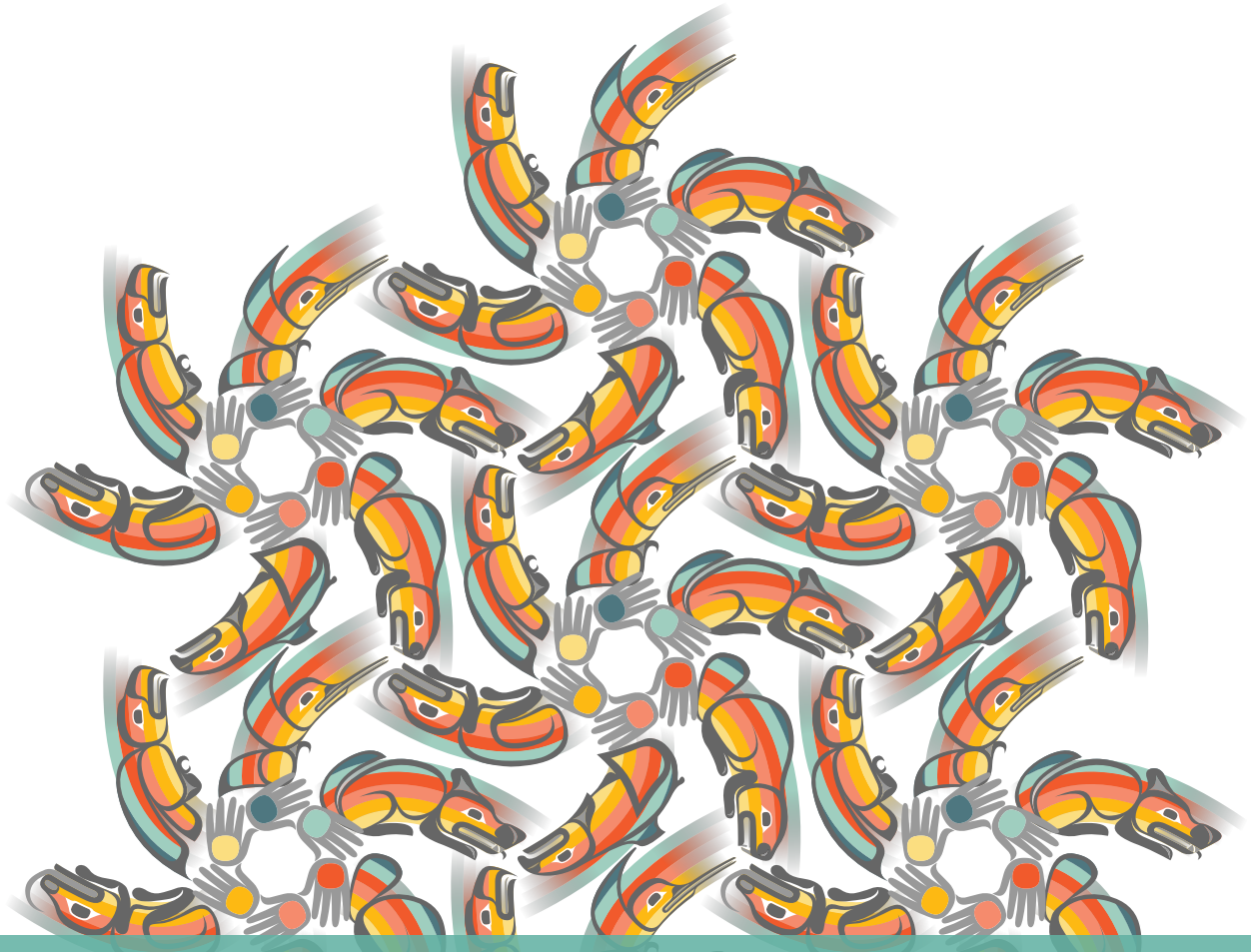


BRITISH COLUMBIA

EAO

Environmental Assessment Office

May 2023

ENVIRONMENTAL ASSESSMENT ACT

DISPUTE RESOLUTION REGULATION DISCUSSION PAPER

Introduction and Welcome from the Chief Executive Assessment Officer

The Environmental Assessment Office (EAO) is responsible for carrying out environmental assessments of major project proposals in British Columbia. The environmental assessment process was revitalized with the passage of the Environmental Assessment Act (EA Act) in 2018. Key changes to the process involve how we make decisions about major projects with First Nations and support the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration).

Some of these changes – such as seeking to achieve consensus and collaboration on the assessment of effects to a First Nation and their Section 35 rights – formalized collaborative practices that First Nations and the Province undertook under the former act. Other changes – such as access to dispute resolution – are a new way of doing things.

Dispute resolution is available at key decision points in the environmental assessment process and is a tool to support consensus-seeking, using a third-party facilitator, when First Nations and the Province are unable to reach consensus on their own. Under the EA Act, the ability to access dispute resolution is one mechanism that supports reconciliation and the implementation of the UN Declaration.

The EA Act defines who can use dispute resolution, the types of disputes that can be referred, and creates some boundaries around the process (e.g., dispute resolution is non-binding; the relevant decision cannot be made until the facilitator provides their report). However, some aspects of how dispute resolution works are undefined.

The EAO is developing a dispute resolution regulatory framework that includes the development of a regulation and supporting policies to create consistency and predictability in dispute resolution processes. The purpose of the regulation is to clarify the powers and duties of dispute resolution facilitators to support collaborative and principled resolution of disputes. Policy, guidance, and tools will be developed to support the implementation of the regulation.

Following the passing of the EA Act in 2018, the Province enacted the Declaration on the Rights of Indigenous Peoples Act (Declaration Act). Section 3 of the Declaration Act requires the Province, in consultation and cooperation with Indigenous Peoples, to take all measures necessary to ensure consistency between the laws of B.C. and the UN Declaration. Changes to the Interpretation Act in 2021 further require that all laws must be read to be consistent with the UN Declaration.

This Discussion Paper and the consultation and cooperation process it supports are focused on developing a dispute resolution regulation and policy framework that is consistent with the UN Declaration. The EAO is applying the Declaration Act Secretariat's Interim Approach to Implementing the Requirements of Section 3 of the Declaration on the Rights of Indigenous Peoples Act to guide the regulation development process. The following section on "How to Participate and Next Steps" provides an overview of the consultation and cooperation process.

Developing the regulation and policy framework for dispute resolution through consultation and cooperation with First Nations is critical because First Nations are partners in the environmental assessment process. The EAO is also seeking the views of Indigenous law and dispute resolution practitioners, as both experts and potential service providers.

As proponents of major projects may be impacted by dispute resolution processes during an assessment, industry representatives will have opportunities to provide feedback as well.

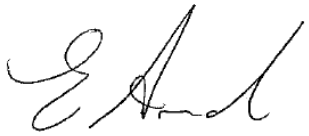
The purpose of this Discussion Paper is to provide considerations for the development of the dispute resolution regulatory framework by:

- Providing an overview of dispute resolution in the context of the EA Act;
- Describing the EAO's thinking and learnings to date; and
- Presenting discussion topics to foster conversations as we engage with First Nations.

We are seeking your views in shaping what the regulation and policies for dispute resolution under the EA Act should look like.

The EAO acknowledges that the work of achieving consistency between the laws of B.C. and UN Declaration is but one aspect of the necessary work of addressing the legacy of colonization and advancing true reconciliation. We hope the development of the dispute resolution regulatory framework is one opportunity for co-development that supports the necessary changes and shifts in laws, policies, and practices.

Sincerely,



Elenore Arend

Chief Executive Assessment Officer and Associate Deputy Minister

Environmental Assessment Office

Cover Design

The artwork on the cover and used throughout the discussion paper was created by Andy Everson. Andy is an accomplished artist from the K'omoks First Nation on Vancouver Island. He draws upon his roots amongst the Kwakwaka'wakw, Salish, and Tlingit peoples to create artwork that reflects the convergence of ancient traditions with modern society.

Artist's Statement:

This design represents Interconnectedness. The six hands represent the coming together of Indigenous peoples and representatives from the Province, as well as others who participate in environmental assessments, illustrating the necessity for relationship-building throughout the decision-making process. Spiraling out from the hands are six animals representing what is assessed in environmental assessment in B.C.: eagle (First Nations & their rights), salmon (environment), hummingbird (culture), beaver (economy), frog (health) and wolf (social). Within each animal are six coloured ribbons representing the strands of unity binding us together. The art style was chosen to be inclusive to all First Nations within the province.

-Andy Everson

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Context - Environmental Assessment, Dispute Resolution, and the UN Declaration on the Rights of Indigenous Peoples

The Environmental Assessment Office (EAO) is a neutral and impartial regulatory agency that manages environmental assessments of proposed major projects in B.C. – such as mines, oil and gas pipelines and facilities, large infrastructure projects, and resorts. Projects that exceed the thresholds set in the Reviewable Projects Regulation under the EA Act must go through a process to assess the project's potential impacts on people, the environment, and on First Nations and their rights.

