



BRITISH  
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Canada

# Ktunaxa Kinbasket Treaty Council Treaty Negotiations

## **DISPUTE RESOLUTION** **Common Principles** **Public Consultation Draft 2** **November 9, 2000**

This document is tabled for discussion purposes only. It is not necessarily representative of the position any Party may take in Final Agreement negotiations, it contains no admissions and is subject to change. It is without prejudice and will not be tendered or relied upon in any court proceedings.

# DISPUTE RESOLUTION

## Common Principles

### BACKGROUND

Canada, British Columbia and the Ktunaxa Kinbasket Treaty Council are engaged in treaty negotiations in the British Columbia Treaty Commission process. Our treaty negotiations include public consultation and internal review of documents jointly drafted by the three Parties.

This document is part of a group of chapters which will form the Agreement-in-Principle and will acquire greater context over time. It has not been finalized and is subject to change.

### OBJECTIVE

The Parties are releasing this document for public information. It is without prejudice to any party and is subject to change.

For further information on the negotiations or the public consultation process, please contact any of the following people:

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## DISPUTE RESOLUTION

**Note:** The Parties share the following objectives:

Not part of the sub-agreement - for guidance only.

- X to establish a clearly defined, time limited and staged process for resolving disputes;
- X to resolve disputes using the most expeditious, collaborative and cost-effective process possible;
- X to have a dispute resolution process that results in finality;
- X to maintain effective working relationships.

### DEFINITIONS

“**Agreement**” means this Agreement-in-Principle between the Ktunaxa Kinbasket Treaty Council, Canada and British Columbia negotiated pursuant to the Framework Agreement dated May 6, 1998;

To be moved to Definitions Chapter in AIP final draft.

“**Final Agreement**” means the Final Agreement between the Ktunaxa Kinbasket Treaty Council, Canada and British Columbia which will be based on this Agreement;

“**Party**” means a Party to this Agreement;

“**Participating Party**” means a Party participating in a dispute resolution process pursuant to subsections 1.4 and 1.5 of this Chapter.

### 1 GENERAL

1.1 This Chapter will apply to disputes arising out of the interpretation, application or implementation of the Final Agreement.

1.2 This Chapter will not apply to:

1.2.1 an agreement between or among the Parties that is ancillary or supplemental to the Final Agreement;

e.g. Fiscal Financing Agreements

1.2.2 the Implementation Plan; or

1.2.3 disputes specifically excluded from this Chapter.

e.g. wildlife

- 1.3 The Parties will endeavour to resolve disputes by informal discussions between or among the Parties without invoking the formal dispute resolution stages described in this Chapter.
- 1.4 A Party becomes a Participating Party directly engaged in the dispute when that Party:
  - 1.4.1 acting reasonably, gives another Party written notice requiring it to participate in a dispute resolution process described in this Chapter;
  - 1.4.2 receives a written notice requiring its participation in the dispute resolution process under the provisions of this Chapter; or
  - 1.4.3 enters into an agreement to have the dispute referred to and finally resolved by arbitration.
- 1.5 A Party not directly engaged in the dispute may become a Participating Party by giving written notice under paragraph 1.7.3 of this Chapter.
- 1.6 A Party will cease to be a Participating Party:
  - 1.6.1 when the dispute is resolved, or
  - 1.6.2 with the written agreement of the other Participating Parties.
- 1.7 The Party which is not a Participating Party:
  - 1.7.1 will receive written notice of any notice given under subsections 3.1, 4.1 and 5.2 of this Chapter;
  - 1.7.2 may observe proceedings; or
  - 1.7.3 may decide to participate at any stage of the process, except after the start of arbitration, by giving written notice to the Parties directly engaged in the dispute, as early as possible in the process.
- 1.8 For greater certainty, a Party that decides to become a Participating Party under paragraph 1.7.3 is not a Party directly engaged in the dispute.

- 1.9 Within [X] days of a new Party becoming a Participating Party in a dispute resolution process that is already underway, the Parties directly engaged in the dispute will decide whether to return to a previously completed stage.
- 1.10 If the Parties directly engaged in the dispute fail to agree on whether to return to a previously completed stage, within the period of time specified in subsection 1.9, then they will be deemed to have selected to continue in the current stage of the dispute resolution process.
- 1.11 The Participating Parties will:
- 1.11.1 provide sufficient and timely information to enable a full examination of how the matter might affect the operation of the Final Agreement;
  - 1.11.2 be subject to their respective freedom of information and privacy legislation;
  - 1.11.3 treat as confidential any information provided to them on that basis;
  - 1.11.4 [act in good faith]; and
  - 1.11.5 appoint representatives with authority to negotiate and resolve the dispute.
- 1.12 Any settlement agreement reached through a process under this Chapter will be:
- 1.12.1 recorded in writing;
  - 1.12.2 signed by the Parties to the agreement;
  - 1.12.3 delivered to all Parties; and,
  - 1.12.4 binding on the Parties who have signed the agreement.

BC is unclear on meaning and intent in this context.

