



Dispute Resolution Board

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March 15, 2018

Minister Carolyn Bennett
Crown-Indigenous Relations and Northern Affairs Canada
Terrasses de la Chaudière
10 Wellington North Tower
Gatineau QC K1A 0H4

Re: Rules for Arbitrations Under the Authority of the DRB (UFA Article 26.5.4.6)

Legal Context

Chapter 26 of the Umbrella Final Agreement is the legal source for both the existence and jurisdiction of the Dispute Resolution Board ("DRB"). The objectives of Chapter 26 are:

"to establish a comprehensive dispute resolution process for resolving disputes which arise out of the interpretation, administration or implementation of Settlement Agreements or Settlement Legislation; and to facilitate out-of-court resolution of disputes ... in a non-adversarial and informal atmosphere."

(Article 26.1.1)

The dispute resolution envisioned by Chapter 26 requires that the mediation and arbitration procedures stipulated in it shall be a process the parties to a Settlement Agreement may seek to resolve differences described in Article 26.3.1 of Chapter 26, namely:

- any matter which the Umbrella Final Agreement refers to the dispute resolution process;
- any matter which a Settlement Agreement, a Yukon First Nation self-government agreement or any other agreement between the parties to a Yukon First Nation Final Agreement refers to the dispute resolution process; and
- any other matter which at any time all parties to a Settlement Agreement agree should be referred to the dispute resolution process, whether or not related to a Settlement Agreement.

Article 26.3.3 prevents any party to a Settlement Agreement from applying to a court for relief in respect of any dispute that may be referred to mediation under 26.3.1, except for judicial review to the Yukon Supreme Court in relation to a decision or order of an arbitrator under 26.7.5.

Article 26.3.1 contemplates that initially a dispute would be referred to mediation under 26.6.0. However, if mediation fails to successfully resolve the issues in dispute, then one of the parties, acting under 26.3.5, may refer the matter to arbitration under 26.7.0.

Article 26.4.1 describes other categories of dispute which may also be referred to mediation and/or arbitration, and there is a similar restrictive provision in article 26.4.5 which limits a party's ability to apply to a court in a manner similar to 26.3.3.

The only exception to the DRB's exclusive dispute resolution jurisdiction, whereby the courts may become involved, is provided under 26.8.1, which only allows for an appeal or judicial review to the Supreme Court where an arbitrator is alleged to have failed to observe a principle of natural justice or otherwise acted beyond his or her jurisdiction or failed to exercise such jurisdiction.

Additionally, effective February 14, 2005, the DRB became responsible for Enrollment Appeals under Chapter 3:

- 3.10.4 *The responsibilities of the Enrollment Commission shall cease, except with respect to matters pending before it, on the day two years after the Effective Date of the last Yukon First Nation Final Agreement or 10 years after the effective date of Settlement Legislation, whichever comes first. Upon dissolution, the Enrollment Commission shall deliver all its documents and records to the Dispute Resolution Board.*
- 3.11.2 *Upon dissolution of the Enrollment Commission, the Dispute Resolution Board, in addition to its powers and duties under Chapter 26 – Dispute Resolution, shall have the following powers and duties:*
- 3.11.2.2 *the chairperson of the Dispute Resolution Board shall appoint a single arbitrator to hear and determine an appeal from any decision of a Yukon First Nation with respect to enrollment and to provide such remedy or remedies as the arbitrator in his discretion deems appropriate;*

Arbitration Rules of Procedure

The DRB's authority to establish rules of procedure for both mediation and arbitration is stated in 26.5.4.6:

The Board appointed under 26.5.1 shall have the following responsibilities: ...after Consultation with the parties to the Umbrella Final Agreement, to establish rules and procedures governing mediation and arbitration.

The DRB has conducted research in respect of appropriate rules of procedure for arbitration proceedings under Chapter 26 and is recommending the rules established by the ADR Institute of Canada, Inc. ("ADRIC"). ADRIC is a national dispute resolution umbrella organization affiliated with provincial and regional counterparts across Canada having the same or similar aims and objectives in relation to dispute resolution alternatives.