Who we work with

The EAO works with First Nations and Indigenous Peoples, technical experts, companies, the public, local governments, and federal and provincial agencies to assess projects. At the end of the process, the EAO makes recommendations to the Ministers to inform whether the proponent should be issued an Environmental Assessment Certificate, which would allow the project to proceed, and if so, with what conditions and requirements. Find more information about the environmental assessment process on the EAO's web page.

The Environmental Assessment Process

The environmental assessment process (Figure 1) is made up of phases. In the box opposite, the phases with an asterisk (*) next to the name indicates that the EAO must seek consensus with participating Indigenous nations (see Note on Terminology on page 7) on a recommendation or decision in that phase.

Environmental Assessment Phases

- **Early Engagement** establishes the foundation for the rest of the assessment by seeking early input on the project to identify interests, issues, and concerns.
- The **Readiness Decision*** refers to a decision on whether the project should, and is ready to, proceed to an assessment.
  - Participating Indigenous nations may provide a notice of consent or lack of consent if the project is being exempted from requiring an assessment or if the project will be terminated (i.e., cannot proceed as proposed).
- If proceeding to an assessment, during **Process Planning*** the scope, methods, procedures, and information requirements are set.
- Next, the proponent of the project develops and submits an Application for an Environmental Assessment Certificate, as directed in the previous phase.
- During **Application Review**, direction is provided to the proponent on any revisions that are required to meet the information requirements.
- If necessary, the proponent then prepares a revised Application, as directed. The revised Application is reviewed for its sufficiency*.
- An **Effects Assessment*** of the project is conducted to understand the effects to people, the environment, and First Nations and their rights. The assessment results in an Assessment Report, that summarizes the conclusions of the assessment, and an Environmental Assessment Certificate with legally binding conditions that the proponent must follow for the life of the project, should a certificate be issued.
- The effects assessment informs **Recommendations*** to provincial decision-makers.
  - Participating Indigenous nations may provide a notice of consent or lack of consent to issuing a certificate.
- Finally, the Assessment Report, Environmental Assessment Certificate, and Recommendations are referred to provincial decision-makers. The EA Act defines what the Ministers must consider when deciding whether to issue or refuse a certificate.

Environmental Assessment Process

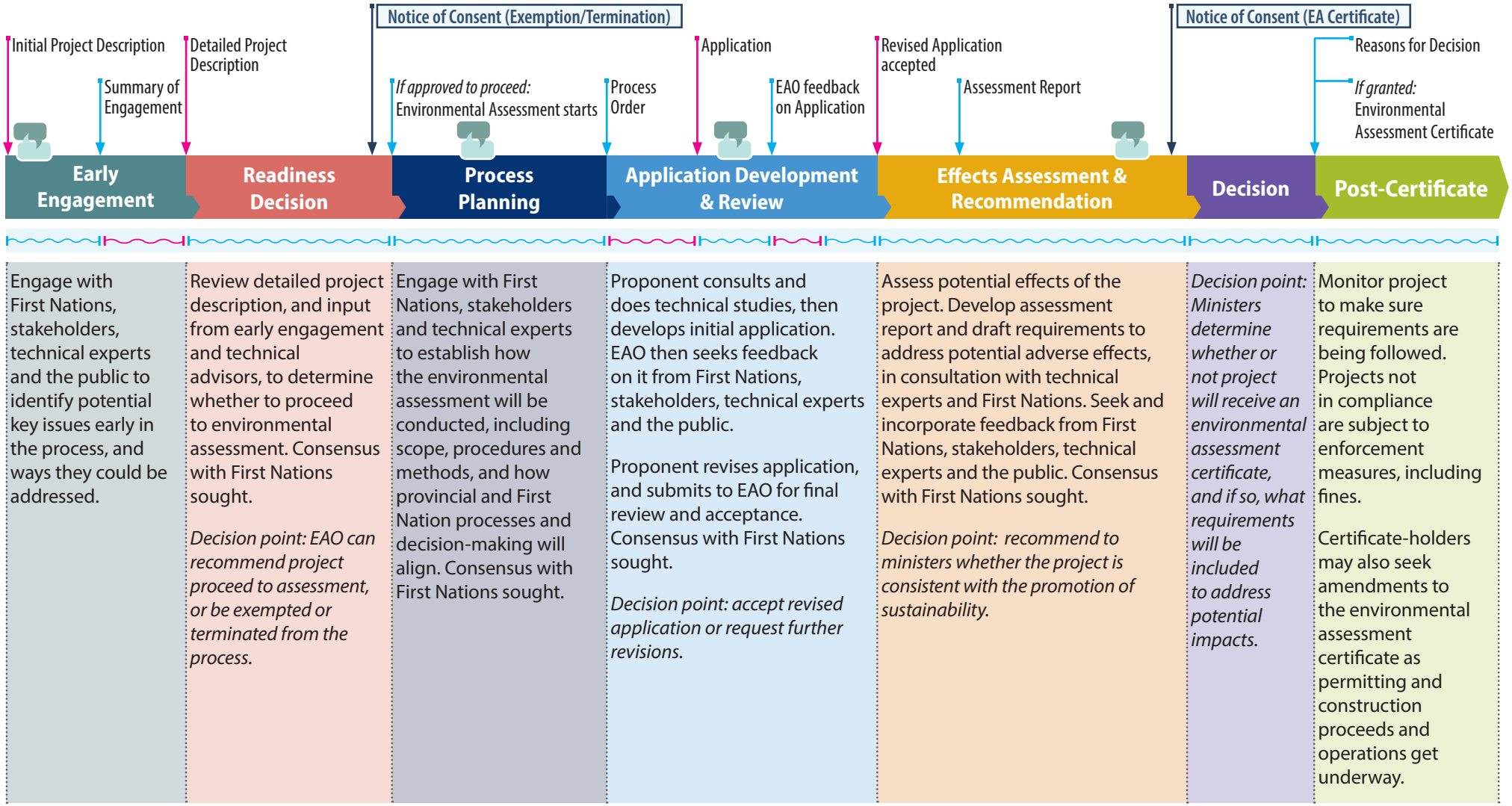


FIGURE 1

Dispute Resolution

There may be times at decision points within the environmental assessment process where, despite efforts of First Nations and the EAO to reach consensus, decisions are not aligned, and consensus is not reached.

Dispute resolution is a tool available to participating Indigenous nations and the Chief Executive Assessment Officer (a provincial decision-maker under the EA Act) by using the services of a third-party facilitator when they are unable to reach consensus on their own. Dispute resolution is also available for disputes between First Nations about participation in the assessment.

Dispute resolution under the EA Act is designed to be a tool to support consensus seeking, rather than a mechanism for resolving conflicts through an adjudicative process, such as litigation or arbitration. As such, it falls under the umbrella term of "alternative dispute resolution," which spans a range of approaches to problem-solving and conflict resolution, such as negotiation, mediation, and facilitation.

These modes of problem-solving are less formal than typical legal approaches to conflict. They are more attentive to underlying values and relationships and seek to move away from adversarial positions toward finding common ground. They also give the parties more control over the process.

Furthermore, alternative dispute resolution processes are not universal in nature but are shaped by the values, culture, traditions, and worldviews of participants. Practitioners with experience in alternative dispute resolution – both formally and culturally – use various tools and techniques to help parties reach an agreement on their own.

To describe the dispute resolution process and the third-party that helps the parties resolve the dispute, the EA Act uses the terms "facilitation" and "facilitator" respectively. The process set out in the EA Act is non-binding, meaning that the facilitator does not make a decision for the parties. Their role is to help the parties to reach agreement on their own.

Note on Terminology

The term 'participating Indigenous nation' is used in the EA Act to describe a First Nation or other Indigenous groups or governing body with Section 35 rights which has provided notice of their intent to participate in the assessment of a project (see Section 14(1) of the EA Act). Participating Indigenous nations are granted broad procedural rights under the EA Act, including access to dispute resolution. In considering this term, as defined in the purpose section of the EA Act, the EAO must recognize the inherent jurisdiction of Indigenous nations and their right to participate in decision-making in matters that would affect their rights, through representatives chosen by themselves.

The EAO must also support the implementation of the UN Declaration, which includes upholding the rights of self-government and self-determination reflected in Articles 3, 4, and 5 of the UN Declaration.

This Discussion Paper uses the term participating Indigenous nation when referring to a provision or right under the EA Act, but otherwise uses the term First Nations when referring to rights and title-holders.

The Province is committed to a **distinction-based approach** that requires relations with First Nations, Métis and Inuit be conducted in a manner that acknowledges the specific rights, interests, priorities and concerns of each, while respecting and acknowledging these distinct peoples' unique cultures, histories, rights, laws and governments. In many cases, a distinction-based approach may require that the Province's relationship and engagement with First Nations, Métis and Inuit Peoples and other Indigenous groups with Section 35 rights include different approaches or actions and result in different outcomes.

