



ESKETEMC

Agreement-In-Principle
ESKETEMC DISPUTE RESOLUTION
CHAPTER

Public Release Chapter
October 5, 2006
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This public release document is tabled for discussion purposes only. It is not necessarily representative of the final position which may be taken in respect of a matter, and is subject to change. It is without prejudice to the position of the parties in any proceeding before any court or in any other forum and will not be construed as an admission of fact or liability and will not be tendered or relied upon in any such proceedings.

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BACKGROUND

Canada, British Columbia and the Esketemc are engaged in treaty negotiations in the British Columbia Treaty Commission process. Our treaty negotiations include public consultation and internal review of documents under negotiation by the three Parties.

This document is part of a group of chapters under negotiation for the purposes of an Agreement-in-Principle.

OBJECTIVE

The Parties are releasing this document as a sample for public information. However, it is intended that the Chapters in any future Esketemc Agreement-in-Principle would be read and understood in the context of the Agreement-in-Principle as a whole.

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ESKETEMC DISPUTE RESOLUTION CHAPTER

GENERAL

1. The Parties agree that the provisions of this chapter and Appendix M-1 to F-6 will be adopted in the Final Agreement and that in this chapter and in Appendix M-1 to M-6:
 - a. any reference to “this Agreement” in this chapter will be deemed to be a reference to the Final Agreement; and
 - b. “Appendix” means Appendix M-1, M-2, M-3, M-4, M-5 or M-6 to this Agreement.
2. In this chapter, and in each Appendix, a Party is deemed to be directly engaged in a disagreement if another Party, acting reasonably, gives the first Party a written notice requiring it to participate in a process described in this chapter to resolve the disagreement.
3. The Parties share the following objectives:
 - a. to cooperate with each other to develop harmonious working relationships;
 - b. to prevent, or alternatively, to minimize disagreements;
 - c. to identify disagreements quickly and resolve them in the most expeditious and cost-effective manner possible; and
 - d. to resolve disagreements in a non-adversarial, collaborative and informal atmosphere.
4. Except as otherwise provided, participating Parties may agree to vary a procedural requirement contained in this chapter, or in an Appendix, as it applies to a particular disagreement.
5. Participating Parties may agree to, and the Supreme Court of British Columbia, on application, may order:
 - a. the abridgement of a time limit; or
 - b. the extension of a time limit, despite the expiration of that time limit in this chapter or in an Appendix.

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SCOPE: WHEN THIS CHAPTER APPLIES TO A DISAGREEMENT

6. This chapter is not intended to apply to all Conflicts or disputes between or among the Parties, but is limited to the Conflicts or disputes described in paragraph 7.
7. This chapter only applies to:
 - a. a Conflict or dispute respecting:
 - i. the interpretation, application or implementation of this Agreement; or
 - ii. a breach or anticipated breach of this Agreement;
 - b. a Conflict or dispute, where provided for in this Agreement; or
 - c. negotiations required to be conducted under any provision of this Agreement that provides that the Parties, or any of them, "will negotiate and attempt to reach agreement".
8. This chapter does not apply to:
 - a. an agreement between or among the Parties that is ancillary, subsequent or supplemental to this Agreement unless the Parties have agreed that this chapter applies to that agreement;
 - b. the Implementation Plan as described in paragraphs 2 and 3 in the Implementation Chapter; or
 - c. Conflicts or disputes where excluded from this chapter.
9. Nothing in this chapter limits the application of a dispute resolution process, under any Federal or Provincial Law, to a Conflict or Dispute involving a person if that Conflict or Dispute is not a disagreement.
10. Nothing in any Federal or Provincial Law limits the right of a Party to refer a disagreement to this chapter.

