FNLC Technical Comments on Draft Environmental Assessment Act Dispute Resolution Regulation

August 2023

1. INTRODUCTION

The FNLC technical team offers the comments and concerns below regarding the BC Environmental Assessment Office's ("EAO") proposed development of a dispute resolution regulation and related policy ("Regulation") under the *Environmental Assessment Act* ("Act") in response to the Dispute Resolution Discussion Paper ("Discussion Paper") provided to FNLC on May 29, 2023 as part of the Province's "consult and cooperate process" to develop the Regulation.

2. OVERARCHING ISSUE

There are major concerns with the proposed Regulation with respect to its perpetuation of a framework that is inconsistent with the *United Nations Declaration on the Rights of Indigenous Peoples* (the UN Declaration).

The Act was developed before the enactment of the *Declaration on the Rights of Indigenous Peoples Act* (Declaration Act) on November 29, 2019. The text of the Act was not developed pursuant to section 3 of the Declaration Act to ensure consistency with the UN Declaration and, therefore, there are inconsistencies of text of the Act, and its implementation, with the Declaration.

Under the Act, First Nations' engagement in the environmental assessment process is predicated on "consensus-seeking" with the EAO, which simply requires the Chief Executive Assessment Officer (CEAO) to attempt to seek, but not necessarily obtain, "consensus" with participating First Nations on certain key decisions made throughout the process. Fundamentally, consensus is conceptually distinct from consent and "consensus-seeking" does not require the EAO to secure the free, prior, and informed consent ("consent") of First Nations prior to proceeding with the environmental assessment or approving a project. Under the approach set out in the Act, while a First Nation may have an avenue to provide consent through the environmental assessment process, a First Nation's consent is not required "prior to the approval of [a] project affecting their lands or territories and other resources."[1] Under the Act, if a First Nation decides to withhold its consent, the provincial statutory decision-maker is merely required to meet with the First Nation to "attempt to achieve consensus" and, if consensus is not reached, "provide reasons for why the decision to issue a certificate" was made in the face of the First Nation's decision to withhold its consent.

The FNLC has been consistent that the "consensus-seeking" approach built into the Act does not meet the Declaration's standard of free, prior and informed consent, and that s. 7 of the Act – which implies that a First Nation's consent is *only* required if they have an agreement with the

[1] Article 32(2) of the Declaration sets out that: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions **in order to obtain** their free and informed consent **prior to the approval** of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Province – is inconsistent with the Declaration. The FNLC has maintained that the Act needs to be amended to rectify this problem.

The Discussion Paper is premised on an assumption that the Regulation will continue to support the "consensus-seeking" model through dispute resolution, and suggests that "consensus-seeking is one approach to support implementation of Article 32(2) [of the Declaration] and the standard of 'consult and cooperate'." There is no "standard of consult and cooperate." Article 32(2) of the Declaration requires that States "consult and cooperate in good faith with Indigenous peoples concerned through their own representative institutions **in order to obtain** their free and informed consent **prior to the approval** of any project affecting their lands or territories and other resources…" The continued reliance through the Regulation on the Province's "consensus-seeking" approach established under the Act is flawed and inconsistent with the consent standard affirmed in the in UN Declaration.

The Declaration Act affirms the application of the Declaration to the laws of BC and requires the Province to work in consultation and cooperation with Indigenous peoples to **take all measures necessary** to ensure BC laws (and regulations) are consistent with the Declaration.[2] While one of the "purposes of the EAO" is to "suppor[t] the implementation of the [Declaration]," the environmental assessment process set out in the Act itself, as currently drafted, does not meaningfully do so.

The consensus-seeking framework under the Act needs to be reviewed and addressed for consistency with the UN Declaration. The Act and its implementation must reflect the legal pluralism that exists in British Columbia and respect First Nations' inherent titles, rights and jurisdictions. First Nations are not – as suggested in the Discussion Paper – another group (among companies and the public) that the EAO merely "works with." First Nations are self-determining and self-governing title and rights-holders that hold decision-making authority with respect to activities in their territories.

