

Lake Babine Nation's Recommendations for  
Dispute Resolution under  
*BC's Environmental Assessment Act*



Tabled by Lake Babine Nation  
Foundation Agreement Team

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## A. GENERAL COMMENTS

Lake Babine appreciated the opportunity to share feedback with EAO staff to inform the dispute resolution (“DR”) regulation and policy under the *Environmental Assessment Act* (“EA Act”) in the July 6, 2023 online meeting (“July 6 Meeting”). As promised, here are Lake Babine’s written comments.

### 1. Indigenous Consent

Lake Babine Nation (“Lake Babine”) supports the inclusion of a robust DR process that Indigenous nations may trigger at key points in the environmental assessment (“EA”) in order to try and resolve differences that may prevent them from reaching consensus with BC at the final decision-making stage. The DR process has the potential to play an important role in aligning Indigenous and BC perspectives by allowing representatives to meet outside of the normal, paperwork-heavy and formal EA process meetings.

At the same time, aligning the EA Act fully with the *United Nations Declaration on the Rights of Indigenous Peoples* requires more than consensus-seeking by BC prior to final decision-making. Where a nation would be deeply affected by a proposed project or where a project lies in a nation’s core territory, BC should also respect the nation’s role as a decision-maker. In those situations, free, prior informed consent to a project is essential. Thus, Lake Babine remains steadfast in its pursuit of a consent agreement under section 7 of the *EA Act* and Shared Decision-Making Milestones 6.

### 2. Extraordinarily Adverse Effects

As to be expected, the “readiness gate” under section 16 of the EA Act has already become a flashpoint for Crown-Indigenous disagreement. Indigenous nations are more likely than the Crown to be certain at an early stage that a project carries unacceptable risks for their territory, rights, culture, and way of life. Their opposition to a project will often be due to the risks that a project poses specifically to them as an Indigenous peoples rooted in a specific geographical, e.g. if a project is proposed for a particularly culturally or environmentally sensitive part of their territory, or if cumulative impacts are already impeding them from exercising their land-based rights in a meaningful way, maintaining food security, or maintaining and transmitting to younger generations their strong connection to their territory.

In previous stages of the EA Act revitalization process and in the EA collaboration agreement negotiations, Lake Babine advocated for public, high-level criteria to guide BC decisions on when to reject a project at the readiness gate because it would have “extraordinarily adverse effects” on an Indigenous nation or their rights (s. 16(2)(c)(B)). Indigenous nations and proponents deserve transparency on how BC approaches that high-consequence decision. Policy guidance should also help make EA staff, including the Chief Environmental Assessment Officer, more comfortable in making those decisions.

Lake Babine was pleased to hear at the July 6 Meeting that the EAO is now seems prepared to develop that guidance. Here are some initial suggestions for what the EAO's guidance should state on how to assess whether a project would have "extraordinarily adverse effects" on an Indigenous nation or its rights, such that the project should be rejected without an EA:

- BC will consider impacts to both proven and reasonably asserted section 35 rights
- "Extraordinary" does not involve comparing the effects that nations would experience from a proposed project to harms they have previously experienced: the harms that Indigenous peoples have previously experienced to their lands, natural resources, language and culture from over a century of colonial laws and policies have been severe and do not form an acceptable baseline.
- BC will not use a mechanical or "checklist" approach to decide whether a project would have extraordinarily adverse effects on an Indigenous people. The assessment must be highly context specific, depending on the geographical location and impacts of the project, the culture, current situation, and aspirations of the Indigenous nation, as well as the cumulative impacts that the nation is already experiencing to its lands, its ability to practice its rights, and its ability to maintain its language and culture.
- Determinations will be culturally sensitive and grounded in the perspective of the Indigenous nation. It will consider any laws, policies or other guidance provided by the Indigenous nation about what constitutes adverse effects and how serious those effects would be, understood within the context of the lived reality of that nation. EAO representatives involved in recommending whether to terminate an EA and responsible ministers will make every effort to understand that unique perspective rather than using their own perspective or simply relying on western science evidence about potential project impacts.
- Determinations will consider the full range of potential impacts, including but not limited to any impacts to parts of the territory of high cultural and/or environmental value, impacts on the ability to practice rights and use the land for traditional purposes, food security in a culturally appropriate way, impacts on cultural security, i.e. ability to practice culture, transmit language and culture from generation to generation, and conduct healing activities to recover from the traumas of residential school, sixties scoop, etc., and less tangible but real impacts on the spiritual, psychological and emotional well-being of Indigenous peoples.
- Cumulative effects are highly relevant to understanding the significance of the adverse effects that a proposed project would have on Indigenous peoples. Cumulative effects will be broadly defined to include changes to environmental, social, cultural, spiritual, health, and economic values caused by the accumulation and interaction of impacts from past, present, and reasonably foreseeable future human activities and natural processes (e.g. climate change).

