

Will the BC/Tahltan Project Consent Agreement Deliver on its Promises?

Arend J.A. Hoekstra

June 21, 2022

On June 6, 2022, Premier John Horgan announced that British Columbia (Province or BC) would be taking a historic step by entering into an agreement with the Tahltan Central Government (TCG) to review and, ultimately determine, whether the Eskay Creek Revitalization Project (Project) will be permitted to proceed. According to Premier Horgan, this “consent-based decision-making agreement” will:

- deliver on the promise of reconciliation;
- support predictability for business;
- encourage responsible investment for business in BC; and
- position BC as a preferred destination for ESG (environmental, social and governance) investors.¹

The Declaration Act Consent Decision-Making Agreement for Eskay Creek Project signed on June 6 with TCG (Agreement)² marks an interesting new chapter in BC’s adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and its efforts to advance reconciliation. However, while BC has made bold statements about how the Agreement will further reconciliation and enhance business predictability, the implications of the Agreement itself are limited. BC has not adopted a new province-wide approach for reviewing and approving resource development projects. Instead, the Agreement applies only to a specific brownfield Project and a specific Indigenous government which has a track record of embracing mineral development within its traditional territories. Furthermore, BC and TCG had engaged the Project proponent on the proposed process in advance of signing the Agreement.³

The Agreement represents an important case study on how reconciliation can be advanced, but more work will be required to demonstrate that the consent-based regulatory processes in the Agreement can be broadly replicated in a way that achieves its aims of reconciliation, greater business predictability, and responsible investment.

Agreement Commitments

There are two key aspects to the Agreement. First, the Agreement is a consent-based agreement under the *Declaration on the Rights of Indigenous Peoples Act* (Declaration Act),⁴ which requires TCG’s free, prior, and informed consent for the Project to proceed. The Declaration Act became law in 2019 and, among other things, seeks to incorporate the principles of UNDRIP into Canadian law. Second, the Agreement

establishes joint regulatory processes as between the Province and TCG (and Canada, where appropriate) for considering and approving the Project.

1. TCG's Consent

The British Columbia *Environmental Assessment Act* (EAA)⁵ has a mechanism whereby BC can agree through contract that Indigenous consent is required for a reviewable project to proceed; section 7 provides that where such an agreement exists, "a reviewable project may not, without the consent of an Indigenous Nation, proceed..."⁶ This power to enter into agreements imposing an Indigenous consent requirement before the exercise of statutory power was built into section 7 of the recently-enacted Declaration Act. The Agreement, pursuant to section 7 of the EAA and section 7 of the Declaration Act, states that TCG's consent is required "for the Project to proceed" within the designated Project area.⁷

The Agreement, through the authority granted under the EAA and Declaration Act, provides that the Project may not proceed absent TCG consent.

2. Joint Review Process

The Project Agreement creates a parallel review process (with joint participation by BC and TCG) whereby both BC and TCG will independently assess the Project. TCG may also participate as an Indigenous nation in the BC environmental assessment process.

The Agreement provides for key process steps through the assessment process where BC and TCG will seek to achieve consensus, including in respect of:

1. whether the Project should proceed to process planning;⁸
2. the informational and assessment requirements for TCG's review of the Project;⁹
3. whether to accept the Project application for assessment;¹⁰ and
4. BC's environmental assessment report, draft environmental certificate, as well as terms and conditions that are agreeable to both TCG and BC.¹¹

In undertaking BC's assessment, BC will consider feedback from and engagement with TCG, including whether TCG has withheld its consent for the Project. In this way, TCG not only conducts its own assessment process, but TCG's positions and feedback are expressly contemplated in the parallel BC assessment.

While the Agreement references specific milestones within the assessment process where efforts will be taken to align TCG and BC's positions, TCG's ability to withhold its consent for the Project remains largely unfettered. There is a dispute resolution procedure between BC and TCG to try and achieve consensus which seeks to promote collaboration between the parties (i.e., negotiation and mediation).¹² However, the

dispute resolution processes do not fetter TCG's consent requirements. Where consent is not provided by TCG, the Project cannot proceed.¹³

Assessing the Agreement against the Promises

The Agreement has been described as an important tool for advancing reconciliation, supporting predictability for businesses, and encouraging investment in BC. Whether these goals can be achieved through the Agreement, or whether the consent-based regulatory processes in the Agreement can be broadly replicated with other Indigenous governments, remains to be seen.

