Philosophy 338
Philosophy of Law
2017
Note Two

Please note that this is mandatory reading

TSILHQOT'IN NATION *v* BRITISH COLUMBIA, 2014

1. *Unrecognized antecedent rights*

Some rights are considered to have been bestowed by the Creator or to be had solely in virtue of being a human being. A great many people see the right to life in these terms. In Canada it used to be the case that the state did not recognize this right if a person had been convicted of a capital offence. Opponents of the death penalty argued that the state's refusal to recognize it in such cases didn't extinguish the convict's right to life. Because the right is *inherent,* they said, it cannot be forfeit, not even in response to an offence of equivalent gravamen. In the end, this view was upheld by a free vote in the Commons in 1976, notwithstanding that at that time the majority of Canadians favoured retention of the death penalty in capital cases.

A more recent example of unrecognized rights is to be found in *Tsilhqot'in Nation v. British Columbia.* Let's turn to this now.

2. *Background*

- Before 1982, aboriginal rights existed by virtue of the common law and were subject to change by legislation. But Parliament cannot extinguish any right that existed in 1982.

- Most of British Columbia is Crown land (something in the order of 95%). Crown Land is owned collectively for the beneficial use of all British Columbians. Ownership is vested in the Province, whose function is to manage the land's resources and to protect its environment. Provincial revenues from Crown land total about 3 billion dollars p.a.

- Section 35 of the 1982 Constitution Act provides that "existing aboriginal and treaty rights" are "hereby recognized and affirmed."

- The courts had already confirmed that aboriginal rights to *use* Crown land for traditional purposes – hunting, fishing, trapping, and gathering are protected.

- Although the Province manages Crown lands and its resources, it has a duty to consult and accommodate before taking decisions which might affect these aboriginal rights. However, these rights are not exclusive (the lands are owned by all and can be used by all) and decision-making authority rests with the Crown.

- The courts have also recognized that claims may be advanced for aboriginal title (i.e. exclusive ownership and use), and in some instances, the Supreme Court of Canada has floated the idea that aboriginal title might even encompass below-ground mineral rights.

True or false, it has been Crown policy since 1871 that all mineral rights – on both public and *private* land – are vested in the Crown for the common good of the public at large.

- What would it take for a claim to aboriginal title to succeed? Common law provides the answer. For the claim to succeed, the people on whose behalf the claim has been filed must have had intensive physical occupation of well-defined tracts of land – e.g. village sites and cultivated fields.

- So it was not surprising that it was agreed on all sides that there was indeed aboriginal title to the Tsilhqot'in village sites and other lands on eight reserves totalling 12.5 km^2, where about 200 Tsilhqot'in people now live.

- The unsettled question was whether the Tsilhqot'in had aboriginal title to a vastly larger territory of Crown land – a good deal of the central interior of British Columbia – used by their ancestors prior to 1846 for semi-nomadic purposes – hunting, fishing, trapping and so on. There was no dispute about whether aboriginals had the right to *use* those lands for such purposes. The question here was whether they *owned* the lands they were free to use in these ways.

- As the trial judge observed in 2007, "Life today for Tsilhqot'in people is very different than it was at the time of sovereignty assertion, or even 50 or 60 years ago. There are few Tsilhqot'in people who travel about the Claim Area as people did in the first part of the last century. Many Tsilhqot'in people living in and about the Claim Area today are ranching and work in various occupations including forestry, park maintenance and guiding …".

- Even so, the trial judge found that the claim to title was *valid*, but denied the claim for procedural reasons which need not detain us here.

3. *The court of appeal*

- In 2012 the British Columbia Court of Appeal unanimously found the title claim to the Claim Area to be invalid. Mr. Justice Groberman, writing for the court, said

  "I do not see broad territorial claim as fitting within the purposes behind s. 35 of the *Constitution Act, 1982* or the rationale for the common law's recognition of Aboriginal title. Finally, I see broad territorial claims to title as antithetical to the goal of reconciliation, which demands that, so far as possible, the traditional rights of First Nations be fully respected without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians, Aboriginal and non-Aboriginal."

