

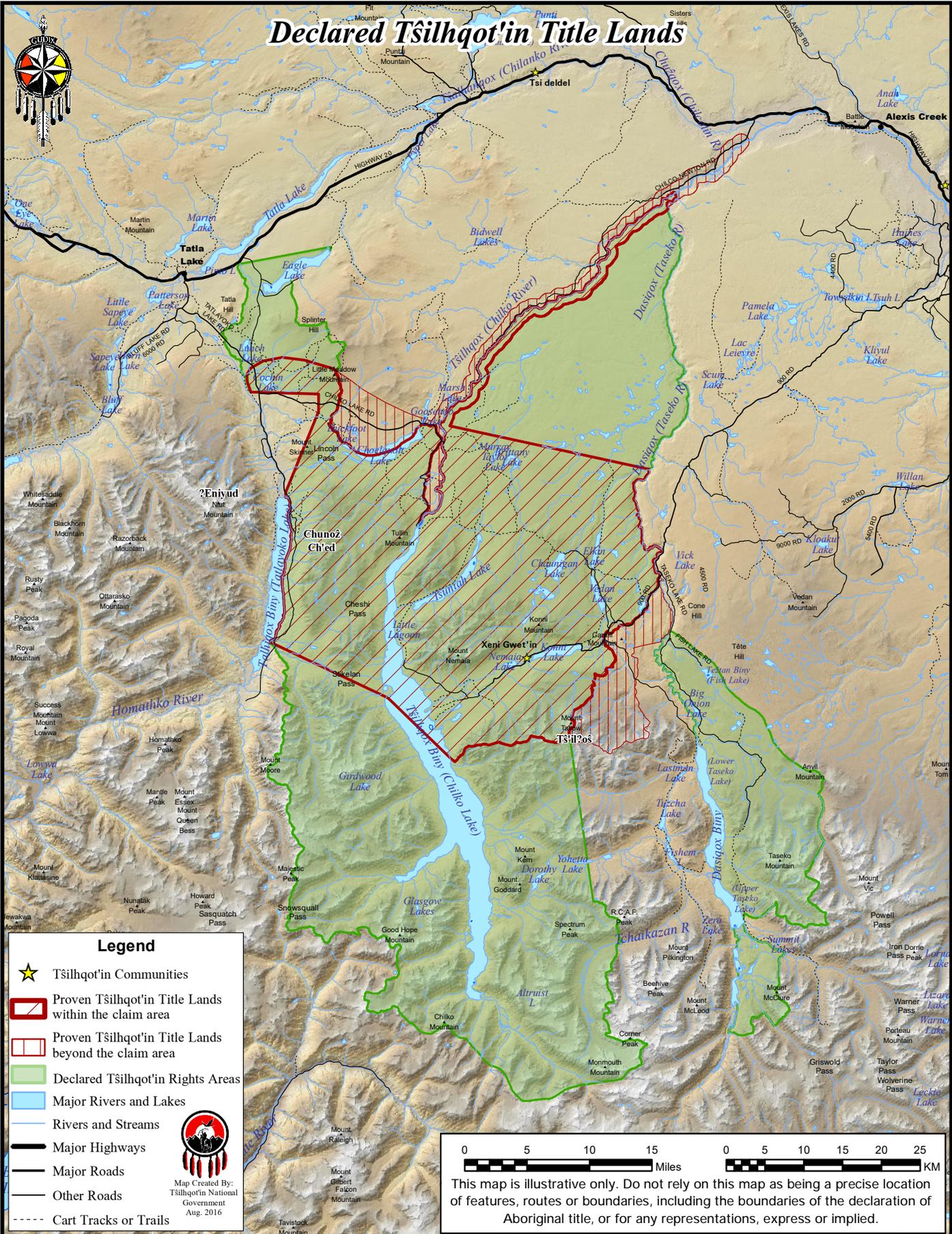


Tsilhqot'in Nation v. British Columbia

Plain Language Version



Declared T̄silhqot'in Title Lands



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1. Summary

For countless generations Indigenous Peoples have governed and cared for their lands.