The Act, Regulation and policy framework must be consistent with the UN Declaration and a UN Declaration analysis of the Regulation is required.

While the Regulation may not, on its own, be able to rectify the abovementioned deficiencies with the Act, the Province has an obligation to ensure that it is not further entrenching a process that is inconsistent with the UN Declaration. Building a dispute resolution process around the overarching goal that it "be a tool to support consensus-seeking" without recognition of First Nations' right of consent, which is an aspect of their rights of self-determination and self-government, is not consistent with the UN Declaration. Any new regulations under the Act, including the proposed dispute resolution Regulation, must be grounded in, and consistent with, the standard of consent. The lack of any acknowledgement of consent requirements in the Discussion Paper – including in the context of consent agreements referenced in section 7 of the Act – is extremely concerning. In addition to making space for First Nations' right of consent more generally, the Regulation 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.

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[2] Note that, pending review and amendments to laws for consistency with the UN Declaration, the *Interpretation Act,* RSBC1996, c.2 38, s. 8.1 requires that existing laws be "construed as being consistent with the UN Declaration."

Next Steps:

a) The Act, specifically the consensus-seeking approach and erroneous implication in section 7 that consent is only required if a First Nation has an agreement with the Province, must be reviewed and addressed for consistency with the UN Declaration.

b) The Regulation must not further entrench the "consensus-seeking" approach and must meaningfully reflect the consent standard in the context of dispute resolution.

c) The Regulation must include a process to refer a dispute to other relevant government-to-government processes that will support the consent standard, as appropriate.

d) The Regulation must provide for dispute resolution processes to be available when required under consent agreements referenced in s. 7 of the Act.

3. ADDITIONAL KEY COMMENTS AND CONCERNS

Additional key comments and concerns with respect to the Discussion Paper regarding the Regulation development include the following, set out in greater detail in the sections below:

1. The Regulation must meaningfully reflect First Nations' consent to, or influence over, the design of the dispute resolution process in each case.

2. The Regulation must ensure that First Nations have adequate control over the identity of the dispute resolution facilitator and consent to the scope of their powers, including with regards to how and when each dispute resolution process proceeds and ends.

3. The Regulation must not narrow the availability of dispute resolution from what is already set out in the Act.

4. The Regulations should provide for participation of the Minister in dispute resolution in relevant circumstances and, consistent with the Act, must ensure participation of the CEAO if requested.

3.1 Design of dispute resolution processes

The Discussion Paper acknowledges that dispute resolution under the Act cannot be a "one size fits all" model. The Discussion Paper further identifies the EAO's intentions that the Regulation reflect the current interim dispute resolution framework that allows the parties to co-develop a "custom dispute resolution process that gives due consideration to the customs, traditions, rules, and legal systems of First Nations".

However, despite this intention, the Discussion Paper does not consider how input on the specific procedural requirements, methods, and procedural approaches required by First Nations will be integrated into a dispute resolution process, other than describing it as a "co-developed" process. This suggests that the Regulation may only create opportunities for First Nations to provide recommendations and not to directly control the content of the dispute resolution planning process. Further, the Discussion Paper's emphasis on consistency and predictability for the dispute resolution process suggests that the EAO wishes to design dispute

resolution processes that are uniform and more suited to the environmental assessment timelines.

Moreover, the Discussion Paper notes that the "time limit" for dispute resolution – if the Regulation sets a time limit - starts from when a facilitator is contracted. It is noted that under the interim framework for dispute resolution, the facilitator has been contracted prior to the co-development of a custom dispute resolution process. If the Regulation is to set a time limit, this time limit must provide for sufficient time to meaningfully co-develop a process. The Discussion Paper notes that the EAO has recommended a 60-day time limit. This should be clarified to be the minimum period to co-develop a process, with extensions of time if requested by a Frist Nation.

The Discussion Paper also considers the role of a proponent in a dispute resolution process – this role must be carefully constructed, and be made subject to First Nation consent, as proponent participation could interfere with First Nation decision-making within the dispute resolution process.

