspects within the place-based ecosystem where the project is undergoing assessment and;
- demonstrated understanding of First Nations distinct customs, traditions, rules, and legal systems.

6. What qualifications or experience should be required?

See #5 above

7. Are there any factors or circumstances where a facilitator should be ineligible to facilitate a dispute, e.g., if they have a personal or financial interest in the project undergoing an assessment?

- Any conflict of interest, direct or indirect, including personal, financial, prior, or current commercial relationship with the proponent or project undergoing an assessment.

8. Are there specific contexts or criteria for the use of team facilitators?

- There may be situations where the data/science provided by the proponent is disputed by the First Nation(s), provincial and federal scientists. This may require the facilitator to engage additional expert support – not necessarily another facilitator, but rather a respected subject matter expert.

9. With regard to disputes between First Nations about participation in the assessment, what are the specific considerations about appointments for this type of dispute?

- Several experts have written on this subject (see References in this submission) and should be asked to provide guidance on this topic.

Facilitator Appointments

10. Do you agree or disagree with these considerations to guide facilitator appointments?

- Agree

11. What are other considerations?

- No additional considerations other than those listed in #5 above

12. What barriers exist for participating in provincial procurement processes?

13. Is the co-development of the process foundational to successful dispute resolution in the context of environmental assessments?

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.

Establishing a Reconciliation Commission, as the Advisory Committee and others have recommended, is the most effective way to ensure that the environmental assessment process will appropriately capture the Indigenous context.

14. If so, how should co-development work?

15. How can trust and constructive engagement be built into the process? I.e., what is needed to support a conducive environment for open, honest, and frank discussions?

Once the parties are at a formal dispute resolution stage, there is realistically only limited room for a line of sight to building trust. ADR professionals are trained to build constructive engagement; if they also are 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.

16. **With regard to dispute resolution between First Nations about participation in the assessment, are there other considerations for co-development for this type of dispute?**

17. **The co-development of the process for dispute resolution would be intended to guide the facilitation itself; so ideally it should not be a protracted process so there is time for the facilitation itself. How much time is needed to develop the process?**

Powers and Obligations of the Facilitator

18. **What powers should the facilitator have to be able to manage a dispute resolution process?**

    They should have the power to request and oblige parties or the proponent to produce relevant and timely information, including the commission of any studies or recommendations from subject-matter experts as required.

19. **What should the facilitator be obligated to do?**

20. **Besides regulatory powers and obligations, what tools do facilitators need to be supported?**

21. **What demonstrates that the parties are entering and participating in dispute resolution in good faith with a willingness to meaningfully participate?**

    Each party has articulated its objectives clearly in relation to the issue at dispute, and their intention to work to understand others with a view to reaching agreement.

22. **Under what circumstances should a facilitator consider ending a dispute-resolution process?**

Time for Dispute Resolution

23. **What should the time limit be?**

    It would have been helpful to include the observations of participating First Nations on the Interim Process on these matters.

24. **What are the challenges of having a time limit in place?**

25. **What are the benefits of having a time limit in place?**

26. **Are there other mechanisms (that would likely be established by policy) that could be built into the process to keep the dispute resolution timely?**

Matters the Facilitator Must Consider in the Report

27. **What should a facilitator be required to consider in their report? For example, this could include the 'facts' of the dispute and perspectives of each of the parties.**

They should be required to consider the facts of the dispute, any Western or Indigenous knowledge that has been presented and is relevant to the matter in dispute, the Indigenous nation's perspective on the technical matters and how their rights and interests are affected.

28. **What else should a facilitator consider in their report?**

Confidentiality

29. **How do we create spaces that are conducive for parties to openly share? Is confidentiality necessary?**

    It is possible to manage confidentiality within the process if the plan clearly defines what can and cannot be shared. Confidentiality is necessary in situations where Indigenous rights and interests are affected.

30. **The facilitator is required to adhere to Section 75 of the EA Act in relation to any Indigenous knowledge provided to them in confidence. Are there any additional considerations about how a facilitator handles confidential Indigenous knowledge?**

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