Given the unique circumstances at play, governments across Canada should consider the outcomes of this specific case study as well as other considerations and risks that may be relevant to broader application of the Agreement's approach, including the risks identified below.

1. Fairness and Reasonableness

Government decisions can generally be appealed (or challenged through judicial review) where there are concerns about compliance with procedural obligations and/or the reasonableness of the decision. This right to appeal (or to judicial review) has been employed widely by Indigenous and non-Indigenous peoples to protect their interests. For project proponents, which can include Indigenous communities, it provides some comfort to know that their interests will not be subject to arbitrary and unfair exercises of governmental authority.

By providing TCG with the power to withhold consent under the Agreement, without limiting the terms under which such consent can be withheld, the Project proponent faces an increased risk that their interests may be subjected to arbitrary or unfair exercises of power. While the Agreement contemplates the potential that someone may seek a judicial review of TCG's consent decision,¹⁴ whether this right to judicial review exists and how it would be conducted remains unclear.

Concerns regarding procedural fairness and reasonableness are not insurmountable and could be addressed in the case of future project agreements through clauses which set out on what bases consent could be withheld. This, however, would qualify the Indigenous government's right of "consent" into a lesser right and may be an unacceptable compromise for those seeking to fully adopt the principles of UNDRIP into BC's resource development regulatory regime.

2. Government as Advocate

The Agreement provides for dispute resolution processes between BC and TCG.¹⁵ The Project proponent generally does not have recourse to these processes. As a consequence, Project proponents may be reliant

on the Province to advocate for their interests with TCG. For proponents this adds additional risk and may reduce “predictability” that BC has suggested will come with the Agreement.

3. Reconciliation

In the context of reconciliation, the Crown holds an important role in considering and assessing both Indigenous interests and non-Indigenous interests when making decisions. The Crown’s role as an arbiter of interests is closely connected with the constitutional obligation of the Crown to act honourably. The Agreement, through the requirement for consent, diminishes the Crown’s role and its ability to consider all interests. In the case of the Project, which is located in a remote area of British Columbia within the traditional territory of the Tahltan, Tahltan interests may be the overwhelming interest at stake. However, if the approach found in the Agreement is replicated in other locations and circumstances, the Indigenous consent requirement could fetter the ability of the Crown to consider all interests at stake, including potentially conflicting interests of other Indigenous and non-Indigenous Canadians.

The Importance of Trying New Things

BC has taken a cautious approach to incorporating Indigenous consent requirements into its environmental assessment regime by starting with the Agreement, which addresses a specific brownfield mine site and a single Indigenous government who has a track record of supporting mining opportunities. BC and TCG also engaged with the Project proponent to discuss the proposed process prior to signing the Agreement. This caution is warranted: Indigenous governments, proponents, and governments all have an interest in getting this right.

While modest, the Agreement represents a significant opportunity and potential case study that can help advance reconciliation. While BC’s promises of reconciliation, greater certainty, and responsible investment may exceed what can reasonably be accomplished under the Agreement, the efforts and willingness of BC, TCG and the proponent to collaborate and try new things should be celebrated.

¹ <https://news.gov.bc.ca/releases/2022PREM0034-000899> [Press Release].

² Declaration Act Consent Decision-Making Agreement for Eskay Creek Project [Project Agreement], available online: https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/declaration_act_consent_decision-making_agreement_for_eskay_creek_project.pdf.

³ Project Agreement, recitals, F.

⁴ *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

⁵ *Environmental Assessment Act*, SBC 2018, c 51 [EAA].

⁶ EAA, s 7.

⁷ Project Agreement, ss 4.1, 4.2 & 4.3.

⁸ Project Agreement, s 7.9.

Cassels

⁹ Project Agreement, s 7.19.

¹⁰ Project Agreement, s 7.29.

¹¹ Project Agreement, s 7.44.

¹² Project Agreement, Part 10.

¹³ Project Agreement, s 4.3.

¹⁴ Project Agreement, s 12.4.

¹⁵ Project Agreement, Part 10.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.