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Expert Mechanism on the Rights of Indigenous Peoples
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Office of the United Nations High Commissioner for Human Rights

Ch 1211 Geneva 10, Switzerland

**RE: Call for input on establishing effective mechanisms at the national and regional levels for implementation of United Nations Declaration on the rights of Indigenous Peoples**

Dear Chairperson Lightfoot and Members of the Expert Mechanism:

The Tŝilhqot’in Nation offers these submissions in support of the Expert Mechanism’s forthcoming study on measures, including laws and judicial decisions, taken by States to achieve the ends of the United Declaration on the rights of Indigenous Peoples (the “**Declaration**”).

The Tŝilhqot’in Nation is an Indigenous Nation located in western Canada comprised of six communities and represented by the Tŝilhqot’in National Government. The Tŝilhqot’in Nation is uniquely positioned to speak to the role of judicial decisions as a mechanism for redress to protect Indigenous rights. June 26, 2024, this coming summer, marks the ten-year anniversary of the Supreme Court of Canada recognizing and declaring Tŝilhqot’in Nation Aboriginal rights and title to a portion of Tŝilhqot’in territory in *Tsilhqot’in Nation v. British Columbia* 2014 SCC 44 (the “**Tŝilhqot’in Title Case**”). This landmark decision, the first of its kind in Canada, was the product of a many decade struggle by the Tŝilhqot’in Nation for justice in the face of Canada’s denial of our existence as an Indigenous Nation and our rights as an Indigenous Nation and Peoples—rights that are now articulated and protected by the Declaration.

Tŝilhqot’in Nation urges the Expert Mechanism to include in its study our experience in bringing and implementing the Tŝilhqot’in Title Case—to understand the limits of such decisions as tools for redress and the additional steps needed by States to achieve the ends of the Declaration. Our experience is that more is needed from States like Canada to align their judicial processes and body of laws with the Declaration so that judicial decisions like the Tŝilhqot’in Title Case are accessible to Indigenous Peoples and so that such decisions can be meaningfully implemented in a manner consistent with the Declaration. States must proactively establish a framework for the recognition and integration of Indigenous rights within their laws so that, when courts make determinations about the existence or scope of Indigenous rights, the State is situated to meaningfully engage with and give effect to those decisions.

The Tŝilhqot’in Nation’s Pursuit of Redress

The Tŝilhqot’in’ people have steadfastly protected our lands, culture, and way of life since time immemorial. This included going to war in 1864 against the establishment and imposition of a colonial state in Tŝilhqot’in territory.

The Tŝilhqot’in Nation has remained resolute in its defense of its lands and culture and has continued to push for just avenues of redress from Canada and the province of British Columbia for colonial taking of Tŝilhqot’in lands and resources and denial of Tŝilhqot’in jurisdiction and governance. This includes active involvement in international fora at the United Nation such as the Expert Mechanism and the United Nations Permanent Forum on Indigenous Issues.

Over 30 years ago the Tŝilhqot’in Nation launched legal action for State recognition of our Aboriginal title and rights to a portion of Tŝilhqot’in territory. The Tŝilhqot’in Nation brought the case as part of broader efforts to stop the harvesting of timber by State permitted companies in a portion of Tŝilhqot’in territory. At that time Canadian courts had already ruled that Indigenous land rights had survived colonial settlement,[[1]](#footnote-1) but no court had yet recognized such a right nor set out a process for how an Indigenous group should go about establishing such a right.

The Tŝilhqot’in Title Case took 25 years from initial filing to the date of the Supreme Court of Canada’s declaration, following appeals to every level of Canadian court. The trial lasted 339 days over a span of five years. Dozens of Tŝilhqot’in elders and knowledge keepers gave testimony, many through the aid of an interpreter. The Tŝilhqot’in faced countless procedural and technical arguments from the State as well as arguments questioning our very existence as a Nation and people, our capacity to develop and have laws, and asserting the extinguishment of Tŝilhqot’in rights and title. The time, effort, and cost of bringing the Tŝilhqot’in Title Case was a tremendous burden. If Canadian courts had not ordered advance costs to the Tŝilhqot’in Nation, requiring the state to partially pay for the litigation,[[2]](#footnote-2) these burdens would have likely been insurmountable.

The result of the Tŝilhqot’in Title Case, the finding of Tŝilhqot’in Aboriginal title and rights, is a credit to the Canadian judicial system and its capacity to deliver on protecting the rights articulated in the Declaration. However, the cost, complexity, and other procedural barriers involved in the judicial process fall short, in our submission, of the Declarations call for effective mechanisms for redress.