UN Declaration and Environmental Assessment

The UN Declaration affirms the inherent jurisdiction and right of Indigenous Peoples to participate in decision-making. The role of free, prior, and informed consent (FPIC) in natural resource decision-making is set out in Article 32(2):

> **States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions to obtain their free, prior and informed consent to the approval of any project affecting their lands or territories and other resources.**

Article 27 affirms the right to participate in:

> **a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous Peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of Indigenous Peoples pertaining to their lands, territories and resources.**

The environmental assessment process (Figure 1) is designed to support First Nation governments in making informed decisions based on their own laws and traditions in relation to proposed major projects that may affect them. The EAO seeks to engage with Indigenous governments through collaborative approaches that recognize their inherent jurisdiction and right to self-determination and self-government.

The EA Act provides for consensus-seeking throughout the assessment process at key decisions, rather than through a single action or point in time. This approach is one mechanism for upholding aspects of free, prior, and informed consent, and highlights the importance of a process of dialogue and negotiation over the course of a project from planning to implementation.

Consensus-seeking is one approach to support the implementation of Article 32(2) and the standard of 'consult and cooperate.' According to the Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples, the use in the UN Declaration of the combined terms "'consult and cooperate' denotes a right of Indigenous Peoples to influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard. It also suggests the possibility for Indigenous Peoples to make a different proposal or suggest a different model, as an alternative to the one proposed by the Government or other actor."[1]

[1] United Nations, General Assembly, Human Rights Council, Study of the Expert Mechanism on the Rights of Indigenous Peoples: Free, prior and informed consent: a human rights-based approach, A/HRC/39/62 (10 August 2018) at para. 15

"'Consult and cooperate' denotes a right of Indigenous Peoples to influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard. It also suggests the possibility for Indigenous Peoples to make a different proposal or suggest a different model, as an alternative to the one proposed by the Government or other actor."

Beaver, Andy Everson

UN Declaration and Dispute Resolution

Access to conflict resolution processes is reflected in Article 40 of the UN Declaration:

> **Indigenous Peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties... Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the Indigenous Peoples concerned and international human rights.**

The inclusion of dispute resolution provisions in the EA Act is one potential mechanism for upholding this right within the assessment process and can support reconciliation through negotiated outcomes, not in courtrooms, in line with the Province's Directive on Civil Litigation involving Indigenous Peoples.

Eagle, Andy Everson

Dispute resolution outside of the courts offers an opportunity for parties to come together in good faith to build a trust-based relationship and a mutual understanding of each other to manage future disagreements.

Particularly for disputes between the Province and First Nations, alternative dispute resolution offers an opportunity to resolve a dispute more effectively than is possible through the courts, and in ways potentially informed by Indigenous knowledge, laws, and approaches to conflict resolution. For this opportunity to be realized, the regulatory framework for dispute resolution must accommodate culturally appropriate processes that respect the distinct and diverse nature of Indigenous legal orders and traditions.

Dispute resolution processes are not universal but are shaped by the values, culture, traditions, and worldviews of participants. For dispute resolution to be an effective tool, the EAO recognizes the importance of a co-developed process that is flexible to reflect the needs of the parties and their distinct approaches to conflict resolution. Taking a distinction-based approach is necessary to implement Article 40 and to reflect the diversity of the First Nations in British Columbia - particularly the distinct languages, cultures, customs, practices, rights, legal traditions, institutions, governance structures, relationships to territories, and knowledge systems - in dispute resolution processes.

The EAO is seeking input from First Nations and experts and practitioners in dispute resolution and Indigenous law, as well as industry, to understand how to design the dispute resolution process to support this goal within the current legal framework of the EA Act.

"Dispute resolution processes are not universal but are shaped by the values, culture, traditions and worldviews of participants. For dispute resolution to be an effective tool, the EAO recognizes the importance of a co-developed process that is flexible to reflect the needs of the parties and their distinct approaches to conflict resolution."

Dispute Resolution Under The EA Act

The opportunity for dispute resolution in the EA Act is provided for in Section 5 (outlined below). The purple text indicates what can be included in a dispute resolution regulation. The text in brackets includes a link to where you can find more information about each topic in this Discussion Paper.

5(1) Subject to regulations made under subsection (4) (a), the minister, after considering a recommendation, if any, of an Indigenous nation, may appoint individuals to facilitate the resolution of disputes in relation to a matter referred to in subsection (2) (see Appointing a Facilitator).

(2) A participating Indigenous nation or the chief executive assessment officer may refer one or more of the following matters to a dispute resolution facilitator: (see What can be referred to dispute resolution?)

(a) a matter pending decision under section 14 (2), 17, 18, 19, 28 or 29;

(b) the provision of a notice under section 14 (1);

(c) **any other prescribed matter.**

(3) On completion of a facilitation, a dispute resolution facilitator must provide a report to the participants and to the applicable of the chief executive assessment officer or the minister.

(4) The Lieutenant Governor in Council may make regulations **respecting the powers and duties of dispute resolution facilitators under this Act,** including, without limitation, regulations respecting the following:

(a) **qualifications of individuals who may be appointed under subsection (1);** (see Appointing a Facilitator)

(b) **the powers and obligations of a dispute resolution facilitator to manage a referral made to the facilitator;** (see Facilitation)

(c) **matters that a dispute resolution facilitator must consider before making a report;** (see Dispute Resolution Report)

(d) **referrals to a dispute resolution facilitator;** (see Initiating Dispute Resolution and Appointing a Facilitator)

(e) **the time by which a dispute resolution facilitator must complete a facilitation and provide a report.** (see Facilitation)

(5) If a matter pending decision is referred to a dispute resolution facilitator,

(a) a decision on the matter may not be made under the applicable section until after the facilitator has provided a report, and

(b) if the participating Indigenous nation requests that the chief executive assessment officer take part in the dispute resolution process, the chief executive assessment officer must take part in the process.

(6) Despite subsection (2), an Indigenous nation that has provided notice under section 14 (1) may refer to a dispute resolution facilitator a matter pending decision under section 14 (2) (see box on Disputes between First Nations about a Nation's participation in the Assessment).

(7) A report of a dispute resolution facilitator is not to be taken as guiding:

(a) the chief executive assessment officer or minister respecting a project not addressed in the report, or

(b) a decision maker under another enactment.

(8) This section is not to be taken as limiting any right a participating Indigenous nation may have to seek a remedy from a court.

(9) For certainty, nothing in this section, nor anything done under this section, abrogates or derogates from the rights recognized and affirmed by section 35 of the Constitution Act, 1982.

Who Participates In Dispute Resolution

Who can refer a matter to a facilitator?

Only participating Indigenous nations or the Chief Executive Assessment Officer may refer a matter to a facilitator, as defined in the EA Act.

Dispute resolution is a procedural right for participating Indigenous nations in the EA process. It also can be used to resolve disputes between Indigenous nations over their participation in the assessment before a Nation is confirmed as a participating Indigenous nation.

Participation by Indigenous nations in dispute resolution is voluntary. As affirmed in the EA Act, taking part in dispute resolution does not abrogate or derogate a Nation's Section 35 rights, under the constitution, nor does it limit a Nation from seeking a remedy in a court.

Role of the EAO

The EA Act requires the Chief Executive Assessment Officer to take part in dispute resolution, if requested by a participating Indigenous nation. The 'project team' at the EAO (i.e., the team of public servants at the EAO who manage the assessment process on specific projects) may represent the Chief Executive Assessment Officer in dispute resolution meetings. How and when the Chief Executive Assessment Officer participates is discussed by the parties when co-developing the process.

Role of the proponent

The EA Act does not speak to the role of the proponent in dispute resolution. However, the EAO has an obligation for procedural fairness to the proponent, which must be met during the assessment. How these procedural fairness obligations are met by the EAO will depend on the specific context of the dispute resolution (see Confidentiality).

Proponents may be invited by the parties to take part in dispute resolution. Their participation may range from being an active participant to a silent observer or it may be decided that the proponent does not attend any meetings.

The EAO is of the view that it may be beneficial to have the proponent involved. Proponent participation can support more efficient discussions, support experiential learning, yield additional project-specific information, and ensure that proponents have an opportunity to comment on anything that arises that may materially affect their interests.

Ultimately, it will be up to the parties, with help from the facilitator, to determine how other participants may take part.

Note on Terminology

This paper uses the term 'parties' to refer to the participating Indigenous nation(s) and/or the EAO who are engaged in dispute resolutions. 'Participants' refers to other individuals or groups who may be invited by the parties to take part in dispute resolution but are not eligible parties under the EA Act or are participants in the assessment process more generally. Examples of participants who may be invited by the parties to participate include proponents or other First Nations.

Other Participants

There may be other participants that, while not parties to the dispute, may be invited by the parties to take part in the facilitation. For example, this could include representatives from provincial agencies, the federal government, or other Indigenous groups. When co-developing a specific dispute-resolution process, the parties may identify other participants and define any conditions of their participation (i.e., whether they are to be an observer versus active participant).

