

British Columbia and Tahltan Nation enter into landmark consent-based decision-making agreement

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On June 6, 2022, the Tahltan Nation and the Province of British Columbia (the Province) entered into the first consent-based decision-making agreement (the [Agreement](#)) [PDF] negotiated under B.C.'s [Declaration on the Rights of Indigenous Peoples Act](#) (the Declaration Act). The landmark Agreement provides an important precedent for government, industry and First Nations as federal and provincial governments adopt and implement legislation incorporating consent-based decision-making in the project assessment and approval process.

Background

The Agreement provides for consent-based decision-making related to environmental assessment for the [Eskay Creek Revitalization Project](#) (the Project). The Project involves reopening the historic Eskay Creek gold and silver mine located on Tahltan Territory, which ceased operations in 2008. The Project remains subject to reviews under both provincial and federal environmental and impact assessment regimes, with the Agreement modifying the provincial process to allow for greater collaboration between the Province and Tahltan Central Government (TCG).

The Declaration Act enables the Agreement and was assented to on November 28, 2019, making B.C. the first province to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) into law. UNDRIP is a non-binding international instrument that enunciates "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world." The [federal government adopted similar legislation](#) on June 21, 2021.

The Agreement and its enabling legislative provisions reflect the Province's efforts to integrate the concept of "free, prior and informed consent" in the environmental assessment process. Section 7 of the Declaration Act allows the Province to negotiate and enter into agreements with Indigenous governing bodies that require their consent before a decision is made. As specified in section 7 of B.C.'s [Environmental Assessment Act](#), a reviewable project subject to such an agreement cannot proceed without the Indigenous nation's consent.

The consent-based decision-making agreement

The consent-based decision-making framework outlined in the Agreement modifies the standard B.C. environmental assessment process in the following ways.

Seeking consensus

The Agreement establishes a Collaboration Team composed of the TCG Lands Director and the B.C. Environmental Assessment Office (EAO) Project Lead, as well as any individuals they designate, to seek consensus and promote collaboration between the Province and TCG at various stages of the assessment process. This includes

- deciding whether the Project should proceed to Process Planning (s. 7.9)
- determining the informational and assessment requirements necessary to support the parties' decision-making (s. 7.19)
- assessing the EAO's draft Environmental Assessment Report and draft Environmental Assessment Certificate, including any conditions (s. 7.44)

The Collaboration Team, alongside the Technical Advisory Committee, will also assist the Parties in collaboratively reviewing the proponent's Application (s. 7.27).

Unique TCG assessment

In addition to the right to participate in the provincial environmental assessment process alongside other interested parties, TCG will conduct an independent "Tahltan Risk Assessment" and prepare a "Tahltan Risk Assessment Report" to inform its decision on whether to consent to the Project (s. 7.1). This report will set out TCG's conclusions with respect to whether the Project is likely to cause significant residual and/or cumulative effects to "Tahltan Values" (s. 7.39).

Final decision

Once the EAO's effects assessment is complete, TCG will decide whether to provide free, prior and informed consent to the Project (s. 8.2), which is required for the Project to proceed (s. 4.3). While the Minister can request that TCG reconsider its decision (s. 9.1), such a request does not fetter TCG's discretion in reaching its final decision (s. 9.5).

Dispute resolution

Where the Agreement requires that the Parties achieve consensus and they are unable to do so, the Collaboration Team will refer the issue to a separate body of TCG and government officials (the "Senior Officials Table") (ss. 6.2, 10.1). If the Senior Officials Table is unable to resolve the issue in a timely manner, they can refer the issue to a dispute resolution facilitator (s. 10.3).

The proponent's role

The Collaboration Team and the Parties are required to engage with the proponent in developing the Process Order (s. 7.21), reviewing the Application (s. 7.31) and discussing the EAO's draft Environmental Assessment Report, the draft Environmental Assessment Certificate and the draft Tahltan Risk Assessment Report (s. 7.45). However, the proponent is not part of the Collaboration Team or the dispute resolution process discussed above.

Implications

This Agreement exemplifies a novel approach to project assessment and decision-making that others will likely seek to replicate across Canada, particularly for projects largely or wholly located on the traditional territory of a single Indigenous community or group. With B.C. and the federal government adopting UNDRIP legislation in recent years, agreements between governments and Indigenous communities or groups that enable shared environmental assessment — and in some cases even require consent — are likely to become increasingly common. These agreements can result in several benefits for project proponents, governments and Indigenous groups, including advancing reconciliation and promoting collaboration, as well as attracting investment that accords to the highest of environmental, social and governance standards. On the other hand, subjecting project approvals to an Indigenous consent requirement will inject another layer of uncertainty into the regulatory approvals process that may deter private capital.