



**KTUNAXA  
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**To:** Environmental Assessment Office

**From:** Erin Robertson, Team Lead, Mining Oversight, Ktunaxa Nation Council

**Date:** July 31, 2023

**Re: Dispute Resolution Regulation Development**

The purpose of this memo is to help aid in the development of the Dispute Resolution Regulation. The content of this memo is from the view point of technical staff and informed by Ktunaxa Nation Council's participation in the recent Fording River Extension (FRX) Project Dispute Resolution (DR) Process. The structure of our response simply provides responses to "Discussion Topics" as presented in Appendix I of the *Environmental Assessment Act Dispute Resolution Regulation Discussion Paper (May 2023)*.

**Principles for successful dispute resolution processes**

- 1) *What principles should guide dispute resolution?*
  - In the FRX DR Process, Ktunaxa and EAO decided to write and sign an engagement protocol. In this protocol we outlined the following principles and values to guide the process: Recognition, Reconciliation, Respect, Collaboration, Creativity/Flexibility, Transparency, Procedural Fairness and Good Faith. Please see the engagement protocol for more details.
- 2) *Respecting disputes between First Nations about participation in the assessment, are there specific principles that are needed for this type of dispute?*
  - See answer above.

**Referrals to facilitators**

- 3) *How should initiation occur so that it is accessible?*
  - The initiation of a dispute should be shortly followed by initiating the selection of a facilitator. This could be completed through a simple form to ensure it is standardized and formally recognized – as was used for the FRX DR. During that process we were not ready to provide facilitator recommendations at the time of initiating the DR process – but followed up with a list of names shortly after. I think it was good for the form to have the option of providing names (if available) but recognizing that a list of facilitators is very much secondary to the point of initiating the dispute itself.
- 4) *How much information should be necessary to initiate a referral to a facilitator?*

*Takisqnuuk*

*Taqam*

*Lower Kootenay*

*Tobacco Plains*

- The issue/decision that is being disputed needs to be clearly defined. Ideally the position and clear rationale from both EAO and the party initiating the dispute has also been clearly outlined – but acknowledge that that additional rigor takes time and space to do so (so must be considered for timelines in the process where DR can occur). In the FRX DR Process, Ktunaxa had clearly laid out concerns leading up to the readiness decision but did not have time to compile it and repackage it for DR purposes prior to the DR process starting. This led to a significant amount of effort put into repackaging existing information to “fit for purpose”. This was challenging given “extraordinarily adverse effects” had not been defined.

### **Qualifications**

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

- Facilitators should have access to all documentation related to the key concerns surrounding the issue/decision being disputed (documents that would be found on EPIC – issue/comment trackers, submissions, etc.). The facilitator must understand the BC Environmental Assessment Act and EA process.

6) *What qualifications or experience should be required?*

- When choosing potential facilitators, Ktunaxa though it was critical to have an Indigenous facilitator but also believed that environmental assessment experience was also critical. To that point, Ktunaxa provided lists of both “cultural” and “regulatory” facilitators with the assumption that two individuals may be needed to fulfill these qualifications - acknowledging that there aren’t many individuals who have that specific skill set. Luckily the facilitator for the FRX DR Process did have all the qualifications needed and only one was required.

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)?*

- Conflicts of interests (real or perceived) should have to be disclosed and both parties need to agree to the facilitator.

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

- See answer to question 6 above.

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?*

- Prefer not to answer this question as technical staff. These situations are likely very complex and would need careful consideration of the circumstances.

### **Facilitator Appointments**

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

- The considerations listed under “Facilitator Appointments” seem reasonable. Strongly believe that both parties should agree on a facilitator or facilitators prior to procurement

11) *What are other considerations?*

- Management of the facilitator should not be done by the EAO staff that are participating in the dispute. Need to remove bias where possible.

12) *What barriers exist for participating in provincial procurement processes?*

- No comment on procurement processes.

### **Co-development of dispute resolution processes**

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

- YES

14) *Is so, how should co-development work?*

- Co-development should be defined by the parties. During the FRX DR Process, BC and Ktunaxa co-developed an Engagement Protocol that was signed by both organizations. Ktunaxa had also put together a draft proposal for consideration.

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

- Focusing on relationship building throughout the EA Process will build trust. Having a facilitator can also help. In the case of FRX – we believe not having the proponent at the meetings also helped with open, honest and frank discussions.

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?*

- No comment.

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?*

- Depends on the status of the relationship – developing the process is a trust building exercise in itself.

### **Powers and obligations of the facilitator**

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

- Ability to terminate the process (if one or both parties is not operating in good faith)

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

- remain unbiased;
- guide the discussions between the parties and support the parties through the process;
- make recommendations, if needed and appropriate, but the facilitator will not be a decision-maker in the process; and,
- draft the Facilitator's Report summarizing the dispute resolution process and
- documenting the outcomes of the process including any points of consensus or any points of disagreement and any recommendations the facilitator may make.

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

- Administrative support – scheduling, note taking, logistics, meeting planning

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

- Not behave in a manner to unreasonably delay, frustrate or control the process.

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

- a party is not prepared to participate meaningfully in the facilitation to the extent that consensus is highly unlikely;
- either party withdraws from the facilitation; or
- the proposed Project is withdrawn from the assessment process;

### **Time for dispute resolution**

23) *What should the time limit be?*

- Every situation is different. Timelines should be co-developed and agreed to.

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

- The timelines might not be reasonable in complex situations. Will likely aggravate the dispute. Timelines will always be to the detriment of the organization that has less capacity (usually the Indigenous Nation(s)).  
Timelines might not be adequate for Indigenous decision making processes.

24) *What are the benefits of having a time limit in place?*

- Keeps parties on task.

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?*

- Co-development of timelines.

**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.*

- Minutes/notes from each meeting
- Materials/submissions brought forward to support the positions of the different parties
- The EA Process – and which step the dispute is in
- Any materials “co-developed” through the DR process

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

- Nothing to add.

**Confidentiality**

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

- Confidentiality terms should be co-developed.

*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?*

- Considerations should be discussed with the Indigenous Nation in question.