Role of the Minister

As the EAO is a neutral agency, the Minister of Environment and Climate Change Strategy (the Minister) is not involved in the assessment process during the environmental assessment, rather the Minister is the statutory decision-maker once the assessment process has concluded. As such, the Minister is not a party to dispute resolution— consensus-seeking and dispute resolution are between participating Indigenous nations and the Chief Executive Assessment Officer.

However the Minister does have a role in relation to the appointment of facilitators (see Appointing a Facilitator). Under section 5 of the 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.

It should be noted that in cases when there is not agreement between the Chief Executive Assessment Officer's recommendation on whether the project should be approved to proceed and a participating Indigenous nation's notice of consent or lack of consent at the end of the environmental assessment, the Ministers must meet with the Nation. A facilitator may support this meeting.

Disputes between First Nations about a Nation's participation in the environmental assessment

During the development of the EA Act and past engagement on dispute resolution, the EAO heard an interest in how resolution of disputes between First Nations could work. The EAO acknowledges that it is inappropriate for the Province to prescribe how such processes would work. It is the EAO's intention that the framework for dispute resolution under the regulation and policies would provide appropriate flexibility for the Nations to co-develop their process for resolving their dispute.

Dispute resolution is available under the EA Act between First Nations about a Nation's participation in the assessment. During Early Engagement, a First Nation may provide notice (under Section 14(1) of the EA Act) that it intends to participate in the EA as a participating Indigenous nation.

A First Nation may choose to pursue facilitated dispute resolution with another Nation during the Early Engagement phase to assist in resolving a disagreement about the Nation's participation as a participating Indigenous nation.

While Nations may enter dispute resolution over the involvement of other Nations in the environmental assessment, dispute resolution and assessments are never intended to be – and are not – rights-determining processes.

While waiting for the outcome of dispute resolution related to participation in the assessment (i.e., whether a Nation becomes a participating Indigenous nation or not), the EAO will continue to engage with all Nations that have provided notice, including those engaged in dispute resolution, as though they are participating Indigenous nations. The EAO strongly encourages the proponent to do the same.

When is Dispute Resolution Available?

Dispute resolution is available before the decision for the matters listed in Section 5(2) of the Act. Once a decision has been made, dispute resolution is no longer available for that particular matter.

If a matter is referred to dispute resolution, the relevant decision cannot be made until a facilitator has been appointed, the dispute resolution process has been completed, and the facilitator provides their report.

Time-limit extensions for environmental assessment phases may be necessary to accommodate a dispute resolution process. Section 38 of the EA Act authorizes the Chief Executive Assessment Officer or the Minister to extend time limits, if required. If a time limit extension for the assessment process is likely in a particular case, the proponent will be notified.

Hummingbird, Andy Everson

What Can Be Referred to Dispute Resolution?

Dispute resolution is available on the 'matters pending decision' listed under Section 5(2) of the EA Act at certain points in the assessment process. These include, for example:

- The decision to proceed to an environmental assessment;
- The information requirements and procedures for the assessment; and
- The conclusions of the assessment.

Figure 2 on the following page describes the decisions and recommendations (the matters) where dispute resolution is available in the assessment process.

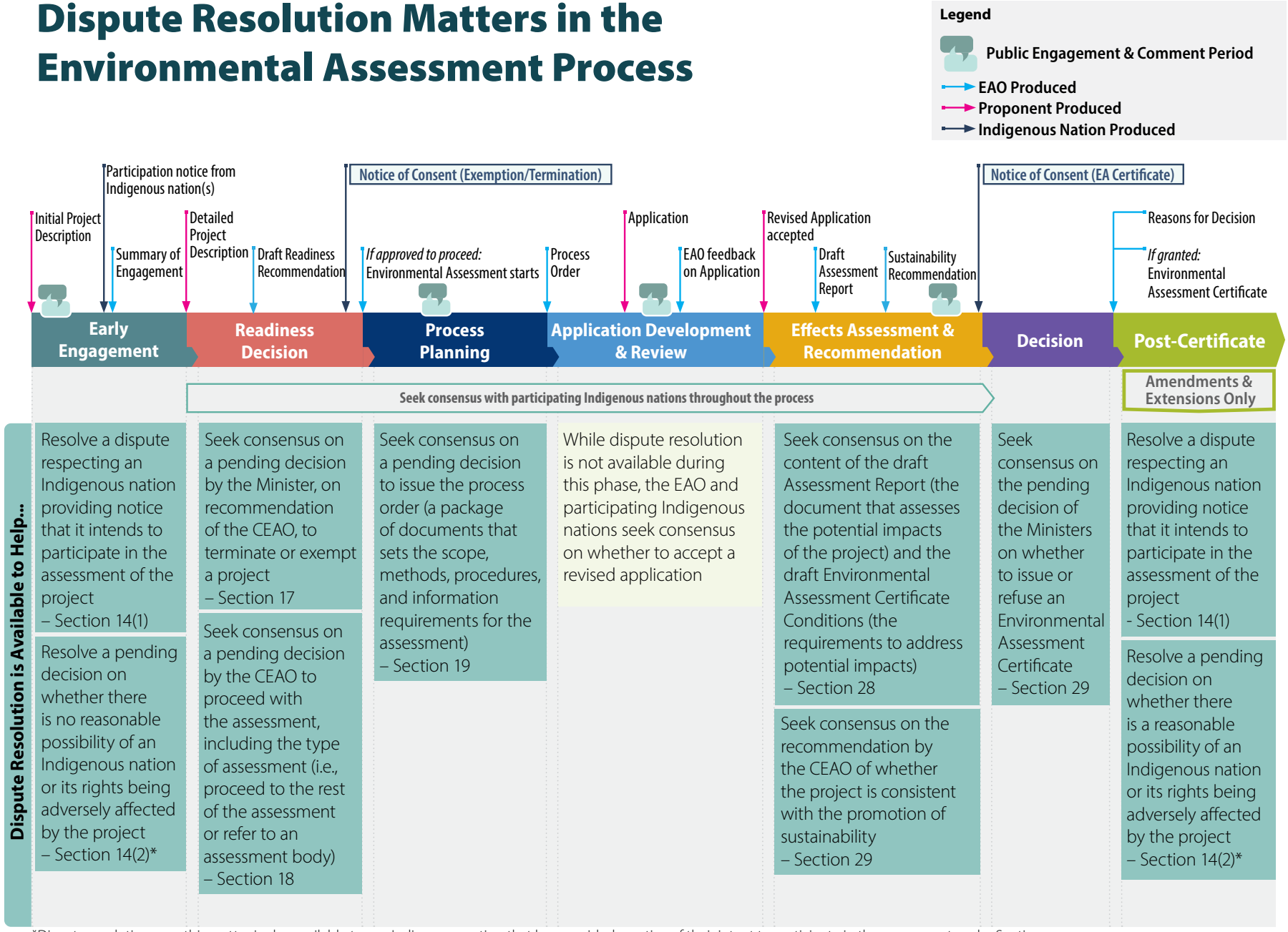
Issues under dispute should be:

- Within the scope of the EA Act;
- About the project undergoing the assessment; and
- Raised at the appropriate phase of the environment assessment.

The scope of dispute resolution related to these matters is quite broad. For example, one of the matters pending decision is the decision to issue the process order, which takes place during the Process Planning phase. The process order sets out the scope, methods, procedures, and information requirements for the assessment. A dispute could be related to any of these components that make up the process order.

Once the decision-maker issues the process order at the end of the phase, dispute resolution related to the components of the process order is no longer available.

Dispute Resolution Matters in the Environmental Assessment Process



*Dispute resolution over this matter is also available to any Indigenous nation that has provided a notice of their intent to participate in the assessment under Section 14(1) of the Act. In all other instances, dispute resolution is available only to participating Indigenous nations or the Chief Executive Assessment Officer (CEAO).

FIGURE 2

Considerations for a Dispute Resolution Regulation and Policies

The EAO is seeking your views to guide what the regulation and policies for dispute resolution should look like. While the EA Act sets out certain aspects of how dispute resolution is to be implemented, significant parts of the process are left to be determined either by regulation or policy.

The following sections present the various considerations related to dispute resolution that the EAO will explore through the engagement process. Each section presents a topic for consideration, along with the current thinking based on what the EA Act says about dispute resolution, input gathered previously, or the EAO's experience to date. The EAO has had experiences with dispute resolution twice so far. In absence of a regulation, the EAO has applied an interim framework. More information about this framework can be found in Appendix III.

Each section then delves into questions the EAO is seeking input on (see the green boxes under each topic heading). These questions are not meant to be comprehensive; rather, they're intended to reflect some of the questions that have been raised already and to stimulate further discussion. Find a full list of the discussion questions in Appendix I.