- In so finding, the Court of Appeal, in effect, accepted the *premisses* of the trial judge's reasoning but disagreed with his *conclusion.* The court above found that the claim to title didn't meet the common law test of occupancy, use and tradition in the manner that prevailed prior to 1846. In shorter words, the Tsilhqot'ins are no longer a semi-nomadic people and haven't been for over a half century at least.

- The second reason for the ruling was that the granting of title would upset the balance between the duty to recognize aboriginal rights of use and the duty to secure the sovereignty of the Crown for the common good. In other words, it would degrade the sovereignty of the Crown to no legally supportable good end.

4. *The supreme court*

- In 2014, the Supreme Court of Canada reversed the judgement of the B. C. Court of Appeal, and granted title to 1,700 km^2 of Crown land to the Tsilhqot'in Nation, removing that large tract from the ownership of the people at large, and stripping the Province of its duties of management and protection.

- The decision pivots on whether the Tsilhqot'in claim met the common law test of occupancy, usage and tradition in the pre-1846 manner. The court found that it did meet that test, declaring in effect that what matters is whether the claim would have succeeded if pressed in (say) 1840 had that section of the Act prevailed then. What matters is not whether Tsilhqot'ins are semi-nomadic now. What matters is whether they were semi-nomadic then.

- The court's ruling gave no weight to the social changes within the Tsilhqot'in family and way of life during the 150 years since 1846.

- It is odd, to say the least, that a court which since 1982 has increasingly recognized the legal force of *social change*, in matters such as same-sex marriage or physician-assisted death, could be so tone-deaf to it in the present case.

- The court's ruling made no mention of the twin duties of respect for aboriginal rights of use and respect for the sovereignty of the Crown, or of the law's long-held insistence that the balance of these duties be judiciously maintained. In this case, it seems, the court abandoned its obligations of reconciliation.

5. *Section 35*

Section 35 of the *Constitution Act, 1982* reads as follows:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indians, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claim agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) "are guaranteed equally to male and female persons".

- Please note that this section is not part of the Charter, whose sole specific reference to aboriginal rights is to be found in *s*. 25. We will come back to this point later in the course.

Given the court's rationale as I have summarized it in this note, are you able to cite any point in the wording of *s*. 35 that supports it? Please be prepared to discuss at our next meeting.

In preparing this part of the note, I've leaned heavily on 2015 unpublished op-ed piece by S. Bradley Armstrong QC, entitled "Crown lands and aboriginal titles". I thank him most warmly for his consideration and assistance.

6. *Interpretation*

- When a court interprets a section of the constitution, or a statute or an earlier juridical ruling, it seeks to acquire an understanding of its *meaning.* The question of meaning is a central preoccupation of the philosophy of language, which (note well, please) we now add as a working partner of establishment epistemology: first order deductive logic, inductive logic + probability theory, rational decision theory, justificationist theories of knowledge, now officially joined by the philosophy of language.

- We now have a way of reformulating the question I put in the last two lines of the section above. We can paraphrase it as follows:

  > "Where, if anywhere, is the rationale for the SCC ruling in *Tsilhqot'in*, to be found in the meaning of the words in *s*. 35?"

In the philosophy of language, a theory of meaning is called a *semantic* theory, often abbreviated as *semantics.*

- Suppose now that you've got a spot of trouble with the income tax authority. Citing some section of the Income Tax Act, they say that you owe them $1,000. Suppose now that you read that section of the act, and respond as follows:

  > "Given the meaning of what that section forbids, my conduct doesn't violate it. Therefore, your claim against me is without merit."

Here's a bit more supposing. Suppose you appeal the authority's ruling to the Federal Tax Court, and lose, on the grounds that what you did indeed is a violation of the act *within the meaning of that section*. In desperation, you seek out the top people in the empirical linguistics of English, and ask whether your conduct violates the act within the meaning of that section, and that the answer that they give you is

> "Heck no! Whatever the court said it means, it doesn't mean that *in English*. Tough luck brother, that's what it means in *law*!"

On the face of it, if true this puts the federal court in disharmony with the rule of law. If so, that would be a serious misperformance of one of the law's most fundamental duties. If true, it would convict the court of *semantic coercion*, the fault of making by the force of law words mean what they don't mean in fact. (Stay tuned!)