DISAGREEMENTS TO GO THROUGH STAGES

11. The Parties desire and expect that most disagreements will be resolved by informal discussions between or among the Parties without the necessity of invoking this chapter.
12. Subject to the provisions of this Agreement, disagreements not resolved informally will progress, until resolved, through the following stages:

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- a. Stage One: formal, unassisted efforts to reach agreement between or among the Parties, in collaborative negotiations under Appendix M-1;
 - b. Stage Two: structured efforts to reach agreement between or among the Parties with the assistance of a neutral, who has no authority to resolve the dispute, in a facilitated process under Appendix M-2, M-3, M-4 or M-5 as applicable; and
 - c. Stage Three: final adjudication in arbitral proceedings under Appendix M-6 or in judicial proceedings.
13. Except as otherwise provided, no Party may refer a disagreement to final adjudication in Stage Three without first proceeding through Stage One and a facilitated process in Stage Two as required in this chapter.
14. Nothing in this chapter prevents a Party from commencing arbitral or judicial proceedings at any time:
- a. to prevent the loss of a right to commence proceedings due to the expiration of a limitation period; or
 - b. to obtain interlocutory or interim relief that is otherwise available pending resolution of the disagreement under this chapter.

STAGE ONE: COLLABORATIVE NEGOTIATIONS

15. If a disagreement is not resolved by informal discussion, and a Party directly engaged in the disagreement wishes to invoke this chapter, that Party will deliver a written notice, as required under Appendix M-1, as soon as practicable to the other Parties, requiring the commencement of collaborative negotiations.
16. Upon receiving the notice under paragraph 15, a Party directly engaged in the disagreement will participate in the collaborative negotiations.
17. A Party not directly engaged in the disagreement may participate in the collaborative negotiations by giving written notice to the other Parties, preferably before the collaborative negotiations commence.
18. If the Parties have commenced negotiations in the circumstances described in paragraph 7.c, then, for all purposes under this chapter, those negotiations will be deemed collaborative negotiations and the particular matter under negotiation will be considered a disagreement.
19. Collaborative negotiations terminate in the circumstances set out in Appendix M-1.

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STAGE TWO: FACILITATED PROCESSES

20. Within 15 days of termination of collaborative negotiations that have not resolved the disagreement, a Party directly engaged in a disagreement, by delivering a notice to the other Parties, may require the commencement of a facilitated process.
21. A notice under paragraph 20:
 - a. will include the name of the Party or Parties directly engaged in the disagreement and a summary of the particulars of the disagreement; and
 - b. may propose the use of a particular facilitated process described in paragraph 24.
22. Upon receiving a notice under paragraph 20, a Party directly engaged in the disagreement will participate in a facilitated process described in paragraph 24.
23. A Party not directly engaged in the disagreement may participate in the facilitated process by giving written notice to the other Parties within 15 days of delivery of a notice under paragraph 20.
24. Within 30 days after delivery of a notice under paragraph 20, the Parties directly engaged in the disagreement will attempt to agree to use one of the following processes:
 - a. mediation under Appendix M-2;
 - b. technical advisory panel under Appendix M-3;
 - c. neutral evaluation under Appendix M-4;
 - d. elders advisory council under Appendix M-5; or
 - e. any other non-binding dispute resolution process assisted by a neutral; andif they fail to agree, they will be deemed to have selected mediation under Appendix M-2.
25. A facilitated process terminates:
 - a. in the circumstances set out in the applicable Appendix; or
 - b. as agreed by the participating Parties, if an Appendix does not apply.

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NEGOTIATING CONDITIONS

26. In order to enhance the prospect of reaching agreement, the Parties participating in collaborative negotiations or a negotiation component of a facilitated process will:
- a. at the request of a participating Party, provide timely disclosure of sufficient information and documents to enable a full examination of the subject matter being negotiated;
 - b. make every reasonable effort to appoint negotiating representatives with sufficient authority to reach an agreement, or with ready access to such authority; and
 - c. negotiate in good faith.

SETTLEMENT AGREEMENT

27. Any agreement reached in a process under this chapter:
- a. will be:
 - i. recorded in writing;
 - ii. signed by authorized representatives of the Parties to the agreement; and
 - iii. delivered to all Parties; and
 - b. is binding only on the Parties who have signed the agreement.

STAGE THREE: ADJUDICATION – ARBITRATION

28. Subject to paragraph 29, disagreements not otherwise settled under Stages One and Two of this chapter will be subject to arbitration only if the disagreement arises out of any provision of this Agreement that provides that a matter will be “finally determined by arbitration.”
29. Disagreements other than a disagreement referred to in paragraph 28 and not otherwise settled under Stages One and Two of this chapter, will be subject to arbitration only with the written agreement of all Parties directly engaged in the disagreement.
30. If two Parties make a written agreement under paragraph 29, they will deliver a copy of the agreement as soon as practicable to the other Party.