- BC will take guidance from UNDRIP to help understand impacts that may count as severe or contribute to the perpetuation of colonialism.

These are just initial recommendations. Lake Babine’s Foundation Agreement Team requests to participate in the EAO’s development of its policy to guide “extraordinarily adverse effects” decisions under s. 16(2)(c)(B) when this work gets underway.

### 3. Additional Matters for Dispute Resolution

Section 5(2) of the EA Act identifies the points in the EA process at which Indigenous nations may trigger DR. Paragraph 5(2)(c) leaves the door open for BC to make DR available for “any other prescribed matter”. Lake Babine recommends that the DR regulation that BC is developing (“**DR Regulation**”) allow DR resolution on these additional matters:

- decisions about EA Certificate *amendments* that require the Chief Executive Assessment Officer to seek consensus with participating Indigenous nations (as referenced in referenced in s. 37(7));
- decisions on EA Certificate *extension* applications;
- EAO capacity funding decisions for the main EA process.

#### B. PRINCIPLES TO GUIDE DISPUTE RESOLUTION

Lake Babine supports the draft guiding principles that the EAO has adopted for DR. Here are some additional recommended principles:

- Dispute resolution sessions should happen in person whenever possible to better support building trust and understanding, and the EAO supports meeting out on the land at the nation’s request whenever this is feasible;
- Dispute resolution processes must strike a balance between completing DR on a predictable and relatively expeditious timeline while also giving enough time to complete a meaningful process. (Part F of this paper identifies general types of situations that may warrant extending the time for DR.)

#### C. HOW TO LAUNCH DISPUTE RESOLUTION

The EAO should provide a template for Indigenous nations to use to initiate DR, so that nations can easily see what information is required to start the process. Nations should also be free to share additional information to support their request.

Two or more nations should be free to request to undertake DR with the EAO together. They may want to do this if they share the same core concern(s) and wish to work together to try and resolve those concerns.

The EAO's DR Discussion Paper says proponents will be notified when a nation initiates DR. The EAO should also notify the other Participating Indigenous Nations and give them updates on the EA timeline and any other implications for the EA process.

#### **D. FACILITATOR QUALIFICATIONS**

There should be a roster of pre-approved facilitators that evolves over time, with new names being added or, if a facilitator develops a negative track record, removed. This will be helpful to nations who do not have a facilitator in mind. At the same time, EAO and the Indigenous nation requesting the DR should always be free to propose someone who is qualified but not on the roster.

Lake Babine generally supports the facilitator qualifications as proposed in the EAO's Discussion Paper, with a few qualifications.

A person should be conflicted out of facilitating if any of these circumstances apply:

- i. *They or a member of their immediate family* has a direct financial interest in the project (e.g. working for the proponent to advance the project, potential contractor or subcontractor on the project)
- ii. They are the family member or close friend to someone from EAO, the Indigenous nation, or any other party (e.g. proponent) who will be participating in the DR process.

The meaning of "personal interests" giving rise to conflicts of interest must be clarified. Lake Babine does not consider it to be an automatic conflict of interest if the proposed facilitator belongs to the nation that triggered the DR. If the nation member does not have strong views for or against the project and is not the family member or close friend of any of the nation representatives who will participate in the DR process, they should not be ruled out on the basis of conflict of interest.

Lake Babine is open to the possibility of co-facilitators, as long as they have worked together before or are confident that they will work well together.

#### **E. DR PROCESS AND PROCESS DOCUMENT**

The EAO should develop a database of DR process templates from past DR processes that worked relatively well for Indigenous nations to draw from. At the same time, the EAO should remain open to a new process or variations on a template where this will better meet the needs of the Indigenous nation or the circumstances of the dispute at hand.

If there are good precedents available, Lake Babine estimates it should be possible to develop a draft DR process within three weeks, though there are many circumstances that may lead a nation to need additional time, as discussed below in Part F.

Nations should be welcome to include ceremony in the DR process, and the EAO should be willing to meet on the land, at the Indigenous nation's request. 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 perspective, 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.