Indigenous litigants in Canada still face these burdens when seeking redress through the courts. Cases are lengthy, complex, and extremely costly. Legal presumptions largely place the burden of proof of their rights on Indigenous peoples rather than the States that have presumed to take control of Indigenous lands and resources. One recent Aboriginal title trial by an Indigenous Nation in British Columbia exceeded 500 days of trial.[[3]](#footnote-3)

The commitment and resolve of our Nation, especially our elders and knowledge keepers, made the Tŝilhqot’in title victory possible. However, much more is needed from the Canadian State and judiciary to make Indigenous rights litigation an accessible and effective mechanism for the protection of Indigenous rights in Canada and to further the implementation of the Declaration.

*Recommendations for Study by the Expert Mechanism*

 The Tŝilhqot’in Nation urges the Expert Mechanism to study and give expert advice to States on the following strategies for ensuring that litigation is accessible and a useful mechanism for redress for Indigenous peoples:

* Revisions to rules of court process for Indigenous rights cases to make cases more manageable, predictable, and generally accessible for litigants. Special attention should be brought to ensuring that Court procedures align with the articles of the Declaration.
* Regular use of advance costs or public financing of litigation involving issues of central and broad concern between Indigenous Peoples and States.
* Legislated removal of technical legal defenses used to deny Indigenous rights such as estoppel, laches, and limitation periods which are inconsistent with the maintenance of Indigenous rights under the Declaration.
* Directives for state lawyers to engage respectfully and constructively in litigation with Indigenous governments in manner consistent with the Declaration.[[4]](#footnote-4)

Implementing the Tŝilhqot’in Title Decision

The Supreme Court of Canada in the Tŝilhqot’in Title Caseheld that Tŝilhqot’in Aboriginal title gives the Tŝilhqot’in Nation the right to determine, subject to inherent limits, the uses to which the land is put and to enjoy its economic fruits.[[5]](#footnote-5) The Court also held that once Aboriginal title is established, the State must seek the consent of the Tŝilhqot’in Nation for any development of the land. As the Expert Mechanism has previously noted, these judicial findings are consistent with the principle of free, prior and informed consent contained in the Declaration.[[6]](#footnote-6)

Following a decade of dedicated work to implement the Tŝilhqot’in Title Case, it is the experience of the Tŝilhqot’in Nation that more is needed from States like Canada to orient their laws towards recognition of Indigenous rights to give those rights and decisions like the Tŝilhqot’in Title Case full and proper effect. More specifically, States need to, consistent with the Declaration, proactively create legislative space for, and recognition of, Indigenous Nations, their lands, and their jurisdiction and decision-making.

Having a judiciary that is prepared to protect Indigenous rights is essential, but it is not enough. States must also take the commensurate implementation measures.

*Making Legislative Space for Tŝilhqot’in Jurisdiction*

The Supreme Court of Canada in the Tŝilhqot’in Title Case identified the rights or ‘incidents’ associated with Tŝilhqot’in Aboriginal title. However, to date, the provincial and federal government have failed to amend their laws to provide space for the Tŝilhqot’in Nation to explicitly exercise the legal jurisdiction associated with these rights.

For example, the Court held that Tŝilhqot’in Aboriginal title includes the right to proactively use and manage the land.[[7]](#footnote-7) The Tŝilhqot’in Nation has exercised this right to enact the *Nulh Ghag Dechen Ts’edilhtan*, a Tŝilhqot’in hunting law applicable to title lands.[[8]](#footnote-8) However, the provincial government maintains its own wildlife law that governs hunting in the province generally. To date the province has not made any legislative changes to account for or defer to Tŝilhqot’in jurisdiction in relation to the Tŝilhqot’in title lands. This leaves space for misinterpretation respecting Tŝilhqot’in jurisdiction over hunting on our title lands.

*Decision-Making in Accordance with Free, Prior, and Informed Consent*

Another implementation challenge comes in respect of State decision-making in relation to Tŝilhqot’in title lands. According to the framework set out in the Tŝilhqot’in Title Case, the State is required to seek Tŝilhqot’in consent when making decisions that directly impact Tŝilhqot’in title lands. However, implementing true consent-based decision making in a structured way has proven challenging. In our experience, efforts to collaborate with Canadian governments on decision-making, including in relation to Tŝilhqot’in title lands, are often frustratingly limited by State concerns that anything beyond considering the Tŝilhqot’in perspective on a decision will ‘fetter’ the State decision-maker.

This limitation emerges, in part, from the Supreme Court of Canada’s decision itself which included the qualification that while Canadian governments should seek Indigenous consent before taking any action in relation to Indigenous title, that some actions might still be justified even without consent.[[9]](#footnote-9) Concerns about ‘fettering’ a potential State decision to override Indigenous consent has caused state governments to refuse entering into shared-decision making frameworks or decision-making frameworks that truly center Indigenous consent. The resulting decision-making processes do not live up to the Declaration’s promise of free, prior, and informed consent.

This is a significant hurdle to the harmonization of Tŝilhqot’in jurisdiction with the State. It also poses a challenge for managing constructively residual State decisions, made prior to the declaration of Tŝilhqot’in Aboriginal, that continue to impact Tŝilhqot’in title lands, such as third-party tenures and permits.