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31. Upon delivering a written notice to the participating Parties to the arbitration within 15 days after receiving a notice under paragraph 28 or copy of a written agreement under paragraph 30, a Party not directly engaged in the disagreement is entitled to be, and will be added as, a party to the arbitration of that disagreement whether or not that Party has participated in collaborative negotiations or a required facilitated process.
32. Despite paragraph 31, an arbitral tribunal may make an order adding a Party as a participating Party at any time, if the arbitral tribunal considers that:
 - a. the participating Parties will not be unduly prejudiced; or
 - b. the issues stated in the pleadings are materially different from those identified in the notice to arbitrate under paragraph 28 or the written agreement to arbitrate in paragraph 29.

and, in that event, the arbitral tribunal may make any order it considers appropriate or necessary in the circumstances respecting conditions, including the payment of costs, upon which the Party may be added.

EFFECT OF ARBITRAL AWARD

33. An arbitral award is final and binding on all Parties whether or not a Party has participated in the arbitration.
34. Despite paragraph 33, an arbitral award is not binding on a Party that has not participated in the arbitration if:
 - a. the Party did not receive copies of:
 - i. the notice of arbitration or agreement to arbitrate; or
 - ii. the pleadings and any amendments or supplements to the pleadings; or
 - b. the arbitral tribunal refused to add the Party as a participating Party to the arbitration under paragraph 32.

APPLICATION OF LEGISLATION

35. No legislation of any Party respecting arbitration, except the settlement legislation, applies to an arbitration conducted under this chapter.
36. A court must not intervene or offer assistance in an arbitration or review an arbitral award under this chapter except as provided in Appendix M-6.

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STAGE THREE: ADJUDICATION – JUDICIAL PROCEEDINGS

37. Nothing in this chapter creates a cause of action where none otherwise exists.
38. Subject to paragraph 39, at any time a Party may commence proceedings in the Supreme Court of British Columbia in respect of a disagreement.
39. A Party may not commence judicial proceedings in respect of a disagreement if the disagreement:
 - a. is required to be referred to arbitration under paragraph 28 or has been agreed to be referred to arbitration under paragraph 29;
 - b. has not been referred to collaborative negotiations or a facilitated process as required under this chapter; or
 - c. has been referred to collaborative negotiations or a facilitated process that has not yet been terminated.
40. Nothing in paragraph 39.a prevents an arbitral tribunal or the participating Parties from requesting the Supreme Court of British Columbia to make a ruling respecting a question of law as permitted in Appendix M-6.

NOTICE TO PARTIES

41. If, in any judicial or administrative proceeding, an issue arises in respect of:
 - a. the interpretation or validity of this Agreement; or
 - b. the validity or applicability of:
 - i. any settlement legislation; or
 - ii. any Esketemc Law;

the issue will not be decided until the party raising the issue has properly served notice on the Attorney General of British Columbia, the Attorney General of Canada and the Esketemc Government.
42. In any judicial or administrative proceeding to which paragraph 41 applies, the Attorney General of British Columbia, the Attorney General of Canada and the Esketemc Government may appear and participate in the proceedings as Parties with the same rights as any other Party.

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COSTS

43. Except as provided otherwise in the Appendices, each participating Party will bear the costs of its own participation, representation and appointments in collaborative negotiations, a facilitated process or an arbitration conducted under this chapter.
44. Subject to paragraph 43 and except as provided otherwise in the Appendices, the participating Parties will share equally all costs of collaborative negotiations, a facilitated process or an arbitration conducted under this chapter.
45. For purposes of paragraph 44, "costs" include:
 - a. fees of the neutrals;
 - b. costs of hearing and meeting rooms;
 - c. actual and reasonable costs of communications, accommodation, meals and travel of the neutrals;
 - d. costs of required secretarial and administrative support for the neutrals, as permitted in the Appendices; and
 - e. administration fees of a neutral appointing authority.

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