

Vaughn Palmer: No quick fix for gulf between province and First Nations

Both acknowledge lack of a ‘common understanding’ of their relationship

BY VAUGHN PALMER, VANCOUVER SUN COLUMNIST SEPTEMBER 18, 2015



Premier Christy Clark addresses the gathering of First Nations leaders and B.C. cabinet ministers in Vancouver last week.

Photograph by: DARRYL DYCK, THE CANADIAN PRESS

VICTORIA — As aboriginal leaders prepared for the recent all-chiefs meeting with Premier Christy Clark and her cabinet, they received a stiffly worded legal rebuff to the principles that they’d put forward for endorsement at last year’s session.

The B.C. Liberals did not make the letter public when it was sent out in mid-July and this week they refused a request to release it now. But thanks to a copy obtained elsewhere, I can report that it documents a gulf between the province and the natives over how to proceed after the Supreme Court of Canada’s landmark recognition of aboriginal title here in B.C.

First Nations want the government to recognize that aboriginal rights and title apply “throughout B.C.,” and all that would entail in terms of indigenous self-government, joint management of lands and resources, and revenue sharing.

The three main organizations representing B.C. natives — the First Nations Summit, the Union of B.C. Indian Chiefs and the B.C. Assembly of First Nations — set out their position in a four-item statement of

principles at the all-chiefs gathering in September 2014, two months after the SCC judgment in the Tsilhqot'in case.

The principles declared in part: "We acknowledge that all our relationships are based on recognition and implementation of the existence of indigenous peoples' inherent title and rights ... throughout B.C."

But when provincial officials expressed reservations about endorsing the principles in face-to-face meetings in advance of this year's gathering, First Nations leaders asked for the province to put its perspective in writing.

Hence the five-page letter that went out over the signature of deputy attorney general Richard Fyfe, which pretty much rejected all four principles.

"The overarching problem," explained Fyfe, "is that the statements are founded on the assumption that there is Aboriginal title throughout B.C. — a term that may be interchangeable with 'everywhere.'"

"That interpretation is not consistent with existing legal authority or the available ethnographic and historical record," he continued. "It would be inappropriate in our view for the province from a legal perspective to proceed with negotiation of agreements based on those concepts."

Granted, the high court recognized aboriginal title for the Tsilhqot'in. But the award covered less than half of the original claim and a still smaller fraction of the band's traditional territory. Plus the court laid down tough provisions for establishing title, obliging claimants to prove continuous and exclusive occupation, pre-dating Crown sovereignty.

Far from requiring the "implementation" of rights and title throughout B.C., "the decision does not require recognition of Aboriginal title, consent-based decision making or title-based fiscal relations" outside Tsilhqot'in territory, in the provincial government reading of it.

The letter further disputed that there was any court-dictated obligation to recognize "indigenous systems of governance and laws throughout B.C.," which was another item on the statement of principles.

"We are unaware of anything in Canadian law that gives effect to indigenous governance authority either over aboriginal title lands or beyond those lands," wrote Fyfe. "The courts have yet to recognize aboriginal rights of self-government of the kind that are alluded to in this statement. When a court is called upon to do so, it will have to consider an appropriate balancing of such laws within a constitutional democracy."

He also quibbled with the references to "indigenous peoples" in the statement of principles, saying it was "terminology used in the international context" but "it has not, to my knowledge, yet been defined for use in a Canadian context."

The letter closed by suggesting some statements of principle that the province would accept. "The regulation of lands and resources in B.C. can be enhanced if informed by First Nations uses of and relationships with the lands and resources in their claimed traditional territories," for instance, and also

that “we jointly acknowledge that there are many reasons to work toward negotiated outcomes, rather than seeking recourse to the courts.”

Putting the bluntness of his message into perspective, Fyfe asked natives to recognize that the contents were crafted through “a legal lens,” which was “only one of a number of lenses that are needed as we work through these matters.”

The Liberals would appear to have taken refuge in the “legal lens” line of defence in responding to First Nation complaints about not-in-the-least accommodating tone and content of the letter.

For when Grand Chief Ed John of the First Nations Summit mentioned the letter in passing in a speech to the all-chiefs gathering last week, he did so only to thank the premier for saying that Fyfe’s views constituted legal advice, not government policy.

Still when the province and First Nations this week released a plan for working together in the year ahead, the 13-page text included an unmistakable echo of the differences set out in the Fyfe letter:

“We have yet to come to a common understanding of what it means to engage in a government-to-government relationship based on recognition of aboriginal title and rights, as evidenced by our different perspectives on the four principles which were presented by chiefs to the province for endorsement” as last year’s session.

“This is not intended to be a long, drawn-out process,” they further maintained. But given the gap between them, I don’t see how it could unfold any other way.

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