Principles and Goals for Successful Dispute Resolution Processes

The EA Act provides for consensus-seeking throughout the assessment process at key decisions. Consensus-seeking is intended to support a process of dialogue and negotiation over the course of a project, rather than through a single action or point in time. Dispute resolution is a tool to help resolve substantial disagreements as a next step to reach consensus if parties are unable to reach consensus on their own.

Any regulation and policies for dispute resolution should be guided by a set of principles to ensure its meaningful implementation. Although the EA Act does not specifically contemplate guiding principles for dispute resolution, the UN Declaration offers a starting point for a discussion on guiding principles – as acknowledged in the reconciliation purpose of the EAO.

Purpose of the Environmental Assessment Office

A relatively unique feature of the EA Act is that it defines purposes for the Environmental Assessment Office (EAO). In carrying out its responsibilities under the EA Act, the EAO must do the following:

- Promote sustainability by protecting the environment and fostering a sound economy and the well-being of British Columbians and their communities; and
- Support reconciliation with Indigenous Peoples by:
  - Supporting the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration);
  - Recognizing the inherent jurisdiction of Indigenous nations and their right to participate in decision making in matters that would affect their rights, through representatives chosen by themselves;
  - Collaborating with Indigenous nations in relation to reviewable projects, consistent with the UN Declaration; and
  - Acknowledge Indigenous peoples' rights recognized and affirmed by section 35 of the Constitution Act, 1982 in the course of assessments and decision making under the EA Act.

As discussed above, the environmental assessment process and dispute resolution are intended to support the UN Declaration, including Articles 27, 32(2), and 40. Article 27 and article 40 both speak to the right to fair, just, impartial, and transparent processes that give due recognition and consideration of the customs, traditions, rules, and legal systems of the Indigenous Peoples concerned. These articles underscore that any dispute resolution process involving Indigenous Peoples cannot be "one size fits all;" rather, they point to the need for flexibility that allows for a diversity of approaches to dispute resolution as an outcome of the varied and unique cultural traditions and legal frameworks held by each Nation.

The draft principles that have guided the interim framework for dispute resolution to date reflect the idea that the regulation and policies must create space for distinct approaches (see Appendix III). These principles were directly informed by the work with the Indigenous Implementation Committee that supported the early implementation of the EA Act (see Appendix II – Inputs into this Discussion Paper). It was recognized that for dispute resolution to be an effective tool, regulation and policies should:

- Be flexible to allow for co-development of the dispute resolution process with First Nations;
- Respect the distinct customs, traditions, rules, and legal systems of First Nations; and
- Be timely and predictable, recognizing dispute resolution takes place within a regulatory process.

With this background in mind, the EAO is interested in your views on the principles that should guide the development of the dispute resolution regulation and policies. Depending on the nature of the proposed principles, some could potentially be met through the future regulation by, for example, defining "the powers and obligations of a dispute resolution facilitator to manage a referral made to the facilitator."

If not appropriate for the regulation, the principles may be established through policy.

Discussion Topic

Principles for successful dispute resolution processes

The following are intended to foster conversation and not intended to be comprehensive.

1) What principles should guide dispute resolution?
2) Respecting disputes between First Nations about participation in the assessment, are there specific principles that are needed for this type of dispute?

Frog, Andy Everson

Referrals to a Facilitator

A participating Indigenous nation or the Chief Executive Assessment Officer may refer a matter to a facilitator. The EA Act does not define a process for how this referral is made, although the regulation may establish one. The text box describes how the referral process has worked under the interim framework.

Appointing a Facilitator

The EAO recognizes the importance of setting qualifications that ensure facilitators have the necessary skills and experience to support the parties. Established qualifications must also avoid creating barriers, particularly for Indigenous dispute-resolution practitioners.

The process for procuring (i.e., finding, acquiring, and paying for services from) and appointing a trusted facilitator that is suited to the needs of the parties is critically important for making the dispute-resolution process meaningful and effective. As soon as the possibility of dispute resolution is discussed or once dispute resolution is initiated, ideally the parties work together to recommend a facilitator to the Minister for appointment. The Province will be responsible for the related procurement and pays for the services of the facilitator. In making the appointment, the Minister is required by the EA Act to consider any recommendation from a First Nation.

The regulation-making powers under the EA Act speak to facilitator appointment and procurement in a few ways:

- The regulation may set the qualifications of facilitators;
- The regulation may create a process for referrals to a facilitator; and
- Subject to the regulation, the Minister of Environment and Climate Change Strategy may appoint facilitators.

There are multiple processes and tools that will need to be further explored and created to support the implementation of the future regulation and associated procurement. For example, this could include creating a list of facilitators and policy around how any list is developed and maintained.

Experience from the Interim Framework for Dispute Resolution

Under the interim framework for dispute resolution, the party making the referral submits an initiating document to the EAO to begin facilitator appointment. This could be a First Nation or the Chief Executive Assessment Officer of the EAO.

Based on the EAO's experience to date, it is helpful for all parties and the facilitator that the initiating document provide a clear understanding of the issues being referred to dispute resolution as well as the remedy that the referring party is seeking. For example, remedies could be substantive changes to a condition in the draft environmental assessment certificate or a different decision than the EAO is recommending to Provincial decision-makers.

All parties to the dispute receive a copy of the initiating document. As First Nations' participation in dispute resolution is voluntary, First Nations will have an opportunity to indicate their willingness to take part if they are not the referring party.

Once the parties confirm their participation, they then recommend a facilitator to the Minister for appointment.

The proponent will be informed that 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.

Discussion Topic

Referrals to a facilitator

3) How should initiation occur so that it is accessible?

4) What information should be provided to initiate a referral to a facilitator?

Qualifications

During the development of the EA Act and past engagement on dispute resolution, the EAO heard the importance of facilitators being able to "walk in both worlds"- meaning understanding both Indigenous and western worldviews and ways of knowing. The EAO recognizes that Indigenous Peoples have diverse terms that captures this concept (for example, two-eyed seeing). In this context, the EAO understands this concept to mean that any future required qualifications for facilitators should reflect and value experience and knowledge in both Indigenous and western laws, processes, and practices.

The EAO also heard that co-facilitation (where two facilitators facilitate the dispute as a team) should be an option available to participants. It may be appropriate in some cases to recommend a team of facilitators, who together meet the qualifications and have capacity in both Indigenous and western dispute-resolution practices. This is an option the EAO is interested to explore more during consultation.

Article 27 and Article 40 of the UN Declaration affirm the right of Indigenous Peoples to participate in just, fair, and transparent processes that give due recognition to Indigenous People's laws, traditions, customs, and legal systems. Facilitators must be able to support co-development of processes that demonstrate understanding and knowledge of Indigenous legal orders and traditions, approaches to dispute resolution, and Nation and community contexts.

Facilitators must also be able to bring a UN Declaration and rights-based lens to dispute-resolution processes. This includes having the skills to create and maintain a culturally safe, respectful, and trauma-informed process and to work with First Nations to reflect their laws, traditions, customs, and legal systems in the co-developed process.

Discussion Topic

Qualifications

Many different people may offer facilitation or dispute resolution services with a range of experience. Some may have formal training or practice as professionals, such as lawyers or mediators, while others may have a wealth of experience and knowledge outside of these designations. The EAO wants to ensure that qualifications for facilitators are flexible enough to recognize a range of training and experience to avoid creating barriers for qualified facilitators. As such, it is important that Indigenous knowledge, practices, and standards are upheld.

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?

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?

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

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?

Facilitator Appointments

The new regulation could define the qualifications for facilitators. A procurement process would then include a review of the qualifications of prospective facilitators. The Minister may then make appointments, subject to the qualifications set in the regulation and must consider any recommendations made by Indigenous nations.

The EAO is interested to hear from First Nations about how they want to recommend a facilitator, and from dispute resolution practitioners about how they would like to participate in procurement.

The EAO has identified considerations to guide the building of a process to appoint facilitators. The EA Act is also clear that the recommendations of Indigenous nations must be considered when appointing facilitators. Any future processes must operate within government procurement policy and trade agreements. In the EAO's view, the process for appointing facilitators to a dispute should:

- Build trust, legitimacy, and confidence in the quality of the facilitators that meets the needs of the parties;
- Enable the parties to recommend the facilitator together (in support of the co-development principle of dispute resolution and to encourage an early signal of working together in good faith);
- Remove barriers for Indigenous facilitators (consistent with the BC Procurement Strategy);
- Minimize any perception of bias of the Province when appointing facilitators; and
- Be efficient and timely.

Discussion Topic

Facilitator Appointments

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

11) What are other considerations?

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

Wolf, Andy Everson

Facilitation

Once a facilitator is under contract, the facilitation begins. If the regulation sets a time limit for dispute resolution, this is when the time limit would start. The regulation-making powers under the EA Act speak to this part of the dispute resolution process in a few ways:

- The regulation may establish the powers and obligations of the facilitator to manage a referral;
- The regulation may establish the matters that a facilitator must consider before making a report; and
- The regulation may establish a legislated time limit for the facilitator to provide their report.