We acknowledge and encourage recent efforts made by the province of British Columbia on this front. Those include enacting as part of the province’s *Declaration on the Rights of Indigenous Peoples Act* the possibility for true decision-making agreements,[[10]](#footnote-10) and signaling further legislative amendments to advance development of decision-making agreements. Still, much more is need from the province, not only to implement the Tŝilhqot’in Title Case, but also to prepare the legislative landscape for similar decisions to come.

*Recognition of the Tŝilhqot’in Nation*

Another challenge following the Tŝilhqot’in Title Case has been translating judicial recognition[[11]](#footnote-11) of the Tŝilhqot’in Nation as the holder of the collective rights of the Tŝilhqot’in peoples to state recognition of the same.

Canada and British Columbia have yet to implement legislation to fully recognize the existence of the Tŝilhqot’in Nation in a manner that allows the Tŝilhqot’in Nation to directly interact with the legislative and legal apparatus of the State or otherwise exercise the rights of a natural legal person. In the interim, the Tŝilhqot’in Nation continues to be represented by the Tŝilhqot’in National Government, which is established as a non-for-profit corporation under Canadian law, and is operated in accordance with that legislation rather than the inherent constitution of the Tŝilhqot’in Nation. This does not align with the promise of Indigenous self-determination in structuring self-governance as protected by Articles 3 and 4 of the Declaration.

The Tŝilhqot’in Nation commends recent productive actions and dialogue with Canada and British Columbia on this front, but emphasizes that States ought to pro-actively align legislation to recognize Indigenous Nations, or at the very least to enable a state to recognize, affirm, and give legal effect to judicial recognition of an Indigenous nation.

*Recommendations for Study by the Expert Mechanism*

The constraints on implementing the Declaration identified above largely require legislative reform. Both Canada and British Columbia have committed, as part of their efforts to implement the Declaration, to ensure their respective laws are consistent with the Declaration.[[12]](#footnote-12) To date, both governments have been light on details respecting how they intend to act on those commitments and whether they intend to coordinate their efforts.

We recommend the Expert Mechanism study and provide expert advice that supports and guides States with respect to efforts to align legislation with the Declaration. This should include advice that:

* States cooperate with Indigenous peoples to develop a comprehensive plan for legislative review and reform to align legislation with the Declaration.
* States prioritize legislative reform that enables recognition of Indigenous Nations, creates space for Indigenous jurisdiction, and ensures decision making that is consistent with the principle of free, prior, and informed consent.
* States identity a managing body or organization responsible for ensuring that legislative review and reform occurs in a coordinated and accountable way.

If it’s of assistance to the Expert Mechanism, we would be pleased to provide further information on the Tŝilhqot’in Title Decision and the decade of lessons learned since the declaration of Tŝilhqot’in Aboriginal title.

1. *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 [↑](#footnote-ref-1)
2. *Xeni Gwet'in First Nations v. British Columbia*, 2002 BCCA 434 [↑](#footnote-ref-2)
3. *Cowichan Tribes et al v. the Attorney General of Canada et al*., Victoria Registry VI 14-1027. [↑](#footnote-ref-3)
4. In 2018 Canada introduced such guidelines. However, they were implemented prior to federal legislation adopting the Declaration and fall short of a commitment to consistency with the Declaration: <https://www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.html> [↑](#footnote-ref-4)
5. *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, at para. 94. [↑](#footnote-ref-5)
6. Human Rights Council, *Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples: establishing effective monitoring mechanisms at the national and regional levels for the implementation of the Declaration – Report of the Expert Mechanism on the Rights of Indigenous Peoples*, 30 May, 2023, A/HR/EMRIP/2023/3. [↑](#footnote-ref-6)
7. *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, at para. 94. [↑](#footnote-ref-7)
8. Tŝilhqot’in Nation: *Nulh Ghag Dechen Ts’edilhtan*, 2019 [https://www.tsilhqotin.ca/2019\_08\_23\_TsilhqotinNationNGDT-WildlifeLaw.pdf](https://www.tsilhqotin.ca/wp-content/uploads/2020/12/Law_2019_08_23_TsilhqotinNationNGDT-WildlifeLaw.pdf) [↑](#footnote-ref-8)
9. *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, at paras. 76-88. [↑](#footnote-ref-9)
10. *Declaration on the Rights of Indigenous Peoples Act*, 2019 SBC c. 44, s. 7. [↑](#footnote-ref-10)
11. *Tsilhqot’in v. British Columbia,* 2007 BCSC 1700, at para 470, affirmed on appeal 2012 BCCA 285, at para. 156 [↑](#footnote-ref-11)
12. *United Nations Declaration on the Rights of Indigenous Peoples Act* SC 2021, c. 14; *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019 c. 44. [↑](#footnote-ref-12)