The Pre-Confederation Treaties of Vancouver Island and Decision-making

The Pre-Confederation Treaties reflect a vision of reconciliation, including of how decision-making about lands and resources would take place within the territories of the First Nation parties. This vision is one in which the First Nations parties would be left unhindered with respect to key elements and components of their lands, economies, and way of life, including “villages sites and enclosed fields”.

This Pre-Confederation vision was born at a time when the interested actors in decision-making were effectively limited to the treaty parties – the First Nations and the Crown as represented by the Hudson’s Bay Company. Since that time, because of the course of settlement, and the paths the Crown and settlers followed which did not respect that vision, a complicated reality emerged where many actors made claims to decision-making authority over lands and resources. This complexity arose early, when British Columbia joined Confederation without recognizing the implications and limits that the treaties placed on its asserted jurisdiction.

Affirming the original vision, close to half a century ago, the issue of provincial jurisdiction to infringe “Douglas Treaty” rights was considered in White and Bob. The issue was visited again in R. v. Morris in 2006, a case from BC concerning the North Saanich Treaty. The conclusion reached in both cases was unequivocal. Treaty rights lie squarely within federal jurisdiction over “Indians, and Lands reserved for the Indians” and, accordingly, the Province has no jurisdiction to infringe “Douglas Treaty” rights. The Court in Morris also concluded that because the Province has no jurisdiction to infringe treaty rights, it cannot rely on the justificatory test from Sparrow and Badger to justify infringements of those rights.

These decisions of the courts echo elements of oral traditions about the intent of the treaties. In the Snuneymuxw oral tradition, the treaty of 1854 was (among other things) a solemn agreement with the British Crown for respectful and peaceful co-existence. That is, it was a political agreement in which solemn assurances were given that the Snuneymuxw people could continue to live under their own laws and institutions. One of the challenges of implementing the Vancouver Island treaties is defining the scope and content of First Nation jurisdiction under the treaties and how that jurisdiction interacts with the jurisdiction of other governments.

After more than a century of provincial encroachment on treaty rights, these decisions are clearly momentous. The recognition of First Nations jurisdiction that the courts have affirmed raise serious and real questions of how lands and resources are used, and how decision-making occurs.

What are the practical implications of White & Bob and Morris for the exercise of jurisdiction by the Treaty First Nations and the Province of BC? What role exists for “Douglas Treaty” First Nation laws in regulating the use of lands and resources? Is escalating conflict over land and resource decisions affecting “Douglas Treaty” rights inevitable or do alternatives exist and, if so, what are they?