A distinctions-based approach in the design and implementation of dispute resolution processes is required in order 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. It is also essential that the Regulation reflect the fact that Métis in BC do not have land or resource-based rights in BC and, accordingly, their participation in EA and related dispute resolution processes will be fundamentally different and much more limited than the participation of First Nations whose title, and rights stand to be impacted by proposed projects.

<u>Recommendations:</u>

a) 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.

b) The Regulation must require that dispute resolution processes take into account and facilitate the gather of information to consider the following matters:

    - First Nations' inherent, constitutional and human rights, including title and jurisdiction;
    - First Nations' perspectives;
    - First Nations' knowledge (if provided);
    - support for reconciliation, as a listed purpose of the EAO; and
    - any requirements or considerations set out in an agreement.

c) The Regulation must 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.

d) The Regulation must not provide for overly onerous, legalistic or time-consuming processes for First Nations to request dispute resolution processes.

e) The Regulation must ensure that a distinctions based approach is taken to the design of dispute resolution processes. This includes taking an approach that reflects the limited scope of Metis rights, which do not include land and resource based rights, both with respect to the design of, and Métis participation in, dispute resolution processes.

f) The Regulation must specify that the proponent may only participate in the dispute resolution process if the participating First Nation(s) consent.

g) If the Regulation sets a time limit on the dispute resolution process, this time limit must account for the time needed to meaningfully co-develop a custom, Nation-specific, dispute resolution process that reflects the matters referred to in recommendation (b), above.

3.2 Facilitator appointment and powers

Currently, Section 5(1) of the Act authorizes the Minister to appoint a dispute resolution facilitator, merely giving "consideration" to the recommendations of First Nations. The Act also allows the Minister to prescribe the powers of facilitators in the Regulation.

The Discussion Paper addresses the need to consider recommendations of First Nations when appointing facilitators and emphasizes that facilitators be able to "walk in both worlds." However, it does not speak to distinctions-based approaches nor acknowledge that First Nations should have decision-making authority to appoint their own approved facilitator with specific cultural competency, who is appropriately versed in the laws and traditions of each respective nation.

Additionally, the Discussion Paper proposes that a facilitator would have authority over the proceedings of a dispute resolution process, including the power to "assess the readiness" of the parties to participate in dispute resolution and make binding determinations on certain "termination criteria", such as: i) "whether parties are not willing to meaningfully participate to an extent that reaching consensus is highly unlikely (e.g. parties are too entrenched in their positions; acting in bad faith)"; ii) whether the substance of the dispute is unrelated to the project; iii) whether the dispute would be better considered during another phase of the environmental assessment process; and iv) whether the dispute has been considered in dispute resolution previously in relation to the same project and there has been no change in the parties' positions.

Giving facilitators unilateral authority to end a dispute resolution process in these circumstances provides facilitators too much discretion and may significantly diminish the outcomes of the dispute resolution process for First Nations. Moreover, this proposal is not consistent with the UN Declaration's consent standard as, under this approach, a First Nation withholding their consent for a project in a culturally or spiritually important area, or otherwise designated "no go zone" of their territory, could be deemed as being "too entrenched in their position" for not being willing to make concessions – providing an avenue for the CEAO to proceed with a contrary decision without recourse to dispute resolution. The Discussion Paper's proposal that a facilitator have the power to end a dispute resolution process when the First Nation wishes to withdraw, or where the proponent withdraws its environmental assessment application, may be an appropriate approach.

Finally, the Discussion Paper's suggestion that a confidential memo could be required from a facilitator where certain confidential information, including Indigenous knowledge, has been shared to avoid such information being published in their public report is an important consideration.

