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August 1, 2023

By Email

Tara Narwani
Director, Strategic Initiatives and Effectiveness
Environmental Assessment Office (EAO)
Government of British Columbia

Re: Written Submission on the EAO's Dispute Resolution Regulation Discussion Paper

Dear Tara Narwani,

On behalf of Gitga'at First Nation ("Gitga'at"), the Gitga'at Oceans and Lands Department ("GOLD") is providing this letter to provide feedback on the EAO's Dispute Resolution Regulation Discussion Paper. Please find attached as Appendix Gitga'at's response and feedback.

Sincerely,

Ty Sorensen
Regulatory Engagement Coordinator
Gitga'at Oceans and Lands Department, Gitga'at First Nation

cc: Chris Picard, Science Director, Gitga'at Oceans and Lands Department, Gitga'at First Nation

Appendix - Feedback on the EAO's Dispute Resolution Regulation Discussion Paper

1) *Response to Questions #3 "How should initiation occur so that it is accessible?"; and #4 "How much information should be necessary to initiate a referral to a facilitator?"*

Gitga'at recommends that a dispute resolution should be initiated by an Indigenous nation providing notice to the EAO via a prescribed form. This prescribed form would be readily available on the BC government website. There should be limited formal requirements regarding the content of the prescribed form. At minimum, the prescribed form should include the following information:

- The name and contact information of the Indigenous nation;
- The name and information of the primary contact person;
- The dispute resolution matter; and
- The description of dispute (i.e. why the Indigenous nation wishes to initiate dispute resolution, and their desired outcome).[1]

Currently, a dispute resolution can be initiated at any time before a decision has been made on a matter. However, Indigenous nations are often unaware of when the EAO will render its decision on a matter, and thus, may unfairly find themselves unexpectedly out of time to initiate a dispute resolution, as occurred to Gitga'at recently in the Ksi Lisims LNG Project environmental assessment. To avoid this, Gitga'at recommends that the dispute resolution regulation contain a notice provision which states that the EAO must provide at least **one** week's notice to Indigenous nations before the date on which it plans to render a decision. This will create a fair and transparent dispute resolution process.

If the notice provision is implemented, Gitga'at further recommends that the dispute resolution regulation specifies a specific deadline for when a dispute resolution can be initiated. For example, the regulation can state that a dispute resolution must be initiated no later than **one** day before the EAO releases its decision on the matter.

2) *Response to Questions #5 "What knowledge do facilitators need to be able to facilitate disputes in the context of assessments?"; #6 "What qualifications or experience should be required?"; and #7 "Are there any factors or circumstances where a facilitator should be ineligible to facilitate a dispute?"*

Gitga'at recommends that a facilitator should be explicitly required to have experience working with or for Indigenous communities. This experience could be demonstrated in a variety of ways such as:

- Previous facilitation of Indigenous engagement activities between Indigenous nations and the provincial or federal government;
- Previous mediation experiences regarding disputes between Indigenous nations and the provincial or federal government;
- Experience being employed directly by an Indigenous nation;

[1] For an example of an initiation document, see "Fording River Extension Project – Ktunaxa Dispute Resolution Initiating Document" at 3-5.

- Experience working as a consultant or legal counsel for an Indigenous nation; and/or
- Previous mediation experiences regarding disputes within or between Indigenous communities.

A facilitator should also have extensive experience in mediation and dispute resolution, and should have some experience and knowledge with environmental laws and the BC environmental regulatory regime.

The qualifications and experience that determine the eligibility of an individual to facilitate a dispute resolution should not solely be based on academic or professional credentials. Formal requirements regarding credentials could result in qualified dispute mediators such as Indigenous elders being ineligible from facilitating disputes. An individual's personal knowledge and experience should be primary consideration rather than academic or professional credentials.

Gitga'at recommends that a facilitator should be ineligible to facilitate a dispute resolution if they have previously been employed in the last 6 months or are currently employed by the proponent of the project, the parties involved in the dispute, and/or the EAO. Facilitators should be ineligible to facilitate a dispute resolution if they or an immediate family member (i.e spouse, sibling, parent, etc.) is employed by the proponent, parties involved in the dispute and/or the EAO, or if the facilitator or their family member has a financial interest in the project that is being assessed.

Conflict of interest checks should be conducted by the Minister prior to facilitator appointment to ensure that the ineligibility requirements are followed. The dispute resolution regulation should have provisions that allow for the immediate removal of a facilitator, if it is found there is a conflict of interest. For example, if during the dispute resolution it is discovered that there is a conflict of interest, the facilitator must be removed immediately, and the dispute resolution process must start over with a new facilitator.

3) Response to Question #8 "Are there specific contexts or criteria for the use of team facilitators?"

