1701 Treaty, Newfan/ Albany Deed

File No. 539/99, 09/99, 20/99, 39/99

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

- against -

GREGORY BARBERSTOCK
SHAWN BRANT
JOSEPH MARACLE
MARIO BAPTISTE

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REASONS FOR JUDGEMENT

BEFORE THE HONOURABLE MR. JUSTICE L.T.G. COLLINS
on WEDNESDAY, APRIL 9, 2003,
at CAMPBELLFORD, Ontario

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CHARGE: S. 9(1) FWCA - Unlawfully hunt in Provincial park x3
S. 9(2) FWCA - Possess firearm in Provincial park x2
S. 2(1)(a)(ii) TPA - Engage in prohibited act x2
S. 2(1)(a)(i) TPA - Enter premises when prohibited
S. 26(1) GFA
S. 26(2) GFA

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V O L U M E XI

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APPEARANCES

B. GOVER — Counsel for the Crown
B. WILKIE (MNR Prosecutor) — Counsel for the Crown

J. DOLGIN — Counsel for the Accused
S. REYNOLDS

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REASONS FOR JUDGEMENT

L.T.G. COLLINS, PROV. J. (Orally):

This is a constitutional issue affecting the cases of Gregory Barberstock, Shawn Brant, Joseph Maracle and Mario Baptiste. The respondents are charged with unlawfully hunting wildlife contrary to the *Fish and Wildlife Conservation Act*, possessing firearms in a provincial park contrary to the *Fish and Wildlife Conservation Act* in addition to charges pursuant to the *Game and Fish Act* and *Trespass to Property Act*. The charges arose as a result of activities in Presqu'ile Provincial Park. The respondents are Mohawk Indians and submit that these provincial statutes do not apply to them in this location.

The respondents argue that their rights to exercise free hunting can not be restricted by provincial legislation by virtue of Section 88 of the *Indian Act* which makes provincial laws of general application subject to the terms of any treaty. The treaty upon which the respondents rely is the Albany Deed of 1701.

At this point I must quote extensively from the well crafted decision of Justice Gautreau in His Honour's decision of Regina vs. Ireland and Jamieson 1991 [10.R. (3d)] page 577 at page 580:

The Treaty

The treaty of 1701 was signed by John Nanfan, the Lieutenant Governor of New York (the Governor, the Earl of Bellomont, having died), and by Robert Livingston, Secretary for Indian Affairs and other officials on behalf of the British. All Five Nations of the Iroquois Confederacy, including the Oneidas, were parties and approximately 20 sachims (chiefs) affixed their signs and seals.

The treaty describes the land which are "in length about eight hundred miles and in breadth four hundred miles," gives the history of the Indians' title and describes its importance to them for hunting:

> ...our predecessors did four score years agoe totally conquer and subdue and drove them out of that country and had peaceable and quiet possession of the same to hunt beavers (which was the motive caused us to war for the same) for three score years it being the only chief place for hunting in this part of the world that ever wee heard of and after that wee had been sixty years sole masters and owners of the said land enjoying peaceable hunting without any internegotion, a remnant of one of the seaven nations called Tionondade whom wee had expelled and drove away came and settled there twenty years agoe disturbed our beaver hunting against which nation wee have warred ever since and would have subdued them long ere now had not they been assisted and succoured by the French of Canada...

The treaty then cedes the land to the King of England and reserves hunting

rights to the Indians which the King of England guarantees:

> Wee say upon these and many other good motives us hereunto moveing have freely and voluntary surrendered delivered up and for ever quit claimed, and by these presents doe for us our heires and successors absolutely surrender, deliver up and for ever quit claime unto our great Lord and Mater the King of England called by us Corachkoo and by the Christians William the third and to his heires and successors Kings and Queens of England for ever all the right titles and interest and all the claime and demand whatsoever which wee the said five nations of Indians called the Maquase, Oneydes, Onnondages, Cayouges and Sinnekes now have or which wee ever had or that our heirs or successors at any time hereafter may or ought to have of in or to all that vast Tract of land or Colony called Canagariarchio beginning…contenining in length about eight hundred miles and in breadth four hundred miles including the County where Beavers and all sorts of wild game keeps and the place call Tjeughsaghrondie alias Fort de tret…

There then follow the words which are critical in this case:

> …provided and it is hereby expected that wee are to have free hunting for us and the heires and descendants from us the Five nations for ever and that free of all disturbances expecting to be protected therein by the Crown of England…

The Issues

The fundamental issue is whether the hunting right contained in the treaty

exempt the accused from prosecution under the charging sections of the *Fish and Wildlife Act*, the *Game and Fish Act* and the *Trespass to Property Act*.

Section 88 of the *Indian Act* makes provincial laws of general application subject to the terms of any treaty. It reads:

> 88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

Aboriginal and treaty rights are entrenched in the *Constitution Act, 1982*. Section 35(1) of the Act reads as follows:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

End of quote.

