Caroline Elliott: The reconciliation path we are on will fail

British Columbia's government is failing to govern in the public interest, and the province needs a real debate on reconciliation.

In British Columbia, major news on the reconciliation file seems to emerge almost every week. Media commentary tends to focus on the immediate implications of each development, rather than on the deeper challenges they present. But when all the government policies, multi-party agreements, and court rulings are taken together, it becomes painstakingly obvious that the path we are on is leading quickly to an unworkable situation and an ungovernable province.

I have documented multiple times over the years how B.C. government policy means decisions over public land are increasingly being made by, or require the consent of, one or more of the 200-plus Indigenous governments whose overlapping traditional territories span the entirety of the province.

I have long criticised the exclusion of non-Indigenous British Columbians from their own provincial parks, the negotiation of problematic agreements without adequate public consultation, and the troubling attempt by the B.C. government to place decision-making over 95 per cent of the province into the hands of a tiny fraction of the population.

Yet the government has continued headlong down this path, often in secrecy, ignoring valid concerns that have been raised about hundreds of distinct groups with unique interests exercising decision-making power over vast tracts of the province, on issues as wide ranging as resource-sector permitting, hunting policy, recreational access, provincial park management, and more.

Even American tribes are demanding rights over Canadian soil. The Supreme Court of Canada has already recognised one U.S.-based tribe as "an Indigenous people of Canada," meaning American citizens residing in the U.S. are entitled to Canadian constitutional rights. Just last week, another U.S. Indigenous group demanded input into infrastructure projects in B.C., such as the critically important Massey Tunnel and Pattullo Bridge replacement projects. These demands go beyond the existing consultation on transboundary effects that are already part of the process.

These assertions by U.S. groups add another layer on to already overlapping claims, such as those in Richmond by three different B.C.-based Indigenous groups that are currently disputing each other's territorial claims in court. Just last week, two B.C. First Nations announced they were seeking to quash the federal approval of the Ksi Lisims LNG project, which is being developed by the Nisga'a Nation and other industry partners. On top

of these complexities, there are also disputes within groups, as we saw with the disagreement between elected and hereditary chiefs over the Coastal GasLink pipeline.

One of the most challenging issues with the current reconciliation approach is that B.C.'s Indigenous governments have no democratic relationship with the 4.6 million non-Indigenous British Columbians who make up the vast majority of the population. While consulting with Indigenous groups on land use is consistent with democratic principles, and has long been required by the courts, entering into consent-based agreements that give Indigenous governments the power to exercise an effective veto over consequential decisions affecting the broader B.C. population is not.

Democracy demands that those affected by collective decisions have the right to participate in making them, directly or through their elected representatives. Most Indigenous governments do not allow non-members to vote in their elections, which is understandable when a group's jurisdiction affects only its own members. But when the province places much broader decision-making powers into the hands of Indigenous governing bodies, it poses a real challenge for democratic principles. This is because non-Indigenous British Columbians are affected by, and even subject to, rules made by governments they have no role in electing.

There are also concerns from a public-interest perspective. Indigenous governments rightly have a duty to consider the unique interests of their own members, which are not always aligned with the broader public interest that we entrust our provincial government to protect. When the province delegates its responsibility or enables an effective veto for these smaller groups, it raises questions about whether the public interest is being properly represented.

Put differently, the B.C. government is the only level of government tasked with looking out for the interests of British Columbians as a whole, above all else. Its ability to act in and protect the public interest is diluted each time it delegates its powers to other governing entities that do not share this mandate.

Multiple land-use planning agreements have now been signed to this effect by the B.C. government. These include the shíshálh Foundation Agreement, which gives varying degrees of decision-making power, including consent-based and even exclusive decision models, over 1.2 million acres of public land on B.C.'s Sunshine Coast to an Indigenous government representing just 1,700 people.

Another agreement establishes a joint land-use planning process, including consent requirements, with five Indigenous groups covering an area larger than England in B.C.'s mineral-rich Northwest. In this case, Indigenous groups representing a combined

population of fewer than 15,000 will be able to exercise decision-making power over a massive, economically crucial region impacting more than five million British Columbians with whom they have no democratic relationship.

Yet another agreement requires the consent of the Tŝilhqot'in Nation for any major mine in a 740,000-acre area of public land lying outside the Tŝilhqot'in Aboriginal title area recognised by the Supreme Court of Canada. This means that, again, the B.C. government has agreed to an effective veto over public land for a governing body that non-Indigenous British Columbians cannot vote for. And once again, it has failed to uphold its own basic responsibility to make decisions in the broader public interest.

At the same time, declarations of Aboriginal title over public and private land by both the provincial government and the courts are throwing long-held assumptions around property rights under a cloud of uncertainty. Last year, the provincial government's recognition of Aboriginal title over the entirety of Haida Gwaii raised serious concerns around private property, democracy, and the constraints it places on the government's ability to pursue the public interest.

Now, the Cowichan decision has similarly recognised Aboriginal title over public and privately held land in the City of Richmond, and declared certain fee-simple interests "defective and invalid," creating considerable unease for property owners across B.C. Fee simple title is the typical form of private property ownership in Canada. The ruling also states that Aboriginal title is a "prior and senior right" to fee simple title. The lead lawyer for the Cowichan Nation has gone so far as to say that current landowners in the new title area will now need the consent of the Cowichan to sell their properties.

Some claim that these government policies and legal decisions will contribute to certainty on the land base and support economic development, but the ongoing inter- and intra-group disagreements mentioned above suggest this will not be the case. Moreover, as Adam Pankratz recently wrote in relation to the Cowichan decision, "secure and strong property rights are the essential difference between rich, prosperous countries and those that suffer from extreme and ongoing poverty."

The Cowichan ruling itself describes its own uncertain consequences for property rights in stark terms: "The question of what remains of Aboriginal title after the granting of fee simple title to the same lands should be reversed. The proper question is: what remains of fee simple title after Aboriginal title is recognised in the same lands?"

When government policies and court rulings are taken together, it becomes clear that the reconciliation path we are on simply is not going to work. The impacts are far more fundamental than many realise, extending to our elected government's ability to act in the

public interest, our democratic foundations, our sovereignty, our economic prosperity, and even the way we see each other as fellow British Columbians and Canadians.

We are long past due for a real debate about how we got here, where we are headed, and whether there is still time to chart a workable path forward.

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