Environmental Assessment Dispute Resolution Regulations Officially Announced In British Columbia



On 9 July 2024, British Columbia announced that new regulations under the *Environmental Assessment Act* (EAA or Act) came into force to support the dispute resolution process available to Indigenous nations or the chief executive assessment officer under the EAA. The *Environmental Assessment Dispute Resolution Facilitators Regulation* (Regulation) aims to support dialogue and negotiation between the B.C. Environmental Assessment Office (EAO) and Indigenous nations throughout a project's environmental assessment.

Background

The Regulations arrive almost five years after the revised EAA came into force in 2019, which sets out who can use dispute resolution and the types of disputes that can be referred to a facilitator.

Section 5 of the EAA authorizes the Minister to appoint a person to facilitate a dispute involving an Indigenous nation in relation to a broad range of procedural and substantive matters, including:

- a decision by the chief executive assessment officer as

to whether there is a reasonable possibility an Indigenous nation or its rights will be adversely affected by a potential project;[1]
- a Minister's decision whether to terminate or exempt a project;[2]
- the chief executive assessment officer's decision as to which type of assessment is required;[3]
- a decision to issue a process order;[4]
- preparation of the effects assessment;[5] and
- a decision to issue an environmental assessment certificate.[6]

An Indigenous nation that has received notice that there is no reasonable possibility the Indigenous nation or its rights will be adversely affected by the project may also refer that matter to a dispute resolution facilitator. If the chief executive assessment officer did not refer the matter to a dispute resolution facilitator, that officer may participate as a party if each participating Indigenous nation consents to the invitation.

Project proponents do not participate in the dispute resolution process unless the participating parties agree.

Consultation Process

Since the EAA was announced in 2018, the government has been working to develop the regulations to clarify the powers and duties of the dispute resolution facilitator by the authority granted to it under the EAA.

Over the past year, the EAO consulted with Indigenous nations to design the dispute resolution process to reflect Indigenous cultural and legal traditions and align with the UN Declaration of the Rights of Indigenous Peoples (UNDRIP) and B.C.'s Declaration on the Rights of Indigenous Peoples Act

(DRIPA). To facilitate such collaboration, the EAO published the dispute resolution discussion paper and prepared a What We Heard and Summary of Engagement.

Since the EAA came into force in 2019, two public examples of where the dispute resolution process has been used include the *Fording River Extension Project* and the *KSI Lisims LNG Project*. At that time, the EAO followed an interim approach and guidelines for facilitators for the dispute resolution process. Going forward, dispute resolution will be guided by the Regulation.

Key Provisions

In response to the issues raised throughout the consultation process, the Regulation sets out the following key points on the role of the dispute resolution facilitator:

- *Timeline*
  - The dispute resolution facilitator must complete a facilitation and provide a facilitator report to the parties no later than 90 days after the applicable referral date.
  - The dispute resolution facilitator may grant a one-time extension (1) by up to 30 days, with agreement of the parties; (2) by up to 15 business days, if the parties do not agree; or (3) by up to 30 days if, in the opinion of the facilitator, extenuating circumstances exist (natural disasters, public health emergencies and death of a participant).[7]

Clarity on timelines is always important to assist participants in navigating project assessment schedules.

- *Ability to End Facilitation*
  - A dispute resolution facilitator may end a facilitation if:

- the disputed matter is unrelated to the applicable reviewable project;
- the facilitation should be deferred until a later stage of the assessment of the applicable review project because it would be more appropriate to deal with the disputed matter at a later time;
- the chief executive assessment officer is required, under the EAA, to seek to achieve consensus with one or more participating Indigenous nations on the disputed matter and that disputed matter was not the subject of reasonable efforts to achieve consensus before being referred to the disputed resolution facilitator;
- the disputed matter has already been the subject of a facilitation involving the same parties, and there has been no significant change in the position of the parties;
- the parties are unable to agree to terms of reference for the facilitation; or
- despite having undertaken reasonable efforts, it is unlikely that the dispute resolution facilitator will be able to assist the parties to reach a consensus on the disputed matter
- provided that the facilitator (1) notifies the parties it is doing so, (2) gives the parties a reasonable period of time to respond; and (3) considers any such responses received from the parties.[8]

- A dispute resolution facilitator may not end a facilitation if it appears that all the parties wish to continue.[9]
- A dispute resolution facilitator must end a facilitation if only one Indigenous nation is a party and that nation

withdraws from the facilitation, or, if there are multiple Indigenous nations involved, all of them withdraw from the facilitation.10

While these factors are helpful, the discretion remains with the dispute resolution facilitator to determine whether the requisite factors necessitate an end to facilitation.

- *Factors to be Considered*
  - When preparing the facilitator report, the dispute resolution facilitator must consider the following:
    - whether consensus has been reached among the parties;
    - the perspectives of each party;
    - submissions made by the parties during the facilitation, including those respecting the rights recognized and affirmed by section 35 of the Constitution Act, 1982 and UNDRIP;
    - materials developed jointly by the parties during the facilitation;
    - the purpose of the EAO to promote sustainability by protecting the environment and fostering a sound economy and to support reconciliation with Indigenous peoples in British Columbia;
    - requirements related to confidentiality; and
    - any other matter the dispute resolution facilitator considers necessary.[11]
- *Qualifications*
  - Under the Regulations, any individual appointed as a dispute resolution facilitator must have knowledge respecting (1) the diversity of Indigenous peoples, (2) rights recognized and affirmed by section 35 of the Constitution Act, 1982, (3) treaties; and (4) UNDRIP. In addition, they must have significant experience (1) working

with Indigenous peoples in British Columbia, (2) working with individuals and groups among whom differing cultural understanding and perspectives may exist; and (3) facilitating dispute resolution.[12]

- Obligations of Dispute Resolution Facilitator
  - In assisting the parties with achieving consensus, the dispute resolution facilitator:
  - must give due consideration to the customs, traditions and legal system of each Indigenous nation that is a party;
  - must discuss with the parties the confidentiality requirements respecting the facilitation, which includes the confidentiality requirements respecting Indigenous knowledge as stated in section 75 of the EAA; and
  - may, with the parties' consent, provide a periodic update respecting the facilitation to the applicable proponent, if the parties do not agree to allow the proponent to participate in the facilitation.[13]

Next Steps

The government intends to announce additional policy and guidance to support the implementation of dispute resolution and to establish the policy framework. This will include the development of an appointment process, which currently is not included in the EAA or the Regulations. The What We Heard Report noted potential appointment options including requiring mutual agreement of an appointed facilitator, preparing a list of pre-qualified facilitators and granting the EAO the power to appoint a facilitator if parties cannot agree.

As required by the EAA, the B.C. government is initiating its

5-year review of the EAA to determine what changes to the Act may be required.

Footnotes

1. EAA, s. 14(2).

2. EAA, s. 17.

3. EAA, s. 18.

4. EAA, s. 19.

5. EAA, s. 28.

6. EAA, s. 29.

7. *Regulations*, s. 12.

8. *Regulations*, s. 6.

9. *Regulations*, s. 6.

10. *Regulations*, s. 7.

11. *Regulations*, s. 9.

12. *Environmental Assessment Dispute Resolution Facilitators Regulation,* (the Regulations), s. 2.

13. *Regulations*, s. 4.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Authors: Sharon Singh, David Bursey, Claire Lingley

Bennett Jones