TWN's Written Submission for the Dispute Resolution Regulation Paper

Introduction

The purpose of Tsleil-Waututh Nation's (TWN) written submission is to review the BC Environmental Assessment Office's (BC EAO) Dispute Resolution (DR) process and regulation as captured in the *Dispute Resolution Regulation Discussion Paper* (DR paper) while providing key recommendations.

Tsleil-Waututh are the "People of the Inlet" and a distinct Coast Salish Nation whose territory includes Burrard Inlet in the lower mainland area of British Columbia, including what is now Vancouver. Our people have occupied, governed, and acted as stewards of our territory since time out of mind and continue to do so today.

Tsleil-Waututh holds a sacred, legal obligation and responsibility to our ancestors, current, and future generations to maintain and restore conditions that provide the environmental, cultural, spiritual, and economic foundation for our Nation and community to thrive.

TWN's written submission outlines TWN's main concerns regarding the DR paper and potential regulation and policy. Following the BC EAO's directive to address at least one question from the 'Discussion Topic' section of the DR paper, TWN has incorporated these questions into our main concerns and recommendations, which are referenced and discussed in TWN's written submission.

Guided by TWN's Stewardship Policy (2009), TWN adopts a rights-based approach to analyzing the DR paper. From TWN's perspective, the DR regulation and policy must recognize Indigenous rights and self-determination, as established in Section 35 of the *Constitution Act*, the *Declaration on the Rights of Indigenous Peoples Act* (DRIPA), and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

Furthermore, TWN explores the implication of the DR framework on the environmental assessment (EA) process and the seeking consensus approach under the *Environmental Assessment Act, 2018* (EA Act). As emphasized in our written submission, the DR paper outlines a process that allows for consultation; however, it does not empower Indigenous peoples to have a meaningful say in the outcomes of EAs that directly affect their lands, resources, and rights. Instead, it appears to function as a procedural step where Indigenous input may be acknowledged, but their recommendations are not necessarily binding.

TWN's Concerns with the *Dispute Resolution Regulation Discussion Paper*

1. Failure to Capture Principles from UNDRIP, DRIPA, and FPIC

While the intention is to establish a regulatory and policy framework that incorporates UNDRIP, the DR process is currently confined to being a consultation procedure under the EA Act. Recognizing that DRIPA came into force shortly after the EA Act, the purpose of the EA Act is to implement and operationalize UNDRIP and the principles of free, prior, and informed consent (FPIC). However, the interim DR regulation and policy lack a clear strategy for effectively integrating and adhering to the principles of UNDRIP and DRIPA.

For example, the BC EAO has a responsibility to "*support the implementation of [UNDRIP], which includes upholding the rights of self-government and self-determination reflected in Articles 3, 4, and 5 of [UNDRIP]*" (BC EAO, 2023, p.7). However, the DR paper does not discuss approaches for upholding UNDRIP principles within the regulatory framework.

TWN is concerned that the proposed DR lacks a clear plan for incorporating UNDRIP, particularly when a dispute arises related to TWN's rights to self-determination (Article 3), or the right to self-government and jurisdiction over lands, resources, and practices (Article 4). The existing gaps in the EA Act, as the EA Act does not adequately capture UNDRIP or DRIPA articles, will likely lead to concerns being overlooked in the DR policy and regulation, rather than facilitating meaningful change. DR is meant to support Articles 40 and 27 of UNDRIP, but these articles are not sufficiently addressed in the DR paper (see sections 2 and 5).

The failure to appropriately capture the principles of DRIPA and UNDRIP in the DR paper undermines the recognition of Indigenous rights to self-determination and the requirement for FPIC. As stated in the *Dispute Resolution Regional Workshop* meeting minutes, the BC EAO is not required to uphold any particular 'aspects' of FPIC, as from the BC EAO's perspective, the DR is "*one mechanism of many that supports FPIC*" (July 13, 2023). It is not clear how the DR mechanism will fit into other mechanisms to ensure that FPIC is followed. Furthermore, meaningful involvement in the decision-making process is a fundamental aspect of the UNDRIP (Article 18) and FPIC principles, enabling Indigenous communities to shape the outcome of projects that have the potential to impact their territories and ways of life.