## F. TIME LIMITS

Lake Babine understands that the EAO seeks to fit DR within the overall standard legislated EA timeline and that DR is not meant to take months. Lake Babine is open to the EAO setting a target timeline for DR as long as facilitators have discretion to extend timelines where this will support a meaningful process and meaningful participation by the Indigenous nation. The DR Regulation should empower facilitators to extend the timeline in a range of circumstances, including

- i. Where they believe more time could help lead to a consensus outcome or help the parties strengthen their working relationship (which could be beneficial later on in the EA process)
- ii. Where the proponent and Indigenous nation request more time to try and solve the dispute (because although the Indigenous nation triggers DR with the EAO, the proponent may be able to offer solutions)
- iii. Where the Indigenous nation reasonably requires additional time
  - to seek direction on the DR process document or potential solutions to the dispute from representatives not participating in the DR sessions (e.g. full leadership, elders, members of more affected communities);\*\*\*
  - to accommodate intensive harvesting periods (in Lake Babine's case August), Christmas office closures (in Lake Babine's case, 2 week closure), or periods of extreme demands on communities from deaths, pandemics, wildfires or other emergencies; or
  - to accommodate their leadership election period (or any other type of leadership selection process), if leadership involvement is required and impossible during that period.

\*\*\*It is important to appreciate that while the EAO may handle DR without any political involvement, DR will normally require participation by the leadership of Indigenous nations and may also require community input. Lake Babine and presumably many other nations will need time for its DR process participants to seek direction behind the scenes to launch DR and to bring any potential solutions forward to a broader group, including full leadership, any of its more affected communities, and/or technical advisors.

Since the EAO will normally be a party to the DR, putting the Chief Executive Assessment Officer in charge of time extensions for DR would be problematic. Facilitators should have discretion to do extend time themselves, and section 5(4)(e) of the EA Act allows BC to grant facilitators this discretion.

## G. POWER OF FACILITATOR TO END DR PROCESS

Page 22 of the DR Discussion Paper proposes six potential grounds for ending a DR process. Lake Babine agrees with #2-6, but as discussed at our July 6 Meeting, #1 seems too broad:

1. The parties are not prepared to meaningfully participate to such an extent that reaching consensus is highly unlikely (e.g. parties are too entrenched in their positions; acting in bad faith). [emphasis added]

Lake Babine agrees that DR will not work if a party is acting in bad faith. However, an Indigenous nation's deep opposition to a project should not be equated with bad faith, nor does that opposition doom the DR process to being unproductive.

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 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.

Moreover, even if a nation remains opposed to a project following completion of DR, the process may prove productive in terms of convincing the EAO to require more information from the proponent to better respond to the nation's concerns, or it may help the EAO open up to the possibility of recommending that the be rejected or substantially re-designed in light of Indigenous concerns. In other words, even where a nation maintains strong opposition to a project throughout the DR process, the discussions may strengthen the overall EA and/or the working relationship between the nation and the EAO in the EA. Thus, the wording about "deeply entrenched positions" should be removed. Ground #1 for terminating DR should instead reference "bad faith" plus something along the lines of either party not being prepared to fully participate in the process.

## H. CONFIDENTIALITY

Lake Babine agrees that parties will normally talk more freely and honestly if discussions and supporting documents are exchanged confidentially and "without prejudice". One exception would be where the parties share those same comments or documents in the regular EA Process



without making them confidential. Confidentiality and “without prejudice” should be the presumption for all DR processes, subject to a mutual decision by the parties to the DR to confirm that some or all their verbal and/or written exchanges will be “on the record”.

## **I. FUNDING FOR DR PROCESS**

It’s good that the EAO will pay for the facilitator’s time, as long as the contract specifies that they must be neutral and help both parties reach consensus. The DR Regulation or policy should also confirm that BC will cover the costs of

- i. in-person meetings (room, food, travel for anyone who must travel to attend)
- ii. technology for virtual meetings, if those have a cost; and
- iii. time of external advisors whom the nation reasonably considers as necessary participants in some or all of the DR proces.

Lake Babine recommends setting a cap on the rates of different types of advisors so that professional fees do not eat up too much of the capacity funding available for DR and so that taxpayers aren’t covering unreasonably high fees (eg: max \$350/hour for legal fees, and two or three tiers up to that maximum based on years of call to the bar).

## **J. CONCLUSION**

Please do not hesitate to reach out to the Lake Babine FA Team for any clarifications on these submissions or for further discussion. Betty Patrick, Verna Power and Dominique Nouvet will all be taking holidays at different points in August but will respond as quickly as possible to any such requests.

*Mesiy* for taking the time to consider Lake Babine’s input on this important policy work to support an EA process that is truly inclusive of Indigenous information and perspectives.