HISTORICAL BACKGROUND

The Court has had the benefit of a report (Exhibit 4) and testimony of Victor P. Lytwyn and has learned the following historical facts:

The Iroquois Confederacy consisted of five tribes south of Lake Ontario. The Seneca were the guardians of the West Gate just east of the eastern shore of the Niagara River. Next to them were the Cayuga, Onondaga, and Oneida. The most easterly tribe was the Mohawk, the guardian of the Eastern Gate.

In the 17th century the Iroquois presence was not restricted to this homeland. Parties of Iroquois traders had traveled as far north as James Bay and as far south as Louisiana.

The arrival of the Europeans was a major cause of wars between the Iroquois and other tribes. Beaver furs were greatly valued by the French, the Dutch and the English. There were very few beaver south of Lake Ontario, whereas there were many beaver north of Lake Ontario and around the Upper Great Lakes. In these wars the Iroquois were successful in dispersing the Hurons from Georgian Bay, and the Neutrals and Tobacco people from south-western Ontario. By 1651 south-western Ontario was the Beaver Ground of the Iroquois.

During this time it appears that hunting camps were established by the Seneca, Cayuga, Onondaga and Oneida along the north shore of Lake Ontario near Burlington, Etobicoke, Oshawa, Port Hope, Belleville, Napanee and near Alderville on the south shore of Rice Lake. It appears likely that

these hunting camps were populated by more than just hunters. These villages were strategically placed to control the routes to the northern hunting grounds. By 1672 the French began to build forts along the north shore of Lake Ontario to force the Iroquois to switch their trading from the English to the French. The growing hostilities between the French and the Iroquois enabled the Ojibwa to expand from north of the Great Lakes down into south central Ontario. After a number of battles with the Iroquois the Mississauga Ojibwa and their allies were able to displace the Iroquois from the north shore of Lake Ontario. However, it appears that some Mohawk hunters continued to hunt north of Lake Ontario up to 1701.

In 1700 the Five Nations attended a preliminary Counsel Meeting at Montreal with the Chiefs from 19 other First Nations. The delegates agreed to return to Montreal the following year to ratify the "Great Peace" Treaty from that meeting. Throughout this process the Five Nations kept the British advised of the proceedings.

In 1701 a treaty conference occurred in Albany. From that conference came the Albany Deed. In that Deed the Five Nations purported to cede a territory 800 miles by 400 miles to the English. In return for the land the English were to provide protection to the Five Nations and free hunting for them and their descendants forever on that land. Exactly

what land was described has been the matter of dispute in this and in other cases. The land has been described in the deed as follows:

> That vast Tract of land or Coloney called Canagariarchio, beginning on the northwest side of Cadarachqui lake [Lake Ontario], and includes all that vast tract of land lyeing between the great lake of Ottawawa [Lake Huron] and the lake called by the natives Cahiquage, and by the Christians the lake of Swege [Lake Erie], and runs till it butts upon the Twichtwichs by which are called Quadoge, conteining in length about eight hundred miles and in breadth four hundred miles, including the Country where the Beavers and all sorts of wild game keeps and the place called Tjeughsaghrondie...

I'll have that spelled for the benefit of the Reporter.

> ...alias Fort De Tret or Wawyachtenock [Detriot], and so runs round the lake of Swege [Lake Erie] till you come to a place called Oniadarundaquat, which is about twenty miles from the Sinnekes castles, including likewise the great falls oakinagaro [Niagara].

In interpreting a treaty between the Crown and Indians this Court is guided by the words of Mr. Justice Lamer in Regina vs. Sioui (1990) [56 CCC (3d) at 233]:

> Finally once a valid treaty is found to exist, that treaty must in turn be given a just, broad and liberal construction. This principle, for which there is ample precedent, was recently reaffirmed in *Simon*. The factors underlying this rule were eloquently stated in *Jones v.*

Meehan, 1975 U.S. 1 (*1899*), a judgement of the United States Supreme Court, and are I think just as relevant to questions involving the existence of a treaty and the capacity of the parties as they are to the interpretation of a treaty (at pp. 10-1):

> In construing any treaty between the United States and an Indian tribe, it must always be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of a legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

The Indian people are today much better versed in the art of negotiation with public authorities that they were when the United States Supreme Court handed downs its decision in *Jones*. As the document in question was signed over a hundred years before that decision, these considerations argue all the more

> strongly for the courts to adopt a generous and liberal approach.

With this approach in mind the Court must consider whether the land now known as Presqu'ile Provincial Park was included in the Hunting Grounds contemplated by the parties to the 1701 Albany Deed. The position of Dr. Lytwyn is best expressed in his report (Exhibit 4) at page 24:

> The Montreal Peace Treaty and the Albany Treaty of 1701 were negotiated apart from one another and involved different parties. The Five Nations, however, were involved in both and had similar objectives in each treaty. In the Montreal Treaty, the Five Nations were interested in securing shared access to hunting grounds north and west of Lake Ontario and Lake Erie. In the Albany Treaty, the Five Nations were interested in obtaining British protection to hunt freely in the same territory. In both treaties, the Five Nations succeeded in securing their main objective. The Albany Treaty and Montreal Treaty of 1701 were recalled in many Council Meetings between representatives of the Five Nations and the British Crown after 1701. A sample of these references can be seen in Victor Pr. Lytwyn, "A Dish with One Spoon: The Shared Hunting Grounds Agreement in the Great Lakes and St. Lawrence Valley Region," at pp.pp 210-227, in: *Papers of the Twenty-Eight Algonquian Conference.* David H. Pentland, ed. Winnipeg: University of Manitoba Press (1997) [DOCUMENT 1997/01/01].