TWN recommends that dispute resolution be focused on FPIC, decision-making, jurisdiction, and self-determination over traditional territories as per UNDRIP [1]. There must be recognition of Indigenous legal traditions and systems, with equal respect provided to Indigenous laws and legal orders. Moreover, all UNDRIP and FPIC principles should be implemented in the DR process, regulation, and policy.

2. Lack of Decision-Making Authority

As described above, the BC EAO's DR paper emphasizes the importance of consultation but falls short in capturing the principles of the DRIPA and the UNDRIP, particularly the concepts of involvement and influence in the decision-making process. The DR process is merely a consultation process as it does not grant Indigenous

[1] In reference to question 1): *What principles should guide dispute resolution?*

Nations equal decision-making power. Despite Section 7 (Decision-Making Agreements) of DRIPA[2] allowing Indigenous groups and the provincial government to make joint decisions, the EA Act fails to recognize Indigenous groups as equal decision-makers.

While the co-development aspect of the framework holds importance, achieving this without a culturally sensitive approach that respects the diverse legal traditions and worldviews could lead to underrepresentation, a lack of meaningful participation, and the marginalization of Indigenous perspectives in the dispute resolution process.

A fundamental flaw lies in the fact that, ultimately, the decision-making power rests with the Crown. For example, as described in the DR paper and EA Act, *"the Minister appoints the facilitator in a dispute resolution process and is required by the EA Act to consider any recommendations made by a participating Indigenous [Nation]"* (BC EAO, 2023, p.12). However, the term "consider" implies that the Minister retains the discretion to determine the appointee, potentially undermining the genuine participation and decision-making role of Indigenous Nations. This approach contradicts UNDRIP's principles, specifically Article 40, which states that Indigenous peoples have the right to access fair procedures for conflict resolution with due consideration for their customs, traditions, and legal systems. Under Article 40 of UNDRIP, Indigenous groups have a right to make decisions regarding disputes. However, Indigenous Nations have limited influence in the DR process and regulation, as seen in the example of the Minister appointing the facilitator [3].

In an endnote for Figure 4, the EAO acknowledges that the graphic does not effectively demonstrate how First Nations exercise their inherent jurisdiction, laws, and authorities to make their own decisions about dispute resolution and throughout the EA process (BC EAO, 2023, p.33). In TWN's view, the DR process is supposed to be a tool that reflects Indigenous legal orders and how Indigenous groups choose to be involved in discussions. Indigenous Nation's rights and decision-making authority should be respected throughout the process, in line with UNDRIP. The ultimate objective should be to elevate the DR process from a mere consultation mechanism to a genuine partnership that respects and upholds Indigenous legal orders and perspectives. According to Article 40 of UNDRIP, Indigenous groups possess the right to make decisions related to disputes. However, Indigenous Nations often find themselves with limited influence in the DR process and regulation. This is evident in cases like the Minister's appointment of the facilitator.

For Indigenous communities to participate in decision-making, there should be meaningful engagement with Indigenous Knowledge holders, along with the necessary capacity building and resources to effectively engage with the DR process, policy, and regulation. Also, there must be recognition of developing a DR process with Nations through meaningful engagement with each First Nation and collaboratively with interested First Nations (with and without the presence of the Crown) to create a collaborative DR mechanism with culturally appropriate dispute resolution methods [4]. For instance, Elders could serve as contact points, providing guidance for conflict resolution, or organizing gatherings on ancestral lands to facilitate community discussions.

Acknowledging the diversity in capacities and approaches among different Indigenous groups in fulfilling their jurisdictional roles, the establishment of a mechanism for entering into statutory decision-making

[2] Section 7 of DRIPA acknowledges and safeguards the rights of Indigenous peoples to maintain, develop, and transmit their own legal systems, which include their customary laws, practices, and procedures (DRIPA, 2019).
[3] In reference to question 10): *Do you agree or disagree with these considerations to guide facilitator appointments?*
[4] In reference to question 16): *With regard to DR between First Nations about participation in the assessment, are there other considerations for co-development for this type of dispute?*

agreements allows these groups to determine the level and nature of their intended participation as relevant jurisdictions.