For countless generations Indigenous Peoples have governed and cared for their lands. Teachings from ancestors have guided every generation and ensured that the children to come would be able to live on the land.

When Europeans came, and did not respect Indigenous sovereignty, Indigenous peoples fought back to ensure the survival their Peoples, cultures, and societies. Europeans thought Indigenous Peoples would be destroyed by disease, by residential schools, by outlawing ceremonies, by taking of lands – but none of those efforts succeeded.

Before and after the newcomers arrived, the Tsilhqot'in defended their territory from trespass. The commitment to protect Tsilhqot'in land and laws included the Chilcotin War of 1846 where Tsilhqot'in chiefs gave their lives to protect the territory and way of life of their Peoples.

This fight continues to this very day – and Nations across Canada use all means open to them to achieve justice.

In 1983 the Provincial Government issued licences to Carrier Lumber Ltd. to take trees. The Tsilhqot'in people stopped this on the ground with a historic blockade at Henry's Crossing. The fight over those trees ultimately ended up in the Courts. Annie C. Williams, then Chief of Xenigwet'in, brought the first court action against this logging. The next Chief of Xenigwet'in continued this struggle— Chief Roger William, on behalf of the Xenigwet'in community and Tsilhqot'in Nation, sought a declaration of Aboriginal Title and Rights to part of Tsilhqot'in Territory. The Tsilhqot'in said to the Courts that they have Title to those lands, and no one can take those trees unless the Tsilhqot'in say so.

The Court fight took over two decades, and tremendous sacrifice by Elders, leaders, and communities. On June 26, 2014 the Supreme Court of Canada – the highest Court in Canada – agreed with the Tsilhqot'in. The Supreme Court of Canada declared that the Tsilhqot'in People have Aboriginal Title over much of the land claimed in the court case—almost 2000 km². And because of that declaration of Aboriginal Title, the Tsilhqot'in people are now recognized as the owners of these lands, with the right to choose how the lands will be used.

The Tsilhqot'in are the first Indigenous Nation in the history of Canada to ever have their Title recognized by a Court. The Tsilhqot'in Title lands are the only Title lands recognized in the entire country.

This changes everything. The great sacrifices of many generations of Tsilhqot'in people to push back on colonialism have laid the foundation where Indigenous peoples – through implementing their Aboriginal Title- can actually re-build their relationship with their Territories in a real way.

2. Why did the Tsilhqot'in have to go to Court?

Ever since Canada was founded, the Federal and Provincial governments have acted on the basis that Aboriginal Title – ownership of the lands and resources throughout a Territory by Indigenous Peoples – does not exist. At the core of this belief, was the idea that Indigenous Peoples did not have systems of governments and laws for the land, and as such when Europeans came the land could simply be taken.

Of course, this was a deeply racist idea – that Indigenous Peoples were inferior to Europeans and were not as “civilized.”

Based on this racist belief the Crown:

1. Took the lands of Indigenous Territories and allocated them between themselves;
2. Allowed settlers to take lands, and set up the fee simple system for 'private' land to be exchanged;
3. Moved Indigenous people to small, segregated, isolated reserves; and
4. Passed laws to restrict Indigenous people to fight for their rights, including making it a crime to raise issues of Indigenous land rights.

Over most of British Columbia, the Crown did all of this without ever asking Indigenous Peoples what they thought, without buying or compensating for the land, without any agreement or treaty, and without permission.

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How was the Crown able to do this? How can the Crown say they lawfully acquired the land of Tsilhqot'in Territory? Given the Tsilhqot'in never agreed to the taking of the land, how can they say Aboriginal Title does not exist?

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Answering these questions is what the Court case was about. The Tsilhqot'in People, like other Indigenous Peoples, know that their lands was taken illegally. Canada was built on these illegal acts. Indigenous Peoples have been fighting to have the Crown acknowledge this illegal act, and repair it. Many Nations have tried for many years to get the Crown to acknowledge their wrongdoing, and make it right through dialogue and negotiation. In almost all cases that hasn't happened. So the Tsilhqot'in went to Court to help force the Crown to do it.