A co-developed process

During past engagement when developing the EA Act, the EAO heard the importance of each dispute resolution process being customized within a flexible regulatory framework. One way to achieve this is for individual dispute-resolution processes to be co-developed by the parties.

The regulation and supporting policies should enable the parties to design a custom process that respects the specific needs and legal traditions of First Nations. Co-developing the process is important for building trust and is a signal of working together in good faith. It should be noted that it is widely documented in the alternative dispute-resolution literature that there are shortfalls in interest- or outcome-based dispute resolution involving Indigenous Peoples and their rights. These types of dispute-resolution processes are not designed to consider the

Experience from the Interim Framework for Dispute Resolution – Co-development

Under the interim framework for dispute resolution, once a facilitator is contracted the basic steps include:

- The facilitator helps the parties to co-develop a custom dispute resolution process and develop a process agreement;
- The facilitator guides the parties through the co-developed process; and
- The facilitator prepares and submits a report to the parties and decision-makers.

To support the first step, the parties document the co-developed process in a document called an engagement protocol. This is the term that the EAO chose to use in the interim framework, but this type of document may have different terminologies associated with it in different alternative dispute resolution contexts (e.g., group/process agreement; agreement to mediate).

The purpose of this type of document in alternative dispute resolution is to define the issues, objective, interests, and the desired outcomes of the parties. The document may define how the parties work together (e.g., guiding principles for interacting with each other) and chart the process for the facilitation. For example, one dispute-resolution process involved a 'meeting on the land' with the community.

differences in worldviews, values, and relationships that are a major driver of conflict.

For dispute resolution under the EA Act to support reconciliation and the implementation of the UN Declaration, dispute resolution should focus on (re)building relationships and trust for the long term. This is important to address what are often the fundamental drivers of conflict (e.g., lack of trust, breakdowns in communication, different worldviews).

Co-development of the dispute-resolution process then must be respectful of the distinct and diverse nature of Indigenous legal traditions, the different histories of relationships between the First Nations and the Province, and the different worldviews between the parties. While dispute resolution in environmental assessment can and should help the parties to move beyond positions towards consensus, and an outcome of that process can be the rebuilding of relationships, dispute resolution in and of itself is just one part of much broader reconciliation efforts between First Nations and the Province.

Discussion Topic

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?

14) If so, how should co-development work?

15) How can trust and constructive engagement be built into the process? I.e., what is needed to support a conducive environment for 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?

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?

Powers and obligations of the facilitator

The EA Act already defines some of the facilitator's obligations. The facilitator is obligated under the EA Act to provide their report to the parties and decision-makers.

The facilitator is also obligated to adhere to Section 75 of the Act in relation to any Indigenous knowledge provided to them in confidence. The confidentiality provisions of the EA Act and the Freedom of Information and Protection of Privacy Act (FOIPPA) provide protection for confidential Indigenous knowledge. Indigenous nations may provide Indigenous knowledge during the environmental assessment and dispute resolution processes in confidence under Section 75(1) of the Act. Subject to Section 75(2), this knowledge must not knowingly be, or be permitted to be, disclosed to any other party (including the facilitator) without written consent.

The regulation may define additional powers and obligations of the facilitator, and the EAO would like to explore potential options.

For dispute resolution to be meaningful and effective, both parties need to have a sincere intention of finding a resolution and common ground. The EAO views an important role of the facilitator will be to assess the readiness of the parties to participate in dispute resolution once a referral is made. If the facilitator uses their judgement to determine that the parties are not ready or willing to participate in good faith, the facilitator may end the process. Based on the EAO's experience of using the interim framework for dispute resolution, this role of the facilitator can be a positive incentive for the parties to continue to find new common ground to explore.

The regulation could prescribe certain circumstances where the facilitator is empowered to end a facilitation. For example, this could include when:

- 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);
- The First Nation participating in dispute resolution wishes to withdraw, as First Nations' participation is voluntary;
- The project undergoing the assessment withdraws from the assessment process;
- The substance of the dispute is unrelated to the project undergoing an assessment (i.e., about another project; about a project or activity that is not regulated by the EAO);
- The substance of the dispute would be better considered during another phase in the assessment; or
- 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

Any 'termination criteria' established in the regulation would apply equally to all parties. If the facilitator decided to end the dispute resolution, the facilitator would still be obligated to provide a report to the parties and decision-makers.

Discussion Topic

Powers and obligations of the facilitator

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?

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

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

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

Legislated time limit

The regulation may establish a legislated time limit for the facilitator to provide their report. There are multiple considerations in establishing a time limit for dispute resolution.

The EAO recognizes the importance of a framework for dispute resolution that is timely and predictable, given dispute resolution takes place within a regulatory process with legislated time limits. Dispute resolution is intended to be a time limited process and not significantly impact the legislated time limits for environmental assessments. This explains the EAO's initial recommendation of a 60-day time limit for dispute resolution in the interim framework. The EAO must also consider procedural fairness when establishing a time limit.

The experience of using dispute resolution without a regulation in place to date has also demonstrated that dispute resolution requires time and capacity from all parties to effectively participate and for the process to be meaningful. The EAO also acknowledges that First Nations are routinely over-subscribed on resources and experience substantial capacity restraints (see Funding).

Discussion Topic

Time for dispute resolution

23) What should the time limit be?

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

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

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?

Dispute Resolution Report

The facilitator is required by the EA Act to provide a report to the parties and decision-makers. The dispute-resolution process ends when the facilitator provides their report. If the regulation establishes a time limit, the report must be provided within the time limit, unless an extension is granted.

The process set out in the EA Act is non-binding, meaning that the facilitator does not make a decision for the parties. Their role is to help the parties to reach agreement on their own.

The regulation-making powers under the EA Act include defining the matters that a facilitator must consider before making a report.

While the dispute resolution process itself may be confidential (see Confidentiality on the following page), the outcome of dispute resolution (whether the parties reach consensus on a decision or recommendation) is generally not confidential. In most cases, the dispute resolution report would be posted on the project's page of the EAO Project Information Centre (EPIC) (where all public assessment documents can be found) following a decision by the provincial decision-maker. An exception may be made for disputes about a First Nation's participation in the EA under Section 14 of the EA Act.

Given that the report is typically made public, the report may include a confidential memo that includes confidential information for the decision-maker to consider, such as confidential Indigenous knowledge.

Discussion Topic

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.

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

Confidentiality

During the development of the EA Act and past engagement on dispute resolution, the EAO received questions from First Nations about how confidentiality is considered in the dispute-resolution process.

Confidentiality is an important component of alternative dispute-resolution processes in general. Confidentiality supports frankness, openness, fairness, and helps to maintain the clear neutrality of the facilitator. It enables the parties to openly share their thoughts, opinions, and lived experiences without the fear of disclosure while the process is ongoing.

The context of environmental assessment in particular adds two nuances to the discussion around confidentiality and dispute resolution: procedural fairness obligations and a transparent public decision-making process.

The parties to dispute resolution determine how other participants may be involved, including the proponent. Proponent participation may range from active participant to silent observer or being informed of outcomes from but not present at meetings. However they take part, the EAO must meet procedural fairness obligations to the proponent, as the subsequent decision affects them. How this obligation is met by the EAO will depend on the facts of each dispute-resolution process and will be determined on a case-by-case basis.

The approach to confidentiality taken by the EAO to date under the interim framework has been that the parties define what information provided in a facilitation is confidential. The parties may also develop guidelines for themselves to determine whether discussions are with prejudice or without prejudice (i.e., able to be used in future litigation).

Discussion Topic

Confidentiality

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?

Information for the proponent

Ultimately, it will be up to the parties, with help from the facilitator, to determine how other participants (including the proponent) may take part in dispute resolution.

Whatever the level of involvement and to meet the requirements of procedural fairness, proponents will:

- Be informed that dispute resolution has been initiated;
- Be informed on the outcome of dispute resolution;
- Receive the facilitator's report (except for disputes about a Nation's participation);
- Be notified of any impacts to environmental assessment phase time limits and process;
- Be engaged on any commitments or resolutions that are tabled that may affect them; and
- Be given an opportunity to be heard in relation to the dispute-resolution report and any relevant submission made during the dispute-resolution process for procedural fairness purposes.

Areas For Further Policy Development

In addition to the regulation, there are other aspects of dispute resolution that may be a matter of policy.

Funding

During the development of the EA Act and past engagement on dispute resolution, the EAO heard about the importance of funding for First Nations to participate in dispute resolution. The EAO acknowledges that First Nations are contributing to multiple initiatives, at many times simultaneously, and need capacity supports. Although these financial burdens cannot be fully compensated by the EAO, it hopes to provide some level of consistent and predictable funding for dispute resolution that can ease some of this pressure.

