

Vaughn Palmer: B.C. and First Nations far apart on aboriginal title

The government's promises of reconciliation run counter to its reading of the Tsilhqot'in decision

BY VAUGHN PALMER, VANCOUVER SUN COLUMNIST SEPTEMBER 21, 2015 7:36 PM



British Columbia Premier Christy Clark, here greeting Chief Michael LeBourdais after addressing a gathering of First Nations leaders and B.C. cabinet ministers on Sept. 10, has spoken publicly about reconciliation.

Photograph by: DARRYL DYCK, THE CANADIAN PRESS

VICTORIA — First Nations leaders have denounced a recent legal letter from the provincial government as “regressive, offensive and wholly disappointing” and a “non-starter” for reconciliation over aboriginal title.

“The province’s letter represents an unworkable and unchanged approach to reconciliation that has already failed in B.C. and been rejected by the courts,” declared the First Nations leadership council in a memorandum circulated to native leaders earlier this month.

The clash of documents indicates profound disagreement over how to proceed after the June 2014 Supreme Court of Canada decision recognizing aboriginal title in the Tsilhqot’in case here in B.C.

First Nations last year issued a statement of principles that called for the “recognition and implementation of indigenous people’s inherent title and rights throughout B.C.” — and all that would entail in terms of co-management of land and resources, revenue sharing and native self-government.

The province, after mulling the statement of principles for nearly a year, responded with a letter sent out July 13 to First Nations leaders over the signature of deputy attorney-general Richard Fyfe.

Over five pages he took great exception to the native reading of the high court decision, denying that it obliged the government to recognize aboriginal title “throughout B.C.” or upheld a right to indigenous self-government. Outside the court-recognized territory of the Tsilhqot’in, Fyfe insisted, there was “nothing to implement.”

The B.C. Liberals refused to make the letter public. But after I wrote a column based on a leaked copy Friday, I was further supplied with a copy of the 22-page response from the First Nations leadership council, dated Sept. 3.

It confirms the impression generated by the Fyfe letter that, for all of Premier Christy Clark’s promises of reconciliation with First Nations, the two sides remain far apart in their interpretations of history, law and the Constitution.

Indeed, some of the most effective passages in the memorandum from the leadership council highlight the contrast between the legal rebuffs in the Fyfe letter and the public reassurances of various B.C. Liberals over the years.

“The province’s letter provides no explanation for these inconsistencies, and makes no effort to explain how the positions in the province’s letter can be explained in light of the new relationship vision or past efforts like the (2009) legislative initiative on recognition and reconciliation.

The leadership council also cited, to considerable effect, the reading of the Tsilhqot’in decision from Geoff Plant, who served alongside Clark as attorney-general in the first term of Liberal government.

The high court’s finding “makes it a virtual certainty that aboriginal title is widespread across the province,” wrote Plant on his Internet blog earlier this year. “Vast swaths of our province are lands on which, if the question were to be litigated, a court would or will find aboriginal title.”

He also speculated — in uncanny anticipation of the Fyfe letter — about what could be the result if the response to the court decision were delegated to the legal mavens in the ministry of the attorney-general.

“They observe ... that aboriginal title only exists as a matter of law on the land that has been awarded to the Tsilhqot’in. And that the rest of the province is land where title may be asserted, but has not been conclusively proven and therefore does not yet exist. And they say that not much has really changed, so it’s stay the course for the vast majority of the province.”

As a former cabinet minister and politician, Plant knew well the temptations of staying the course. “There are many who would defend this approach,” he wrote. “I am not one of them.”

For he also knew “how spectacularly unsuccessful the province’s legal strategies have been when it comes to aboriginal title” in the courts. “The failed ethic of denial,” is how Plant further characterized the

provincial record on that score over the years

In an effort to minimize the significance of the Fyfe letter, the Liberals have urged native leaders to regard the contents as legal advice not public policy. But the leadership council noted that the views set out in the letter dovetail with long-standing political positions by this and earlier governments.

“The law did not demand the province adopt a legal strategy grounded in denial,” the native leaders wrote. “This was a choice by the province — one that has had profound economic and social costs for aboriginal peoples and British Columbians generally.

“The law does not demand that it be interpreted in the most narrow, formalistic, and minimalist way. This is a choice.

“The law does not demand that the province move away from progressive efforts and positions undertaken in past years in seeking to build recognition-based relationships. That is a choice — one, if maintained, that will have the most likely outcome of deepening levels of legal, economic and social uncertainty and conflict.”

Yes, the letter stated a legal position. But it also represented a political decision to say one thing in private and another in public.

With the Liberals now entering into discussions with First Nations on a comprehensive response to the Tsilhqot'in decision, the year ahead will tell whether they are guided by the public rhetoric of reconciliation or the private language of rejection.

vpalmer@vancouversun.com

© Copyright (c) The Vancouver Sun