Specifically, the Tsilhqot'in went to the Court to have their Title declared over a particular area of the Territory, in the caretaker area of the Xenigwet'in, one of six communities that together make up the Tsilhqot'in Nation. That area was chosen in response to the immediate threat of clearcut logging on those lands, based on the guidance of their Elders, leaders, and communities, and knowing that winning the fight in that area would help with the fight throughout the rest of the Territory.

The Tsilhqot'in Nation is not the only Nation to use the courts in this way. Many First Nations, like the Tsilhqot'in Nation, have been using the courts to push back on the Crown's illegal conduct with respect to lands and resources. These efforts began in the 1960's when courageous First Nations first argued in the Courts for recognition of Title and Rights, as well as the implementation of historic treaties that had been completed by some First Nations and the Crown in the 1800's.

In 1982, when the Constitution of Canada was changed, section 35(1) was added which states that "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." At the time, nobody knew what these words meant, but they led to First Nations using the courts even more as a path to pushing back on the Crown's efforts to use Indigenous lands and resources without permission.

Since 1982 there have been hundreds of court cases brought by First Nations about their Title and Rights. Most of the time First Nations have been victorious, and Nations have built on each other's efforts.

But only a few of these cases have asked the court to make the most important and fundamental step of issuing a “declaration” of Aboriginal Title over a particular area of land. The main reason for this is because of how long, expensive, and complicated seeking such a declaration can be. But the Tsilhqot'in People persevered, and by the time the case reached the Supreme Court of Canada it was clear that the Court would have a real opportunity to issue the first such declaration in history.

In other words, the Court would have the opportunity to force the Crown to recognize Aboriginal Title and affirm that it had wrongfully taken and used Tsilhqot'in land.

3. What did the Lower Courts say Before the Case Reached the Supreme Court of Canada?

The Supreme Court of Canada has the final word on the law of Canada, and one has to go through many stages before the Supreme Court might hear a case and give a decision. Before the Tsilhqot'in got their day before the Supreme Court of Canada, they had to through a long trial in the British Columbia Supreme Court, and a hearing before the British Columbia Court of Appeal.

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(1) British Columbia Supreme Court

The trial before the British Columbia Supreme Court is where the Tsilhqot'in people directly spoke to their relationship with the land and resource of their Territory, culture, spirituality, and way of life. Tsilhqot'in described their Territory in Court as their “spiritual and economic homeland” and “the physical expression of the legends that describe their origins, their laws, and their identity as Tsilhqot'in people.” The evidence of Tsilhqot'in elders and knowledge keepers showed that the “Tsilhqot'in Nation was a rule ordered society, governed by dechen ts'edilhtan (“the laws of our ancestors”). These laws are shared through the oral traditions, stories and legends passed down from generation to generation.”

The trial lasted over 300 days. When it ended the Judge agreed the Tsilhqot'in had proven Title over a large area of approximately 2000 square kilometres, and had proven Aboriginal hunting, trapping and trading rights over an even larger area. Interestingly, he found

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the Tsilhqot'in had proven Aboriginal title in some areas that were not part of the court action. To reach his conclusion about where Tsilhqot'in Title exists he applied the test of "exclusive occupation" – historically (in 1846), was Tsilhqot'in occupation sufficient to demonstrate their deep connection to an area as Title holders, and were the Tsilhqot'in in exclusive control over these lands. Strong evidence of Tsilhqot'in Aboriginal Title included: oral histories and testimony of elders and knowledge keepers, evidence of the extensive land use and a network of foot, horse and water trails, and wars and battles fought in defence of the territory.