Based on experience in dispute resolution to date, its clear that funding is an essential component for First Nations to adequately and meaningfully participate in the process. Although the EAO may not be able to provide capacity funding for the entirety of the costs First Nations may incur participating in dispute resolution, the EAO is committed to providing a funding range to any participating Indigenous nation that is a party to a dispute-resolution process.

The dispute-resolution regulation does not have the scope to empower a specific capacity-funding-model for dispute resolution; however, the EAO is exploring models that are consistent in their availability and transparent in allocation criteria.

Future policy development

To support the regulation, policy, guidance, tools, and internal procedures will need to be developed. These are just some of the areas that the EAO has identified where future work is required, including consultation and cooperation with First Nations and engagement with dispute resolution practitioners:

- Facilitator appointment and procurement;
- Standards of conduct for facilitators;
- Guidance or training for facilitators; and
- Complaint procedures.

How to Participate and Next Steps

The EAO has developed an engagement plan to consult and cooperate with First Nations and engage with Indigenous organizations, dispute resolution and Indigenous law experts and practitioners, and industry representatives to develop a regulation and policies for dispute resolution. See the EAO's Dispute Resolution web page for the most up-to-date information about how to take part. Email EAO.DisputeResolution@gov.bc.ca with any comments or questions.

You can help shape the regulatory framework for dispute resolution, including by:

- Participating in workshops, either virtually or in-person;
- Providing a written submission in response to this Discussion Paper; and/or
- Requesting a Government-to-Government meeting to discuss.

The EAO is developing a dispute resolution regulation and policies that are consistent with the UN Declaration and creates clarity, consistency, and predictability in the process. The purpose of this regulation is to clarify the powers and duties of dispute resolution facilitators to support collaborative and principled resolution of disputes. Policy, guidance, and tools will support implementation of the EA Act and the regulation. We are seeking your views in shaping what the framework for dispute resolution under the EA Act should look like.

The EAO is targeting completion of a draft regulation for approval by Cabinet by fall 2023. Further engagement on the implementation of the regulation and the development of supporting policies, tools, and guidance will follow.

In summer 2023, following the end of engagement on the dispute resolution regulation, the EAO will summarize what we heard during the process in a What We Heard Report. As the EAO moves into regulation development, the EAO is looking at models to support co-development with First Nations and will continue to accept feedback from First Nations on the topic. Figure 3 on the following page describes at a high level the pathway - starting from the publication of this Discussion Paper - to develop the regulation and supporting policy. Figure 3 also shows the inputs into this Discussion Paper, which is discussed further in Appendix II.

Salmon, Andy Everson

DISPUTE RESOLUTION REGULATION DEVELOPMENT PATHWAY

ENGAGEMENT DURING THE DEVELOPMENT OF ENVIRONMENTAL ASSESSMENT ACT

First Nations Consultation

- Direct engagements (Dec 2018-Dec 2019)

Implementation Committees

- Environmental Assessment Advisory Committee (March-April 2018)
- Indigenous Implementation Committee (June 2019-Feb 2020)
- Stakeholder Implementation Committee (April-Dec 2019)

EXPERIENCE USING DISPUTE RESOLUTION

The EAO developed a draft administrative framework ("Interim Approach") for dispute resolution to guide the process before a regulation is in place

DISPUTE RESOLUTION HAS BEEN USED BY FIRST NATIONS TWICE

- Related to the Readiness Decision for the Fording River Extension Project;
- Related to the Readiness Decision for the Ksi Lisims LNG Project.

RATIONALE FOR THE REGULATION

The purpose of the regulation is to clarify the powers and duties of facilitators to support collaborative and principled resolution of disputes between First Nations and the Province in the context of assessments.

Given that dispute resolution has already been used by some First Nations, a regulation is needed to support its implementation. The Province in consultation and cooperation with Indigenous peoples must take all measures necessary to ensure the regulation is consistent with the UN Declaration.

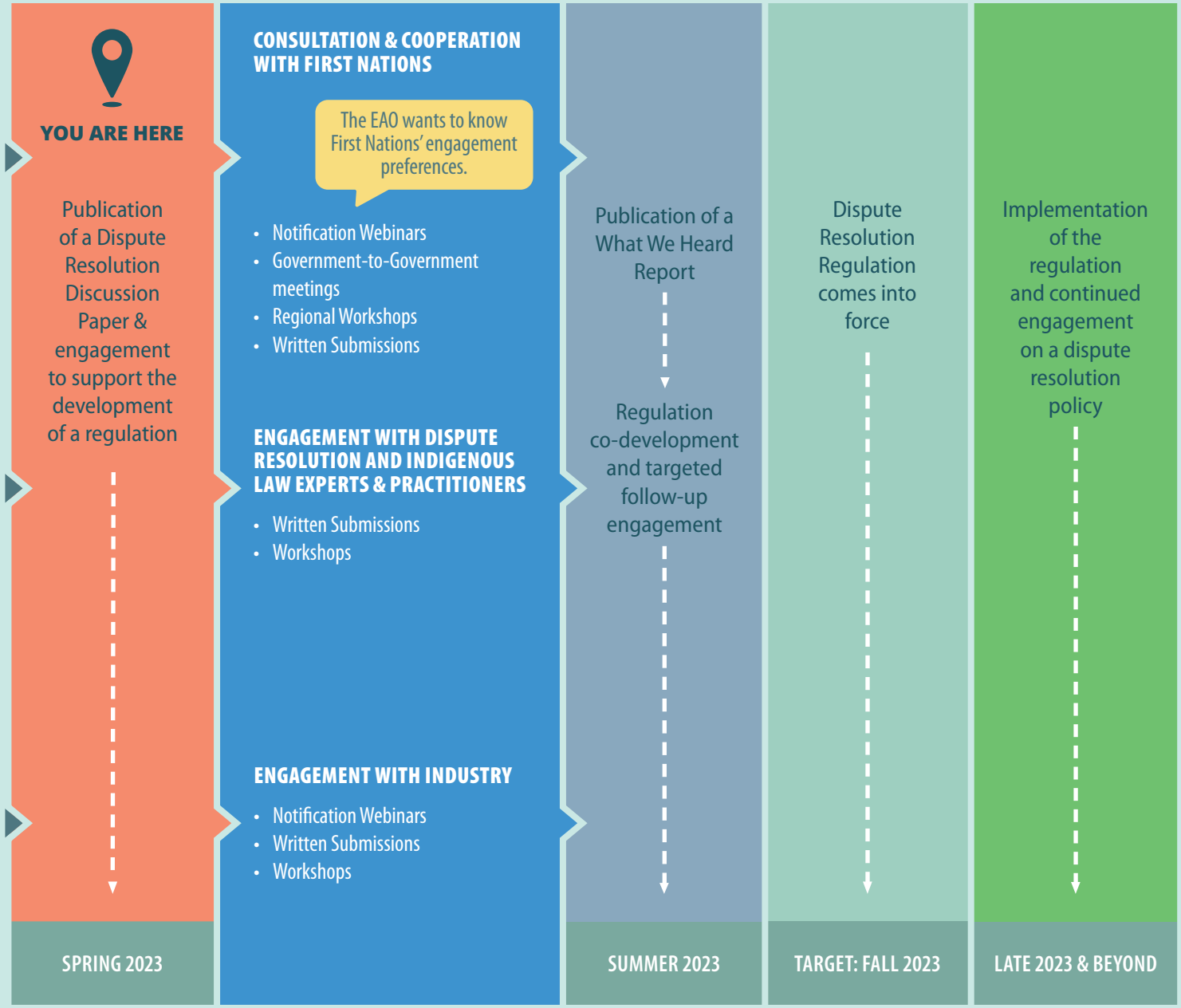


FIGURE 3

Appendix I: Discussion Topics

The following are intended to foster conversation and not intended to be comprehensive.

Principles for successful dispute resolution processes

1) What principles should guide dispute resolution?

2) Respecting disputes between First Nations about participation in the assessment, are there specific principles that are needed for this type of dispute?

Referrals to facilitators

3) How should initiation occur so that it is accessible?

4) How much information should be necessary to initiate a referral to a facilitator?

Qualifications

Many different people may offer facilitation or dispute resolution services with a range of experience. Some may have formal training or practice as professionals, such as lawyers or mediators, while others may have a wealth of experience and knowledge outside of these designations. The EAO wants to ensure that qualifications for facilitators are flexible enough to recognize a range of training and experience to avoid creating barriers for qualified facilitators. As such, it is important that Indigenous knowledge, practices, and standards are upheld.

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?

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)?

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

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?

Facilitator Appointments

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

11) What are other considerations?

12) What barriers exist for participating in provincial 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?

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

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?

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?

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?

Powers and obligations of the facilitator

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?

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

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

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

Time for dispute resolution

23) What should the time limit be?

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

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

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?

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.

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

Confidentiality

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?

Appendix II: Inputs into this Discussion Paper

This Appendix describes the inputs into this Discussion Paper, including what we heard during the development of the EA Act and what we've learned conducting dispute resolution without a regulation in place.