Gitga'at believes that team facilitation would be beneficial in situations where a dispute arises regarding a particularly technical matter. In these cases, the facilitation team should be composed of at least one individual who is considered an expert in the technical topic of dispute and at least one individual who has expertise in mediation.

4) Response to Questions #10 and #11 "What are some considerations to guide facilitator appointments?"

Gitga'at recommends that facilitator appointments should occur through open and transparent discussions, and numerous meetings between the EAO and the Indigenous nation. Facilitator appointments should be consented to by both parties and should not simply be consensus-seeking. Ideally, both parties would come together each with their own list of potential facilitators, and would then work together to recommend certain facilitators to the Minister for appointment. If the parties cannot come to a consensus on a facilitator recommendation, the following process would be followed:

- 1) Each party submits their own list of three potential facilitators to the Minister.
- 2) 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 recommendation.

- 3) The lists are then revised if there is an opposition/veto.
- 4) The Minister then appoints a facilitator based on the recommendation lists, and must provide written reasons on why they chose that facilitator.

5) ***Response to Questions #13 "Is the co-development of the process foundational to successful dispute resolution in the context of environmental assessments?"; and #14 "If so, how should co-development work?"***

Gitga'at recommends that the co-development process of a custom dispute resolution process remains in place, and that the dispute resolution regulation contains provisions to that effect. Co-development should occur through the facilitation of 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.

6) ***Response to Questions #18 "What powers should the facilitator have to be able to manage a dispute resolution process?"; #19 "What should the facilitator be obligated to do?"; and #22 "Under what circumstances should a facilitator consider ending a dispute resolution process?"***

Gitga'at is aware that the powers and obligations of a facilitator are important as they influence the scope and process of the dispute resolution. In order for the dispute resolution process to have meaningful weight, Gitga'at recommends that the facilitator has the following obligations and powers:

- Ensuring that both parties have been adequately heard regarding the issue in dispute and have been responsive to the concerns raised by the other side;
- Ensuring that both parties are prepared and willing to reach consensus, and assisting the parties in getting to that point;
- Power to force disclosure of certain reports and information in relation to the project; and
- Power to create binding conditions and/or decisions on the parties, the decision-maker or the proponent.
    - Presently, the dispute resolution process and the dispute resolution report are non-binding. The facilitator's role is to assist the parties in reaching consensus on their own. However, if consensus cannot be reached, the process ends and the EAO can still continue with the assessment. Allowing the facilitator to create binding conditions and decisions will ensure that concerns/issues raised by the parties throughout the dispute resolution process are adequately addressed throughout the assessment process.

A facilitator should only consider ending a dispute resolution if they reasonably believe that no meaningful discussion will occur between the parties throughout the process, despite several meetings and documented efforts by the facilitator to help the parties achieve consensus. The circumstances in which dispute resolution can be ended should be a matter that can be addressed in a custom process developed by the parties at the outset of a particular dispute. Ending a dispute resolution should be a last resort option. 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 on in the assessment process, which was the case in the Lax Kw'alaams Band dispute resolution process in the Ksi Lisims LNG Project. Gitga'at recommends that a 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.

7) Response to Questions #23 "What should the time limit be?"

Gitga'at recommends that the time limit for a dispute resolution should be set at a minimum of 60 days. However, this limit should be flexible and should be able to be extended in cases where a dispute is complex/technical and/or where more time is needed for the parties to participate in meaningful and effective dialogue. The time limit for each dispute should be formally determined when the dispute resolution process is being co-developed between the parties. The party that has initiated a dispute resolution should be able to recommend a time limit for the dispute, which the other party in the dispute can either agree to or counter with an alternative. If both parties are unable to agree to a time limit, the facilitator should have the power to set a time limit. In setting a time limit, a facilitator must take into account:

- The complexity of the matter in dispute;
- Funding availability to the Indigenous nation; and
- Capacity of the Indigenous nation (i.e. resource constraints).

8) Response to Questions #27 and #28 "What matters should a facilitator be required to consider in their report?"

Gitga'at recommends that a facilitator should consider the following matters in their report:

- The facts of the dispute;
- The perspectives of each of the parties;
- Past communications, consultations, and accommodations during the environmental assessment process;
- Any confidentiality requirements that must apply to the report, including keeping strictly confidential any sensitive information (i.e. Indigenous traditional knowledge) provided by the parties; and
- The proponent's past dealings (i.e. has the proponent been non-cooperative or not obeyed conditions in the past).
    - For example, one concern raised by Ktunaxa Nation in the Fording River Extension Project dispute resolution process was their negative past experiences with the proponent on existing projects within their territory, and the proponent not hearing their concerns on past projects. Therefore, if the proponent has a past tendency to not consult with nor accommodate the Indigenous nation, this should be considered by the facilitator.