While the Tsilhqot'in had hoped that the Judge would have agreed Title existed everywhere they were fighting about – the determination was still considered a great victory because it demonstrated that Aboriginal Title can exist over large areas, on a 'territorial' basis. British Columbia and Canada were wrong when they said that Aboriginal Title could only exist over small spots of land. Aboriginal Title exists to larger areas of land, closer to the territories that Indigenous Peoples talk about.

However, the Judge did not issue a declaration of Aboriginal Title for legal technical reasons – rather, he asked the Tsilhqot'in and the Crown to sit down and negotiate. Unsurprisingly, real negotiations did not take place. So the case moved forward to the British Columbia Court of Appeal.

(2) British Columbia Court of Appeal

Although the Court of Appeal fully agreed with the trial judge's rulings on Tsilhqot'in Aboriginal rights to hunt, trap and trade, the Court of Appeal disagreed with the outcome on Aboriginal title at trial and sided with the Crown.

Like many judicial decisions throughout history, the Court seemed to focus more on the challenges facing other Canadians, than the injustice Indigenous Peoples have faced, their relationship with the land, and the fact the land was taken without their permission.

Specifically, the Court of Appeal said that Indigenous Peoples may be able to show Aboriginal Title to small hunting, fishing or gathering sites, such as salt licks, fishing stations, or buffalo jumps – but not to larger areas of their territories. Further, the Court of Appeal said that recognition of Aboriginal Title to large areas of land is not necessary to protect Indigenous cultures. Rather,

Aboriginal Rights are enough to protect Indigenous cultures and limiting Aboriginal Title to small areas is better for the relationship between Indigenous and non-Indigenous Peoples because it does not threaten non-Indigenous Peoples' understanding of their ownership of land and the right to govern it.

The Tsilhqot'in People, and Nations across British Columbia, completely rejected what the Court of Appeal said - and moved on to the highest court in the land, the Supreme Court of Canada.

4. What did the Supreme Court Decide?

The Supreme Court of Canada agreed with the Tsilhqot'in. The Court issued a declaration of Tsilhqot'in Title to approximately 2000 square kilometres of the Territory including portions of Tachelach'ed (Brittany Triangle) and the Trapline Territory, Xeni (Nemiah Valley) and surrounding area, and along the Tsilhqox (Chilko River). The Court also agreed the Tsilhqot'in had extensive rights over an even broader area.

There were three things the Tsilhqot'in asked the Supreme Court to rule on: (1) Where does Aboriginal Title exist – is it over large areas or restricted to small-spots? (2) What are the characteristics of Aboriginal Title? (3) What does Aboriginal Title mean for the relationship between Indigenous Nations and the Crown – for jurisdiction, decision-making, and the application of Indigenous laws?

Where does Aboriginal Title exist?

The Court rejected the “small spots” theory of Aboriginal Title that the Crown argued for, and the Court of Appeal had endorsed.

Aboriginal Title can exist over larger territories. This is important, because the purpose of Aboriginal Title is to protect Indigenous cultures and societies into the future. This can only occur where there is a strong relationship between Indigenous Peoples and the lands of their Territory. The relationship between Indigenous Peoples and their Aboriginal Title lands is alive, and can support both an economy built on ancient traditions (fishing, hunting, trapping, harvesting) and a modern economy built on land and resource use. In this way, the decision of the Court reflects some

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of the core ideas in the United Nations Declaration on the Rights of Indigenous Peoples which upholds the importance of the connection of Indigenous Peoples to their traditional lands, and how this is necessary for the maintenance of the culture, society, and way of life of Indigenous Peoples around the world.

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To prove Aboriginal Title, an Indigenous Nation must show that their Peoples regularly occupied and had exclusive control over the land at the time that the Crown asserted sovereignty (considered to be 1846 in British Columbia). Instead of only looking at ways that newcomers own or occupy lands – such as building fences or planting fields of crops – the Court said that land ownership and occupation should be looked at as Indigenous Peoples would look at it. For example, for Indigenous Peoples, regularly using areas for hunting, fishing, trapping or gathering plants and medicines, or keeping others out of an area (such as requiring others to get your permission to enter, trespass laws, or treaties/protocols with other Indigenous Peoples), shows Aboriginal Title.