Environmental Assessment Revitalization

In early 2018, the EAO began developing a new EA Act and supporting policies and regulations, a process known as Environmental Assessment Revitalization. The work to bring the EA Act into force consisted of two phases:

- The development of the new EA Act itself (the legislation), and
- The development of policies and regulations required to implement the EA Act and guide participants through the process.

The process of updating the EA Act from its 2002 version involved extensive engagement with First Nations, Indigenous organizations, assessment participants, experts, industry, and the public throughout these two phases. The EA Act and seven associated regulations came into force on December 16th, 2019. Find more information about the process of Revitalization on the EAO's web page.

What we heard about dispute resolution

During the development of the EA Act, the EAO convened an independent Environmental Assessment Advisory Committee. This Committee made recommendations on key areas of improvement to the process under the former version of the Act. Recommendations 12 and 13 suggested the inclusion of a dispute-resolution mechanism, albeit a different model was proposed than what ended up in Section 5 of the EA Act.

During the development of the EA Act and the policies and regulations required to support it, the EAO undertook direct engagements with First Nations and Indigenous organizations, such as the First Nations Leadership Council and the First Nations Energy and Mining Council. The EAO jointly established and co-chaired the Indigenous Implementation Committee (IIC) with the First Nations Leadership Council and chaired the Stakeholder Implementation Committees and Practitioner Committee. The IIC was formed to provide technical advice on the development of regulations and policies to help ensure the implementation of the EA Act contributes to reconciliation and sustainability.

On the topic of dispute resolution, during engagement the EAO heard an interest in:

- Who can initiate or take part in dispute resolution;
- The scope of what can and cannot be referred to a facilitator;
- The role of the Minister in the process;
- How dispute resolution affects legislated time limits for the environmental assessment process;
- How dispute resolution between First Nations would work;
- The need to consider confidentiality in the process;
- The importance of a flexible process that is customizable to reflect a Nation's laws, customs, traditions and culture;
- The importance of funding for participation; and
- The importance of facilitators being able to 'walk in both worlds', including the option to allow for a facilitation team as well as a single facilitator.

Interim dispute resolution processes

Participating Indigenous nations and the Chief Executive Assessment Officer may still use dispute resolution during project assessments without a regulation in place. Informed by what was heard during the development of the EA Act, the EAO developed a draft administrative framework to guide any dispute resolution initiated prior to consultation and cooperation with First Nations on the regulation.

The 'Dispute Resolution – Interim Approach' (interim framework) is only a temporary measure to provide support in guiding a dispute resolution process until the regulation has been developed. However, learnings from its use could help inform the development of the regulation and policy.

The interim framework has been used to guide two dispute resolution processes (at the time of writing):

1) Related to the Readiness Decision (the decision on whether the project should, and is ready to, proceed to an assessment) for the Fording River Extension Project; and
2) Related to the Readiness Decision for the Ksi Lisims LNG Project.

The interim framework is presented in Appendix III.

An Acknowledgement

The input described in this section only scratches the surface of the hard work that contributed to the development of the EA Act by First Nations, Indigenous organizations, experts, industry, non-governmental organizations, the public and multiple provincial ministries. The EAO sincerely appreciates all the time and effort that went into all of the comments, submissions, and survey responses received when developing the Act.

The EA Act requires the Minister of Environment and Climate Change Strategy to initiate a review of the Act within five years of it coming into force. The Act came into force on December 16, 2019, meaning that a review of the Act must begin by December 16, 2024. The EAO looks forward to continuing conversations during the five-year review of the Act.

Appendix III: Interim Framework for Dispute Resolution

Dispute resolution under the EA Act has been undertaken twice in the absence of a regulation and formal policy; these processes were guided by the interim framework. The interim framework is presented here as it provides an effective way to separate the various components of dispute resolution that we're seeking input on.

Figure 4 on the following page outlines the interim framework. The basic steps include:

1) A participating Indigenous nation or the Chief Executive Assessment Officer (together referred to as the parties) decide to refer a matter listed under Section 5(2) of the EA Act to a facilitator for dispute resolution;

2) The party making the referral submits an initiating document to begin the facilitator appointment process;

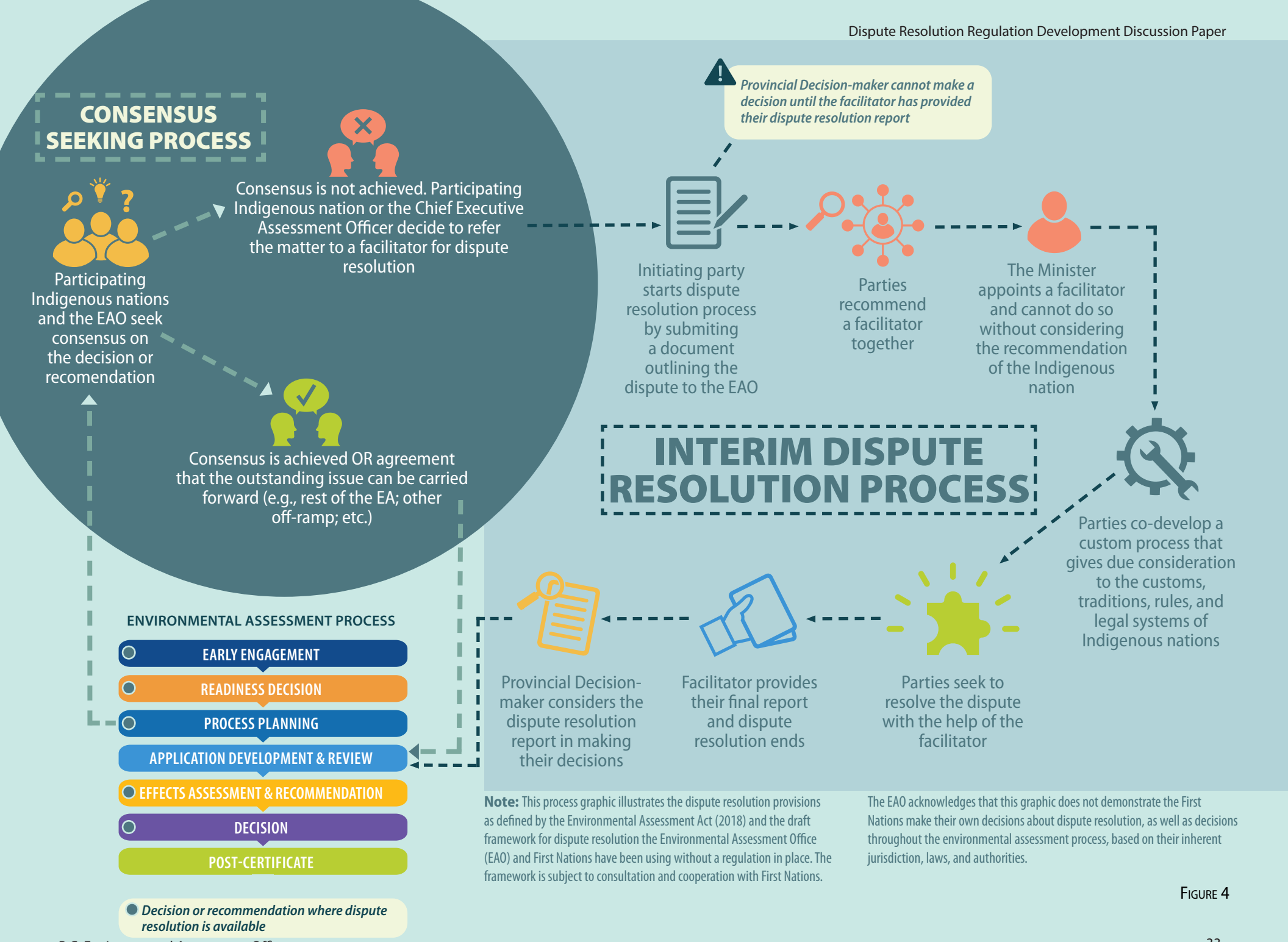
3) The parties work together to recommend a facilitator;

4) The Minister appoints a facilitator (and must consider the recommendation of First Nations in doing so) and the Province completes a contract with the selected facilitator;

5) The facilitator helps 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;

6) The facilitator guides the parties through the co-developed process, and in some circumstances, the facilitator may use their discretion to end the facilitation; and lastly,

7) The facilitator prepares and submits a report to the parties and decision-makers.



Note: This process graphic illustrates the dispute resolution provisions as defined by the Environmental Assessment Act (2018) and the draft framework for dispute resolution the Environmental Assessment Office (EAO) and First Nations have been using without a regulation in place. The framework is subject to consultation and cooperation with First Nations.

The EAO acknowledges that this graphic does not demonstrate the First Nations make their own decisions about dispute resolution, as well as decisions throughout the environmental assessment process, based on their inherent jurisdiction, laws, and authorities.

FIGURE 4

B.C. Environmental Assessment Office