Honouring the Spirit and Intent of the Pre-Confederation Treaties of Vancouver Island - The Challenges of Treaty Interpretation

Treaties provide a living and dynamic vision and guide for structuring relationships between peoples, governments, and societies. Not merely legal instruments, treaties form part of the shared histories and futures that bind people together.

The quest to understand the meaning of treaties is often construed narrowly as a function of legal interpretation. While such a narrow focus on legalities has its place, it also comes with its limits. It tends to privilege fixed meanings over dynamic realities, written words and evidence over experiences and the spoken word, and legal structures and principles over relationships and their patterns. By its nature, methodologies of legal interpretation tend in the direction of dichotomies – correct and incorrect understandings, relevant and irrelevant evidence – and not as much on the broad, changing, and human contexts within which treaties emerge and must operate.

These limits are well seen in how the Pre-Confederation Treaties are often discussed and understood, whether in scholarly literature or in the courts. There is a tendency towards an intentionalist discourse that seeks to divine the meanings and mental constructs in play in the mid-1800’s. There is also a primacy given to the intention of written words – an irony in the context of the Pre-Confederation Treaties given that the written text of the Treaties essentially copied a deed of conveyance used in New Zealand by the New Zealand Company in agreements with the Maori. Oral histories are seen as having some relevance and use, but are often viewed through the lens of how texts might be read, and less so in relation to expectations and lives lived, including how the lives to be lived by these peoples would unfold.

Envisioning today how the Pre-Confederation Treaties will shape our lives requires an audacious imagination. In addition to relevant legal lenses, patterns of relationships and interconnections must be envisioned that carry forward the treaty vision into contemporary realities. It means shifting from a stance where beyond only a focus on divining what was intended in the 1850’s, we also focus on actively expressing the new patterns, structures, and relationships which reflect the substance of the essential reconciliation and recognition accomplished through the Treaties. This requires, amongst other things, an added focus and understanding on the worldviews, perceptions, and experiences that shape expressions of treaties today.

How do the Pre-Confederation Treaties structure relationships and interactions between peoples and governments? What roles can and should oral histories and the written text and other documents play in the interpretation of the Treaties? Can an approach to treaty interpretation be adopted that does not unduly privilege the written text of the treaties over First Nation interpretations? Is the search for a “common intention” plausible? How should treaty interpretation influence and guide processes for treaty implementation today?