What are the characteristics of Aboriginal Title?

Aboriginal Title is held collectively by an Indigenous group for the present generation and for all future generations.

Aboriginal Title is a right to the land itself. It is a recognition that the Aboriginal group holding Aboriginal title is the true owner of the land. Aboriginal Title includes: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.

Aboriginal title can be used for both traditional and modern purposes. The only limit on the use of Aboriginal title lands is that the Indigenous group cannot use its Aboriginal title lands in a way that would destroy the cultural value of these lands for future generations. This is because Aboriginal title lands are held collectively not only by the present generation, but also by all future generations.

Finally, the Court held that once Aboriginal title is proven in court, those lands are no longer “Crown lands” under the Forest Act—they are Aboriginal title lands. The Court said that the Forest Act applied until Aboriginal title was declared by the Court, but after the declaration of Aboriginal title, the Forest Act no longer applied to

the proven Aboriginal title lands. This is because it is now clear that this is not “Crown timber” on “Crown land”—it is Tsilhqot'in timber on Tsilhqot'in lands.

What does Aboriginal Title mean for the relationship between Indigenous Nations and the Crown?

Where Aboriginal Title has been declared by the courts, the standard to be followed is that of Indigenous consent. Before the Crown or third parties can use Aboriginal title lands, they must first seek the consent of the Indigenous Nation.

If the Crown or third parties try to act without Indigenous consent, they are at risk that the project will be unlawful and not allowed to proceed (as discussed below). By emphasising consent, the Court is moving closer to the/a standard of free, prior, and informed consent that is in the United Nations Declaration on the Rights of Indigenous Peoples.

However, the Supreme Court made it clear that Aboriginal Title is not absolute. If an Indigenous Nation does not give consent to the use of their Title lands, the Federal or Provincial governments can still try to move ahead with their plans on that Title land. To try to do that, the government must meet a very high standard. They must demonstrate that what they are trying to do is in the broad public interest and that it actually furthers the goal of reconciliation with the Indigenous Nation. The government must also show that they have fully consulted, accommodated and compensated the Nation, and that they are acting consistent with the honour of the Crown and their duty to act in the best interests of the Nation including impairing Aboriginal Title as little as possible, and showing that Indigenous interests were taken into account and given priority.

This is a very high standard and it will likely be only in exceptional cases that the Crown will be able to justify its actions on Aboriginal title lands taken without the consent of the Indigenous Nation. In the Tsilhqot'in Nation case, the Supreme Court of Canada agreed that British Columbia's plans for clearcut logging on Aboriginal title lands could not be justified and were therefore unlawful. Because of Aboriginal title (as well as Aboriginal rights), the logging cannot proceed and the Tsilhqot'in people were victorious in protecting their lands.

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5. What are some of the Problems with the Supreme Court of Canada Decision?

It is, of course, one of the failings of Canada that Indigenous Peoples have to go to Court so much for their inherent rights to be upheld, recognized.

It is, of course, one of the failings of Canada that Indigenous Peoples have to go to Court so much for their inherent rights to be upheld and recognized. The reason we have to go to Court is that the Crown has consistently violated the obligations they owe Indigenous Peoples. The very fact that the Tsilhqot'in People had to spend countless years and resources for the basic recognition of their Title is a sign of how far there still is to go to have honourable relations in this country.

Courts are also not institutions that are designed for repairing the broken relations with the Crown that are result of generations of colonialism. Courts interpret and apply the law of Canada's constitution. They are not built around Indigenous laws, and Indigenous ways of achieving justice. Courts are also limited in their ability to understand our teachings, stories, and way of life, and are restricted in the kinds of outcomes that they can order and achieve.

Given all of this, not surprisingly, for all of the positive in the Court's decision, there are also problems and challenges with it.