3. Issues with the Dispute Resolution Regulation and Facilitator Appointment

The framework acknowledges Indigenous participation but lacks clarity regarding the significance of Indigenous knowledge and consent in the selection of facilitators. The process should ensure that the qualifications for facilitators include a deep understanding and respect for Indigenous rights, customs, and legal traditions. The facilitator should have an understanding of the Nation specific knowledge and the onus should not be on the Nation to provide their Nation specific knowledge to the facilitator; rather, there should already exist a foundational understanding [5].

Additionally, there should be a safeguard to ensure that the appointment process does not undermine Indigenous Nations' rights to seek remedies through the court system. To address these concerns, TWN recommends the inclusion of specific criteria for selecting facilitators that demonstrate a genuine commitment to respecting Indigenous rights and knowledge. The policy framework should explicitly integrate Indigenous legal systems into the dispute resolution considerations, and the guidelines for facilitators should highlight the significance of aligning with Indigenous traditions and values.

While the DR paper acknowledges voluntary participation, it lacks clear guidelines that would guarantee that Indigenous engagement is truly based on FPIC. TWN recommends strengthening the language in the document to clearly emphasize non-abrogation and non-derogation of Section 35 rights and developing comprehensive guidelines that prioritize FPIC to align the process with the principles enshrined in UNDRIP.

Furthermore, the current framework lacks clarity regarding the role of EAO in facilitating meaningful participation and consultation. The process should establish distinct boundaries for proponent participation to prevent any disproportionate emphasis on proponent interests that might overshadow Indigenous perspectives. TWN recommends developing clear guidelines to make sure everyone is equally represented, and power imbalances are addressed during the resolution process. This step is key to ensure the process is fair, open, and respects Indigenous rights.

4. Limited Opportunities to Apply Dispute Resolution

From TWN's perspective, the DR regulation should not be limited to five decision-making gates in the EA process. While DR is available during some phases of the EA process, there is no gate during the Application Development and Review phase (BC EAO, 2023). This is problematic because if a Nation misses the opportunity to initiate DR during the Process Planning phase, the Nation will be unable to enter DR until the Effects Assessment phase. Consequently, during the Effects Assessment phase, DR is only available to *"seek consensus on the draft Assessment Report and draft Environmental Assessment Certificate,"* meaning that issues regarding Process Planning may not warrant a DR process during the Effects Assessment phase (BC EAO, 2023, p.14).

[5] In reference to question 6): *What qualifications or experience should be required?*

DR is undergoing an interim approach, and without adequate and transparent communication with participating Nations, opportunities to initiate the DR process will be missed. For example, unaware of the DR mechanisms being developed under the new act, TWN overlooked an opportunity to open a gate to the DR process during the Process Planning phase for a project. The DR gate closed, then the project moved into the Application Development phase of the EA process, carrying forward TWN's unresolved issues. In response, TWN sent a letter to the BC EAO detailing our consultation issues during the Process Planning phase, which highlighted that TWN's outstanding concerns remained unresolved prior to issuing the Process Order and entering into the Application Development and Review phase[6]. One of TWN's outstanding concerns relates to the methodological gaps in the Strategic Assessment of Climate Change and the insufficient assessment of downstream greenhouse gas (GHG) emissions. As the consequences of climate change will substantially affect TWN, the absence of a thorough impact assessment hinders TWN's ability to make informed decisions, potentially infringing upon our rights and interests. To address this, we have requested the involvement of a third-party independent expert to address this matter.

TWN's experience with EAs, particularly in evaluating climate change impacts, shares similarities with other cases[7], where unresolved issues were insufficiently addressed, leading the EAO to proceed to the subsequent phase of the EA through its consensus-seeking approach (BC EAO, February 21, 2023). In TWN's case, the factor that led to the BC EAO advancing to the subsequent phase of the process was the considerable tightening of legislative timelines mandated by the EA Act, which has hampered efforts to adequately support meaningful consultation.