Following are several advantages the DRB has considered as supporting the choice of the ADRIC Arbitration Rules:

1. The ADRIC Arbitration Rules are Canadian-made, designed to work within the Canadian dispute resolution context and to conform to Canadian procedural practices and expectations. They were also designed to accord with the arbitration legislation in force in every Canadian province and territory. Although developed primarily for commercial arbitrations, the ADRIC Rules are readily adaptable to non-commercial and international disputes.

2. The ADRIC Arbitration Rules are flexible, allowing the arbitration parties and the arbitrator to tailor the arbitration procedure to meet the specific needs of the case at hand. This feature will also allow appropriate indigenous dispute resolution values and traditions to be blended with the “core” procedural rules adopted by the DRB. This advantage is discussed at greater length below.
3. Due to ADRIC’s affiliation with provincial and regional alternate dispute resolution organizations, the ADRIC Arbitration Rules enjoy widespread usage across the country. As parties involved in proceedings under Chapter 26 – resource companies, for example – may often be based outside the Yukon, or may be represented by outside legal counsel, using a standard set of arbitration rules accepted nation-wide would be an advantage for all participants.
4. The ADRIC Arbitration Rules are reputed to be the leading choice of Canadian businesses and are also designated as the arbitration rules to apply where an arbitration agreement or submission refers to the arbitration rules of the following organizations:
 - Canadian Foundation for Dispute Resolution, Inc.
 - Arbitrators Institute of Canada
 - Arbitration and Mediation Institute of Canada
 - ADRIC regional affiliates, except where otherwise provided by statute.

According to ADRIC, the Rules “*establish clear, modern, and common-sense procedures under which effective arbitrations can be conducted*”. These qualities make the Rules an attractive choice for Canadian lawyers involved in domestic arbitrations.

5. Embedded in the Rules are optional provisions whereby ADRIC can serve (for a fee) as an arbitration case manager, should the arbitration parties prefer an independent administrator to manage the logistics of their arbitration. However, as the DRB fulfils that function in the UFA’s Chapter 26 context, ADRIC’s administrative function under the Rules may be excluded.

Incorporating First Nation Traditions and Values

It is important to remember that arbitrations under the DRB will almost always involve First Nation participants, and so it is necessary to consider ways in which indigenous traditions and values may complement whatever form of arbitration rules the DRB may adopt.

Given that Yukon First Nations do not represent a single, uniform cultural tradition, the DRB proposes a flexible mechanism for incorporating traditional values or practices specific to individual First Nations, while still retaining the overall framework of the ADRIC Rules. The DRB has developed the attached guideline document to allow arbitration parties to fine-tune, in consultation with the arbitrator, the procedures for arbitrations in which they are involved.

In addition to enabling the generic ADRIC Rules to be adapted to the Chapter 26 arbitration context, the guidelines also invite arbitration parties to consider incorporating indigenous dispute resolution traditions and values into the basic process. The design is intended to be flexible to accommodate the diversity of traditions and values from among the First Nation signatories to the UFA.

Consultation

UFA Article 26.5.4.6 requires the DRB to consult with the parties to the UFA, namely the governments of Canada, Yukon, and the Council for Yukon First Nations. The criteria for adequate consultation are expressly stated in the definition of “*Consultation*” in Article 1 of the UFA, specifically, to provide:

- a. “to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
- b. a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and
- c. full and fair consideration by the party obliged to consult of any views presented.”

The DRB has met with the Implementation Working Group on January 18, 2018 to begin discussion and solicit input prior to the consultation process proceeding to the Parties.

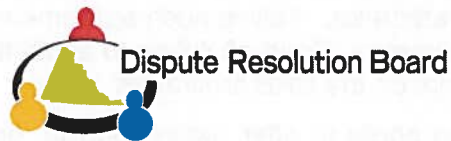
In accordance with the consultation process referred to above, the DRB trusts that this letter will serve as an effective tool to begin the required consultation with the UFA signatories. The Board looks forward to receiving and discussing the signatories’ views and suggestions in connection with the proposed arbitration rules by September 15, 2018.