First, the Tsilhqot'in wanted the Court to confirm that the Province had no ability to infringe Tsilhqot'in Title—that only the Federal Government has the power to interfere with Aboriginal title. The Court did not agree and said that both the Province and the Federal Government can try to justify infringements of Tsilhqot'in Title – meaning they can try to advance their plans even where the Tsilhqot'in don't consent.

Second, while the Court was strong in emphasising the importance of the Indigenous perspective to defining the scope and nature of Aboriginal Title, the Court was not clear on the role and space of Indigenous laws in governing Territories historically, or into the future.

The Court may have to address Indigenous laws in more detail in a future case. In the meantime, it seems clear that a declaration of Aboriginal Title is also a declaration of Indigenous laws. Indigenous laws govern relationships between Indigenous Peoples and the animals, plants, fish and other beings that share the lands and

resources. Before and after newcomers arrived, Indigenous laws continued to exist, and continue to this day to guide the actions of Indigenous Peoples. The right of an Indigenous group to pro-actively manage and decide the uses of its Aboriginal title lands must bring with it the right to make such decisions in accordance with their own Indigenous laws and systems of government.

Third, the Court did not declare Aboriginal Title to everywhere the Tsilhqot'in claimed – even though since time immemorial the Tsilhqot'in have used and occupied the areas in question.

Finally, the judgment of the Court suggests that many of the strongest rights that come with Aboriginal title will not be recognized by government or the courts until the Indigenous group has proven its Aboriginal title in court, like the Tsilhqot'in did in this case. Until Aboriginal title is proven in court, the Court judgment suggests that provincial legislation (like the Forest Act) continues to apply to the land. Governments and industry may take the position that before Aboriginal title is proven in court, the only duty of the Crown is to consult and accommodate the Indigenous Nation, not to seek consent, or to meet the high standard of justifying any interference.

This is disappointing because Indigenous Peoples are unfairly denied their full rights as title-holders in their territories unless and until they have gone through the long and expensive task of proving their rights in court. The Supreme Court of Canada did provide some guidance, however, by cautioning the government and industry that the best course of action in all cases may be to seek Indigenous consent, in case Aboriginal title is proven in the future, putting all Crown approvals at risk if they were issued without consent.

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From the 1920's until the late 1950's Indigenous Peoples were prohibited by the Indian Act from using the courts to advance their Title and Rights.

6. Why is the Decision Important for the Tsilhqot'in People and all Indigenous Peoples?

Indigenous Peoples have been working in many ways to re-establish the proper relationships with the Territories that have always sustained them. When Europeans came they disrupted and impacted that relationship in the most serious and harmful of ways. Tireless effort and sacrifice has been made by many generations to build again towards the proper relationships with Territory that supports healthy and thriving culture, spirituality, society, community, and economy.

From the 1920's until the late 1950's Indigenous Peoples were prohibited by the Indian Act from using the courts to advance their Title and Rights. Since then, however, the courts have been one of many avenues Indigenous Peoples have used to advance the re-establishment of that proper relationship. Until June 26, 2014 it was unknown if the courts would actually recognize and affirm – in strong, legal, and binding terms – the ownership of Indigenous Peoples over territory. Through issuing the declaration of Aboriginal Title to the Tsilhqot'in People, the Court removed that unknown, and made it clear that the connection of the Tsilhqot'in to their land is real, meaningful, and must be respected by the Crown and third parties.

Further, by repeatedly speaking of the standard of consent, the Court is reflecting the sovereignty of Indigenous Nations – including their governance and decision-making authority over their Title lands. While the Court fell short of telling the government it must seek consent in all cases, it cautioned government and industry that they proceed without consent at their peril.

The decision is a turning point in Canada. For the longest time – ever since Canada was born – the Crown has denied the relationship of Indigenous People to their land. In the decision, the Court, for the first time, formally recognized the relationship of Indigenous People to their land. Because of the efforts of Tsilhqot'in People for over two decades, all Indigenous Peoples can now look towards a future that is increasingly about mutual recognition, acceptance, and understanding. ●

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Cover Photo: Talhiqox Biny (Tatlayoko Lake)



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