TWN recognizes that the dispute resolution process is meant to be time-limited and should not substantially affect the legally mandated timeframes for EAs. However, it is important that the process outlines well-defined steps to effectively document the discussions and positions of each Party regarding the dispute. These steps should be separate from the overall EA process. One potential solution could be the creation of a "Process Summary" that isolates the dispute, presents the concerns and interests of each Party, and incorporates the assistance of a neutral third party to address any outstanding issue. While the involved Parties are examining unresolved matters, both the matter itself and its decision should be temporarily paused. This pause ensures that during this period, all parties can continue to engage constructively and focus on finding a mutually agreeable resolution to the matter while still addressing other aspects of the EA process.

As outlined in TWN's letter to the BC EAO, moving forward to the next phase of the EA process with several outstanding concerns and insufficient time to review the TAC Process Planning Comment Tracker does not constitute meaningful consultation as described in Tsleil-Waututh Nation's Stewardship Policy (2009). Ultimately, there was a lack of meaningful consultation with TWN regarding our concerns and a lack of transparency with the DR process. Despite the availability of a DR gate for participating Nations during the

[6] For this submission Tsleil-Waututh Nation has opted not to disclose the name of the project and is open to further discussing our concerns with the BC EAO.

[7] See for instance the dispute resolution process regarding Lax Kw'alaams Band (Lax Kw'alaams) and the Ksi Lisims LNG project. (Lax Kw'alaams Band, July 21, 2022; Kelly, 2023)

Process Planning phase, TWN did not receive sufficient information from the BC EAO, including written details about the interim approach.

TWN's Process Planning issues remain unresolved and have yet to be adequately addressed by the BC EAO. The project is undergoing some major changes to the Process Planning documents, including amendments, meaning that as recommended (R13) by the Environmental Assessment Advisory Committee, if there are any major revisions to the project, there should be an opportunity to re-examine previous dispute resolutions (BC EAO, 2018). Although the dispute resolution should not conclude at the decision gate, there should be an opportunity to re-open a DR gate from a previous phase of the EA process. TWN recommends that DR be available throughout the entire EA process, and the DR topics to be discussed should not be restricted to a specific phase. Indigenous groups should be able to participate in the DR process at any phase of the EA process. TWN should be informed about all aspects of the EA process and the project, and FPIC should be followed throughout the development and implementation of the DR process, policy, and framework.

5. Balancing Confidentiality and Procedural Fairness in the Dispute Resolution Process [8]

The document highlights a potential contradiction between confidentiality and procedural fairness within the DR process under the EA Act. As noted on page 17, "*the proponent will be informed when a referral has been made. The proponent may receive a copy of the initiating document to meet any procedural fairness obligations; however, this will be determined on a case-by-case basis"* (BC EAO, 2023). While confidentiality is emphasized, indicating that the report of a dispute resolution facilitator is not meant to guide decision-makers under other enactments, the current framework raises a significant concern regarding the concentration of power and authority vested in the facilitator [9]. From TWN's perspective, Indigenous Nations should have the right to withhold their initiating document from the proponent [10]. The reliance on the facilitator to decide what matters should be considered in the report introduces a potential risk of subjectivity and bias.

While the paper emphasizes the importance of Indigenous participation in dispute resolution to uphold Section 35 rights and promote reconciliation, it also introduces the idea of inviting proponents and other participants, including provincial agencies and federal government representatives, to engage in the facilitation process. On page 11, it is noted that the EAO has an obligation for procedural fairness to the proponent, which must be met during the assessment (BC EAO, 2023). How these procedural fairness obligations are met by the EAO will depend on the specific context of the DR. This inclusion poses a challenge as it potentially clashes with the principles of confidentiality, which are crucial for maintaining a safe space for Indigenous Nations to openly discuss and resolve issues related to their territories and rights. From the TWN's perspective, the protection of Indigenous knowledge and cultural heritage takes precedence. The involvement of external parties might

[8] In reference to questions:
29) *How do we create spaces that are conducive for parties to openly share? Is confidentiality necessary?*
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?*
[9] In reference to question 18): *What powers should the facilitator have to be able to manage a dispute resolution process?*
[10] In reference to question 4): *What information should be provided to initiate a referral to a facilitator?*

inadvertently compromise the confidentiality necessary for Indigenous self-determination and the protection of their interests.