Recommendations:

a) The Regulation must ensure that any facilitator appointment process will be distinctions-based and that specific requirements of participating First Nations will be reflected through the appointment process.

b) The Discussion Paper suggests the possibility of "creating a list of facilitators." The use by the EAO of a pre-selected roster of facilitators should be avoided to better support the appointment of a culturally appropriate facilitator on a Nation-by-Nation basis.

c) The Regulation should require that facilitators have knowledge of, and experience with, First Nation issues.

d) The Regulation must provide that First Nation consent is required in relation to who is appointed as a facilitator.

e) The Regulation must provide First Nations clear opportunities to establish the powers and obligations of the facilitator within each dispute, including with respect to how the dispute resolution process proceeds and concludes with the consent of each First Nation.

f) The Regulation must require the dispute resolution facilitator to keep any confidential information provided by a First Nation in a confidential memo following the end of the dispute resolution process, and must be prevented from releasing such information publicly.

g) The Regulation must allow a dispute resolution process to extend timelines when required to allow the process to be meaningful.

3.3 Narrow interpretation of section 5(2) of the Act

Section 5(2) of the Act sets out that matters pending decision under sections 14(2), 17, 18, 19, 28, or 29, the provision of notice under section 14(1), and that any other prescribed matter can be referred to a dispute resolution facilitator. However, the Discussion Paper suggests that dispute resolution would only be available under s. 29 with respect to the CEAO's pending recommendations regarding whether the project is consistent with the promotion of sustainability (see 29(2)(b)(i)).

The CEAO must also make recommendations under section 29(b(ii) with respect to the following:

> (a)positive and negative direct and indirect effects of the reviewable project, including environmental, economic, social, cultural and health effects and adverse cumulative effects;

(b)risks and uncertainties associated with those effects, including the results of any interaction between effects;

(c)risks of malfunctions or accidents;

(d)disproportionate effects on distinct human populations, including populations identified by gender;

(e)effects on biophysical factors that support ecosystem function;

(f)effects on current and future generations;

(g)consistency with any land-use plan of the government or an Indigenous nation if the plan is relevant to the assessment and to any assessment conducted under section 35 or 73;

(h)greenhouse gas emissions, including the potential effects on the province being able to meet its targets under the *Greenhouse Gas Reduction Targets Act*;

(i)alternative means of carrying out the project that are technically and economically feasible, including through the use of the best available technologies, and the potential effects, risks and uncertainties of those alternatives;

(j)potential changes to the reviewable project that may be caused by the environment;

(k)other prescribed matters,

The Discussion Paper does not contemplate that dispute resolution would be available to address disagreement between the CEAO and a Participating Indigenous Nation with respect to these recommendations.

Recommendation:

a) The Regulation should explicitly make clear that dispute resolution is available with respect to **any** matter pending decision under section 29 of the Act.

3.4 Ministerial and CEAO participation in dispute resolution

While the Discussion Paper acknowledges that the Act requires the CEAO to take part in dispute resolution if requested by a Participating Indigenous Nation, it suggests that the "project team" (public servants who manage the assessment process on specific projects) may "represent" the CEAO in dispute resolution meetings.

Section 5(2)(a) of the Act makes clear that matters pending decision under section 29 of the Act (including the Minister's decision to issue or refuse a Certificate) may be referred for dispute resolution. However, the Discussion Paper suggests that, because the Minister is not involved in the assessment process until the decision-making stage, that the "Minister is not a party to dispute resolution." The Discussion Paper instead highlights that there is a requirement for the Minister to meet with a participating Indigenous Nation if the CEAO's recommendation on whether or not a project should be approved to proceed is inconsistent with the First Nation's notice of consent or lack of consent. It is not clear from the Discussion Paper that the availability

of a formal dispute resolution process (which may involve multiple meetings) is currently contemplated.

Recommendations:

a) The Regulation must consider how the Minister may be involved in the relevant dispute resolution processes and the appropriate timing of that involvement during key phases of an environmental assessment, including if the Minister's participation is required under a consent agreement referenced in section 7 of the Act.

b) The Regulation should explicitly make clear that dispute resolution may be requested to address the circumstances described in section 29(5) of the Act.

c) Consistent with the requirement of section 5(5)(b) of the Act, the CEAO must take part in the dispute resolution process if requested to do so by a Participating Indigenous Nation.