Sincerely,



Barbara Joe,
Chair

cc: Self-Governing Yukon First Nations, CYFN, Yukon



Arbitration Rules Application Guidelines

The Yukon Dispute Resolution Board (“DRB”) is constituted and functions under the authority of Chapter 26 of the Umbrella Final Agreement (“UFA”), dated May 29, 1993, between Canada, the Yukon and Yukon First Nations. Chapter 26 of the UFA has since been incorporated unchanged into the Final Agreements of each of the eleven Yukon First Nations that have concluded settlement agreements. Article 26.5.4.6 of Chapter 26 requires the DRB to establish rules and procedures governing mediation and arbitration. The following provisions establish the procedural rules and guidelines for arbitrations under the authority of the DRB and Chapter 26.

In developing a body of arbitration rules, the DRB intends that there be a standard, well-accepted core body of rules to give relative certainty and predictability to arbitration procedures. At the same time, the DRB recognizes that flexibility may be needed to respect and accommodate particular First Nation traditions and values relative to dispute resolution.

Eleven Yukon First Nations are currently signatories to their respective Final Agreements. Each First Nation has its own values and traditions, some of which may be common to other Yukon First Nations, and some of which may be unique. Thus, no single adaptation to blend a core set of arbitration rules with indigenous traditions and values could be expected to accommodate the cultural diversity of all Yukon First Nations.

Stipulations and Modifications

1. All arbitrations conducted through the DRB are subject to Chapter 26 of the UFA and the Final Agreement (“FA”) of any Yukon First Nation involved. For greater certainty, the rules of procedure for DRB-facilitated arbitrations shall be interpreted in accordance with and subject to related provisions of the applicable FA. In the case of any conflicting provisions or ambiguity, the provisions of the FA shall prevail.
2. The general rules governing arbitrations under the jurisdiction of the DRB shall be the 2016 edition of the arbitration rules (the “Rules”) published by the ADR Institute of Canada, Inc. (“ADRIC”), subject to the following modifications and stipulations:
 - a. All references in the Rules to ADRIC providing administration services under Article 1.5 and exercising authority elsewhere in the Rules shall be excluded. Arbitrations shall be administered by the DRB in accordance with article 26.5 of Chapter 26.
 - b. The way an arbitrator is chosen shall be in accordance with articles 26.7.1 and 26.7.2 of Chapter 26. When appointing an arbitrator for a dispute involving a Yukon First Nation, the DRB and the arbitrating parties shall give consideration to persons with an understanding of indigenous traditions and values.

- c. If the arbitrator withdraws, or for any other reason the office of arbitrator becomes vacant, the parties may agree on a substitute arbitrator. Failing such agreement within 21 days, either party may apply to the Supreme Court of Yukon to appoint a substitute arbitrator, giving priority to arbitrators on the DRB arbitrators' roster.
 - d. The parties and the arbitrator may at any time agree to alter, waive, add to, or modify the Rules, as they consider appropriate for the circumstances of a given arbitration.
3. Before starting an arbitration, the arbitrator shall consult with all parties involved in the arbitration about how particular indigenous traditions and values may be incorporated or reflected in the arbitration procedures. Following such consultation, the arbitrator may determine the extent to which the Rules for the arbitration may be altered, waived, added to, or modified to accommodate indigenous traditions and values. The arbitrator's determination shall be informed by the principles of respect, reconciliation and the values inherent in the arbitration process.
4. Where the Rules lack any provisions the arbitrator considers advisable for the better management of the arbitration, the arbitrator may, after consulting with the parties, adopt such provisions of the Rules of Court of the Supreme Court of Yukon, or other sources, as the arbitrator considers appropriate.

General Principles and Values

In addition to any specific indigenous traditions and values incorporated following consultation with a First Nation party to an arbitration, arbitrations shall be conducted according to the following traditions and values common to most Yukon First Nations:

- a. Respect;
- b. Honour;
- c. Honesty and integrity;
- d. Accountability, transparency and fairness; and
- e. Community harmony and balance.

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