Furthermore, the document affirms that Indigenous participation in dispute resolution is voluntary, and that participation does not limit the Indigenous Nation's Section 35 rights. However, the apparent contradiction arises when considering that a matter pending decision cannot be decided until a DR facilitator provides a report. This suggests a potential conflict between protecting confidentiality and ensuring all parties have a fair and transparent opportunity to address concerns. On the one hand, the facilitator is obligated under the EA Act to provide their report to the parties and decision-makers. While on the other hand, the facilitator is also required to adhere to Section 75 of the EA Act in relation to any Indigenous knowledge provided to them in confidence.

This potential contradiction becomes more evident when viewed through the lens of Articles 27 and 40 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). These articles emphasize the need for just, fair, and transparent processes that respect Indigenous laws, traditions, and legal systems. Placing such significant authority to a single facilitator may not align with these principles, as it could undermine Indigenous participants' ability to shape the process and outcomes in a manner consistent with their cultural values.

TWN recommends further collaboration with Indigenous participants in shaping the report's content, as well as providing clearer guidelines to the facilitator regarding the matters that must be considered [11]. From TWN's perspective and in accordance with UNDRIP, procedural fairness should prioritize open dialogue and meaningful engagement while respecting the confidentiality of sensitive information. Other important factors to consider include the implementation of limited confidentiality measures and obtaining informed consent.

6. Ending the Dispute Resolution Process

As the text indicates, the dispute-resolution process is non-binding, implying that the facilitator's report lacks inherent enforcement mechanisms to guarantee the implementation of its outcomes. While the report marks the conclusion of the facilitation, the lack of a binding nature might lead to a situation where the recommendations or agreements outlined in the report are not necessarily put into action, thereby diminishing the effectiveness of the entire process. This aspect of non-binding resolution, combined with the prescribed time limit, could potentially create a scenario where the report's importance diminishes rapidly after submission.

TWN is also concerned about the lack of an opportunity for Indigenous Nations to review the report before it is submitted to the minister. As shown in the procedural flowchart (p.33), the facilitator provides their final report and DR ends (BC EAO, 2023). Indigenous Nations may not have the chance to ensure that the report

[11] In reference to question 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.

accurately reflects their perspectives, concerns, and the outcomes they aimed to achieve through the dispute resolution process.

To address the limitations of a non-binding dispute resolution process, TWN recommends incorporating mechanisms that strengthen the influence and implementation of the report's recommendations. The main goal of the DR process should be to reach an agreement that not only resolves the dispute but also includes actionable plans. This goes beyond just creating a recommendation for regulators; it's about finding practical solutions that work for everyone involved. This could be achieved through establishing robust feedback channels, implementing verification procedures, and creating collaborative opportunities with Indigenous Nations. Through these mechanisms, Indigenous Nations can thoroughly review, validate, and contribute to refining the report's content, ensuring its accuracy and alignment with their perspectives and goals.

Closing

The interim dispute resolution framework raises significant questions about its ability to effectively uphold the rights of Indigenous Peoples. The absence of clear and formal guidelines can potentially lead to inconsistent and ad-hoc approaches, thereby undermining the meaningful implementation of dispute resolution processes for Indigenous communities.

In sum, the interim framework falls short in fully acknowledging and upholding the rights of Indigenous Peoples, particularly regarding free, prior, and informed consent, self-determination, cultural sensitivity, and timeliness. The framework's steps do not explicitly prioritize these principles, which can result in Indigenous communities being guided into dispute resolution processes without their full consent, thereby undermining their decision-making authority over matters that affect their rights, lands, and resources.

The comments provided in this submission are based on a limited review of the DR Discussion Paper, and TWN intends to further engage when the draft policy framework is available for review and comment. As this process continues, Tsleil-Waututh Nation expects to be fully consulted at a deep and meaningful level in accordance with our Stewardship Policy. Should you wish to discuss TWN written submission further, please contact Maria du Monceau (mmonceau@twnation.ca) and Alison Chadwick (achadwick@twnation.ca).

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