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R. V. MORRIS: A SHOT IN THE DARK AND ITS REPERCUSSIONS

By Kerry Wilkins

The Supreme Court's decision in *R. v. Morris*, [2006] 2 S.C.R. 915, 2006 SCC 59, which upheld and enforced the treaty right of Tsartlip hunters to hunt safely at night with lights, is important for the practical consequences of its somewhat surprising doctrinal pronouncements. By rejecting the assumption that hunting at night is inherently dangerous, it converted what many thought would be an all or nothing issue into a matter for case-by-case attention. From now on, the Crown cannot succeed without proving, on the facts of each case, that any particular means or occasion of Aboriginal hunting is, in that instance, disqualified for reasons of safety from the constitutional protection afforded to treaty rights. On the other hand, by declaring that provinces ordinarily have no power to infringe Indians' treaty rights, on grounds that should apply with equal force to Aboriginal rights, the Supreme Court turned what many thought would be a matter for determination case by case—the relationship between such rights and provincial authority—for all intents and purposes into an all or nothing issue. In doing so, the Court departed from its earlier unspoken practice of keeping its doctrinal options open as long as possible, and it made the game of treaty (and quite possibly Aboriginal) rights assertion and litigation much riskier for all sides.

THREE ARGUMENTS FOR FIRST NATION PUBLIC NUISANCE STANDING

By Andrew Gage

Attempts to use the common law tort of public nuisance to protect the natural environment have generally been frustrated by the judicial rule that such a claim can only be brought by the Attorney General, his or her designate, or someone who has suffered a special harm from a public nuisance. Recent developments in Aboriginal law, however, present a number of compelling reasons to re-evaluate this rule of public nuisance standing. Assuming that these arguments are successful, a First Nation might choose to assert a claim in public nuisance as a less complex alternative to rights and title litigation, or as a means of avoiding the political controversy that might be generated by a title- or rights-based claim (for example, a claim in respect of private land).

The arguments in favour of First Nations public nuisance standing are three-fold. First, since the honour of the Crown is at stake in dealings with Canada's First Nations, the Attorney General may not be entitled to decline a First Nation permission to bring a claim in public nuisance. Second, since Aboriginal rights are defined in terms of activities which are "inherent" to the culture of the First Nation, any public nuisance which does or is likely to have a direct or indirect impact on those rights will, almost by definition, affect the First Nation in a manner different

from the rest of the public. This will generally amount to “special harm”, and consequently allow the First Nation to bring a claim in public nuisance. Third, a First Nation’s own laws and rules governing who may speak for the nation and its public may provide standing to bring a claim in public nuisance. Taking these arguments together, it is likely that a First Nation will be able to establish standing to bring a claim in public nuisance related to environmental harm within its territory. They also represent a compelling reason to re-examine the public nuisance standing rule more generally.

FROM PLURALISM TO TERRITORIAL SOVEREIGNTY: THE 1816 TRIAL OF MOW-WATTY IN THE SUPERIOR COURT OF NEW SOUTH WALES

By Lisa Ford and Brent Salter

In this paper we examine the trial of Mow-watty: the first Indigenous person to be sentenced to death by a Superior Court in Australia. By reviewing the Mow-watty trial, and the efforts of Governor Lachlan Macquarie to bring order and law to New South Wales’ frontiers in 1816, we argue that it is possible to trace the remnants of an older understanding of sovereignty in empire and the rudiments of a new “territoriality” in the Colony of New South Wales.

TRIBAL LAW IN INDIA: HOW DECENTRALIZED ADMINISTRATION IS EXTINGUISHING TRIBAL RIGHTS AND WHY AUTONOMOUS TRIBAL GOVERNMENTS ARE BETTER

By Apoorv Kurup

India’s population includes almost one hundred million “tribal people.” The two main regions of tribal settlement are the country’s northeastern states bordering China and Burma, and the highlands and plains of peninsular India. In this paper, I focus on the latter. An overwhelming majority of India’s tribal people inhabit this region and were only recently introduced to self-government when the Indian Parliament legislated the Panchayat (Extension to Scheduled Areas) Act, 1996 (PESA).

PESA mandated the states in peninsular India to devolve certain political, administrative and fiscal powers to local governments elected by the tribal communities in their jurisdiction. The Act was hailed as one of the most progressive laws passed since independence, granting tribal communities ‘radical’ powers to preserve their traditions and entrusting them with the authority to manage their community resources. But, after a decade, it is apparent that PESA is clearly not achieving those objectives. Blatant violation of tribal interests and the reluctance (in some cases, sheer procrastination) of the state administrations to cede authority have compelled the tribes to reassert their identity and rights. Tribal unrest has spawned violent movements across these regions, and renegade groups known as the “Naxals” have become a significant threat to India’s national security.

Despite the surge in tribal violence, there has never been a serious debate about alternative schemes for governing the tribal regions in peninsular India. Almost everybody presumes that the fault lies not with the substantive content of the law, but with its implementation. However, as I show, a major cause for the failure of governance in the tribal areas is the topdown approach of decentralization adopted in the Indian Constitution and PESA. I therefore advocate

a range of constitutional and statutory reforms that would institutionalize “tribal autonomy” (the term that I employ to refer to a bottom-up approach) and permit the tribes to maintain their individual identity while participating in national development.

SUBJECT, OBJECT AND ACTIVE PARTICIPANT: THE AINU, LAW, AND LEGAL MOBILIZATION

By Georgina Stevens

This paper draws upon previous literature on legal mobilization to assess the outcomes, both legal and non-legal, of Ainu legal mobilization from the early 1980s until 2008. After describing the historical context of Ainu cultural destruction, assimilation and portrayal as a “dying race” by the Japanese authorities in the period from the 1590s to the 1960s, the paper goes on to examine Ainu legal activism from the 1980s to 2007 in the domestic context, in Part II, and in the international context, in Part III. In Part II, Ainu legislative activism with the Ainu New Law movement and judicial activism in the Nibutani Dam, Ainu Communal Property and Group Defamation cases are described, together with their concrete legal outcomes, the influence of and on non-Ainu actors, and the effect on Ainu unity and mobilization. Part III discusses the use of coordinated lobbying with non-governmental organizations and other Japanese minority groups at United Nations human rights fora to bring about change in Ainu legal status through mobilization of *gaiatsu* or outside pressure. Part IV examines the convergence of both domestic and international legal activism in the fight for recognition of Indigenous rights and gives the outcomes up to 2008. Finally, the paper concludes by considering the achievements, significance, weaknesses and limitations of Ainu legal activism to date, including the impact on Ainu peoples themselves and their mobilization structures, and the work that remains to be done.