The Court had the benefit of the testimony of Elder William Two Rivers providing the Court with the oral tradition with respect to the Beaver Hunting

Grounds. He described the tradition of shared Hunting Grounds and the wampum belts used for the commemoration of the agreements for those shared hunting grounds. He points out that the Montreal Peace Treaty of 1700 had been arranged to promote the free movement of furs to Montreal. It was clearly in the interest of the French to see that the Five Nations and the other First Nation people could peacefully share the hunting grounds. It was in the following year the Five Nations participated in the Albany Deed in order, among other things, to get the best possible price for their furs.

The respondent to this application called as an expert witness; Alexander von Gernet, P.H.D. who is an anthropologist and ethno historian specializing in the use of archaeological evidence, written documentation, and oral traditions to reconstruct the past cultures of aboriginal peoples (including the Iroquois) as well as, the history of contact between aboriginal peoples and European newcomers throughout Canada and the neighbouring states of the United States. Dr. von Gernet pointed out that no scholar seems to have written a specific treatise on the 1701 Deed. He says that the treaty was promulgated for the purpose of advancing diplomatic argument on behalf of the Iroquois and the English against the French. He says the Deed was not seriously intended by either side to be a real treaty. He points out that the Deed shortly after its signing fell into obscurity and has only

recently been resurrected as a "serious treaty." He goes on to point out that the "Great Peace" to which the five nations were parties in Montreal, August 4, 1701 in fact rendered obsolete the Albany Deed which had been signed a few days earlier. This obviously was not the opinion of His Honour, Judge G.A. Phillips in Regina vs. Ireland and Jamieson *supra* nor of Mr. Justice Gautreau on appeal although this argument may not have been presented to them. The treatise of Dr. von Gernet does not persuade me to differ with the position of those two judges.

In describing the land that was the subject of the 1701 Deed, the courts dealing with the case of Regina vs. Ireland *supra* had to wrestle with the description of the land without the benefit of any kind of map. It appears that no one made a serious search for such a map because a letter written shortly after the signing of the Deed asserted that the map had suffered some damage. Dr. von Gernet in preparation for the case at bar traveled to England and in fact was able to unearth a copy of the "Clowes" map that was drawn on that occasion. Clowes was a surveyor and also a signatory to the Deed. Dr. von Gernet pointed out that the Indians were very interested in the style of map-making of the English and accordingly he is of the view that the lands shown "within the prick'd line" were the lands understood by both parties to be the subject of the Deed. The map itself is rather crude

especially in the westerly portions. This is understandable because in contrast to the French, the English had done very little exploring west of Niagara Falls.

The prick'd line on the map appears to start near present day Toronto on the south side of Lake Ontario. It seems to proceed directly west to cut through present day Michigan and the Indiana before turning south. The line then proceeds to the east around the southern side of Lake Erie up into Five Nations territory. Among the other interesting features of the map is a reference to a French Fort on the north shore of the east end of Lake Ontario. This appears to be the Fort that was later named Fort Frontenac. I also not with interest that the land that was the subject of Regina vs. Ireland *supra* definitely falls within the perimeter of "the prick'd line."

SUMMARY

1. The Albany Deed of 1701 is a treaty binding the Crown. It is a treaty within the scope of S.88 of the *Indian Act*.
2. Where the Deed conflicts with the legislation of the Province, the Court must be mindful of the paramountcy of the *Indian Act* as federal legislation.
3. The treaty must give "a just, broad and liberal construction" Regina vs. Sioui [(1990) S6 CCC (3d) pg. 225 at 233].

4. The testimony of oral tradition does not refer to the Albany Deed and does not establish the fact that Presqu'ile was part of the Mohawk hunting grounds in 1701. These lands were in the control of the Mississauga Ojibwa.

5. The Clowes map confirms that the lands contemplated to be the subject of the Albany Deed did not include lands on the north shore of Lake Ontario east of what is now Toronto.

Accordingly, on the Albany Deed, I find, is a binding treaty, the lands described therein do not include Presqu'ile. Do counsel need 15, 20 minutes before we carry on? How much time do you need?

MR. WILKIE: Fifteen would be fine.

THE COURT: Fifteen.

MR. DOLGIN: Fifteen's good.

THE COURT: Fifteen, very well.

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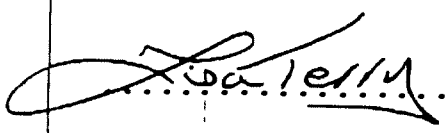

Lisa Terry
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