## 2 DISPUTE RESOLUTION STAGES

2.1 Except as otherwise provided, disputes not resolved informally will progress, until resolved, through the following stages:

2.1.1 collaborative negotiations;

2.1.2 facilitated negotiations; and

2.1.3 final determination by arbitral or judicial proceedings.

2.2 Except as otherwise provided, no Party may refer a dispute to final determination by arbitral or judicial proceedings without first proceeding through collaborative negotiations and facilitated negotiations.

2.3 Except as otherwise provided, the Participating Parties directly engaged in a dispute may agree to vary the procedures within each stage of any dispute resolution process contained in this Chapter.

2.4 Nothing in this Chapter prevents a Party from commencing arbitral or judicial proceedings at any time:

2.4.1 to prevent the loss of a right to commence proceedings due to the expiration of a limitation period; or

2.4.2 to obtain interlocutory or interim relief that is otherwise available pending resolution of the dispute under this Chapter.

## 3 COLLABORATIVE NEGOTIATIONS

3.1 If a dispute is not resolved through informal discussion, a Party directly engaged in the dispute may serve written notice requiring commencement of collaborative negotiations.

3.2 Unless extended by agreement of the Participating Parties directly engaged in the dispute, negotiations under this Section terminate:

3.2.1 when the Participating Parties have reached an agreement to resolve the dispute;

3.2.2 at the end of a time limit set by agreement of the Participating Parties directly engaged in the dispute; or

3.2.3 by written agreement of the Participating Parties directly engaged in the dispute.

#### 4 FACILITATED NEGOTIATIONS

4.1 Within [X] days of termination of collaborative negotiations that have not resolved the dispute, a Participating Party directly engaged in the dispute, by delivering a written notice to the other Parties, may require the commencement of a facilitated dispute resolution process.

The period will be set out in the Final Agreement.

4.2 Within [X] days of the end of collaborative negotiations that have not resolved the dispute, the Participating Parties directly engaged in the dispute will agree to use one of the following processes to resolve the dispute:

4.2.1 mediation;

4.2.2 technical advisory panel;

4.2.3 neutral evaluation;

4.2.4 elders advisory council; or

4.2.5 any other non-binding dispute resolution process assisted by a neutral person.

4.3 The Final Agreement will set out a process to be used in the event the Participating Parties directly engaged in the dispute are not able to agree on a process for facilitated negotiations.

4.4 Unless extended by agreement of the Participating Parties directly engaged in the dispute, facilitated negotiations under this Section terminate:

4.4.1 when the Participating Parties have reached an agreement to resolve the dispute;

- 4.4.2 at the end of a time limit set by agreement of the Participating Parties directly engaged in the dispute; or
  - 4.4.3 by written agreement of the Participating Parties directly engaged in the dispute.
- 4.5 With respect to the process for resolving disputes through facilitated negotiations, the Final Agreement will include provisions establishing:
- 4.5.1 the requirements for commencing or terminating the process;
  - 4.5.2 the method for selecting a facilitator;
  - 4.5.3 the duties and responsibilities of the facilitator; and
  - 4.5.4 such other related matters as may be agreed to by the Parties.

## 5 FINAL DETERMINATION - ARBITRATION

- 5.1 Within [X] days of the end of facilitated negotiations that have not resolved the dispute, the Participating Parties directly engaged in the dispute may agree to a final determination of the dispute by arbitration.
- 5.2 If two Parties agree to a final determination of the dispute by arbitration, they will deliver a written notice of the agreement to the other Party and, as soon as practicable, a copy of the agreement to the other Party.
- 5.3 With respect to the process for resolving disputes through arbitration, the Final Agreement will include provisions establishing:
- 5.3.1 the requirements for commencing or terminating the process;
  - 5.3.2 the method for selecting an arbitrator;
  - 5.3.3 the powers, duties and responsibilities of the arbitrator;

and

5.3.4 such other related matters as may be agreed to by the Parties.

## 6 FINAL DETERMINATION - JUDICIAL PROCEEDINGS

6.1 Subject to subsection 6.2, at any time a Party may commence proceedings in the Supreme Court of British Columbia in respect of a dispute.

6.2 A Party may not commence judicial proceedings in respect of a dispute where:

6.2.1 the Participating Parties directly engaged in the dispute have agreed to refer the dispute directly to arbitration under another Chapter or the Participating Parties directly engaged in the dispute have agreed to resolve the dispute by arbitration under subsection 5.1;

6.2.2 the dispute has not been referred to collaborative negotiations or a facilitated process as required under this Chapter; or

6.2.3 the dispute has been referred to collaborative negotiations or a facilitated process that has not yet been terminated.

## 7 COSTS

7.1 Subject to subsection 7.2, each Participating Party will bear its own costs associated with any chosen method of dispute resolution conducted under this Chapter.

7.2 Where the Participating Parties directly engaged in the dispute agree to jointly engage neutrals in a process under this Chapter, the costs of the neutrals will be shared on an equal basis between the Participating Parties.

7.3 Nothing in this Chapter requires the Participating Parties to share costs of judicial proceedings.

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*Prepared by Canada*