Part 3

The "Nanfan Treaty" – Legal Considerations

Is the "Nanfan Treaty" legally valid? Does the *1701 "**Conveyance of lands by the Native American Chiefs of the Five Nations**"* constitute a valid treaty between the Crown and the Indians? Do the Haudenosaunee have a valid case to claim hunting rights in the Dundas Valley Conservation Area? Does the Hamilton Conservation Authority have the right to enter into relevant Protocol Agreements with the Haudenosaunee, based on alleged "treaty rights"? Were the Ontario learned justices in *R. v. Ireland and Jamieson [1990]* and *R. v. Barberstock [2003]* wrong? Is the Ontario government wrong?

On June 6, 2011, the Hamilton Spectator published an article, "Treaty covers HCA lands: Bentley", in which it reported:

> *"Ontario's attorney general and minister of aboriginal affairs says Six Nations' hunting and fishing treaty rights apply in lands owned by the Hamilton Conservation Authority (HCA)."*
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> *"In a letter received by the authority last month, Chris Bentley said the 1701 Treaty of Albany (or Nanfan Treaty) provides for the continuation of Six Nations "hunting and fishing activities on the lands subject to the treaty. The lands owned by the Hamilton Conservation Authority are within this treaty territory. /…/*
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> *"HCA general manager Steve Miazga said the letter, which was accepted at the board of directors' annual general meeting Thursday, "builds on" the recommendations they received from police and the Ministry of Natural Resources' enforcement branch to "build the relationship with the Haudenosaunee regarding environment matters. /…/*
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> *"Bentley wrote that he "fully support(s)" an agreement that was reached to respect the treaty rights of Six Nations people to hunt deer in the area for food. "This approach represents reconciliation in action," he said."*

The Government of Ontario has recognized the 1701 Albany Deed as a treaty, following two Ontario court decisions (***R. v. Ireland and Jamieson [1990]*** and ***R. v. Barberstock [2003]***). These decisions heavily lean on the Supreme Court of Canada decision in ***R. v. Sioui [1990]***. Both extensively quote Chief Justice Lamer's analysis and conclusions, and apply them to the ***"Conveyance of lands by the Native American Chiefs of the Five Nations"*** *(Conveyance of Lands),* also known as the *Albany Deed of 1701* or the *Nanfan Treaty*.

The ***R. v. Sioui [1990]*** decision refers to a different case and different document that, in my view, are incompatible with the ***Conveyance of Lands*** and the alleged hunting rights of the Six Nations. The key questions, in both cases, focused on the determination:

- whether or not a certain document constituted a treaty between the English Crown and the Indians within the meaning of the *Indian Act;*
- if yes, is this treaty still operative today.

To make this determination, Chief Justice Lamer (in *R. v. Sioui*) considered the following issues:

1. The *capacity* of the parties to enter into a treaty (the question of competency);
2. The existence of an intention, on both sides, to create mutually binding obligations that would be solemnly respected;
3. The historical context and evidence relating to facts which occurred shortly before or after the signing of the document;
4. Compatibility between the exercise of the treaty rights by the Indians and the purpose underlying the occupancy of the land by the Crown (or any organization acting on behalf of the Crown).

Based on these criteria, the analysis and justifications used by Chief Justice Lamer in support of his recognition of Gen. Murray's *written note* of 1760 as a "treaty" do not apply to the *Conveyance of Lands* of 1701. Here are just a few differences between these two documents:

A significant difference between the applications of these two documents exists in the "intended use" of the land. While the exercise of religious and cultural activities by the Huron Indians does not interrupt public access to and use of the Jacques-Cartier Provincial Park, the deer hunt by the Six Nations' Indians resulted in a closure of the western part of the Dundas Valley Conservation Area for a period of:

- 18 days in 2011
- 31 days in 2012/13
- 24 days in 2013/14

General Murray's note was written and signed by the party granting the "treaty" rights on behalf of the Crown. *Conveyance of Lands* was written (or dictated) and signed by the party asking for and expecting the rights – (the Five Nations' sachems). It is worth noting that, contrary to the beliefs of the Ontario courts and the Ontario government, the *Conveyance of Lands* was signed only by the Five Nations' sachems. John Nanfan signed this document on the reverse, following his hand-written note, *"This is a true Coppy –",* merely confirming the authenticity of the document as a witness. He did not make any promises with respect to the hunting rights neither in the document itself nor during the conference in Albany leading to the signing ceremony. Therefore, no *"intention to create mutually binding obligations"* with respect to any hunting rights was ever expressed by the party representing the Crown. Alleged fishing rights were never mentioned in this document and, as such, are a sole creation of Chris Bentley's imagination.

Historical context is very different in these two cases. The Huron Indians, whose treaty rights were confirmed by Justice Lamer in *R. v. Sioui [1990]*, have actually occupied and used the land in question, (the Lorette Indian Reserve and the current Jacques-Cartier Provincial Park area), at the time when Gen. Murray was issuing his note, dated September 5, 1760 and later recognized as a "treaty." General Murray himself was in military control of this territory. The Indians have exercised their religious and cultural customs in that territory both before and after the treaty was executed. There was a continuation of these religious and cultural activities, indicating the intention of both parties to uphold the obligations arising from the treaty.

In contrast, the Five Nations, who signed the *Conveyance of Lands* on July 19, 1701, did not, at that time, occupy or use the lands specified in this document. Between 1696 and 1700, they have retreated to their homeland, south of Lake Ontario, as a result of a lost war with the French and the Ojibwe. In June of 1700, (thirteen months before the *Conveyance of Lands* was signed in Albany), they surrendered these lands to the Ojibwe Mississaugas in exchange for peace. Governor Nanfan did not control these lands, either. As part of the Treaty of Ryswick between England and France, signed in 1697 – (four years before the so called Nanfan Treaty), the English Crown agreed that the land of the northern shores of Lake Ontario was part of New France (French Territory). Therefore, neither the sachems of the Five Nations nor Governor Nanfan had the capacity, based on authority, control, or ownership, for either disposing of the lands specified in the *Conveyance of Lands* or granting any rights within these lands.

The lack of continuance in the Five Nations' occupancy of the alleged "treaty" territory is evident. It did not exist for at least 13 months before the signing of this document. It did not exist for 83 year after the signing of this document, until October 1784, when Governor of the Province of Quebec Frederick Haldimand granted part of this land to the Iroquois who had served on the British side during the American Revolution. Only then, part of the Six Nations' population, led by General Joseph Brant, officially returned to today's Ontario and to British North America (today's Canada). It is worth noting that, in May of 1784, Haldimand bought this land from the Ojibwe Mississauga Indians, which clearly proves that the Crown considered the Mississaugas to be the rightful owners of this territory. Earlier, the Seneca, in the Fort Niagara Treaty of 1764, ceded the west bank of the Niagara River to the Crown. Again, this was a land allegedly deeded by the Five Nations to the Crown in the 1701 "Nanfan Treaty". In 1781, the Crown listed payment of that 4 mile strip as going to the Mississauga Indians. Clearly, the Crown did not recognize the *Conveyance of Lands* as a binding document. Even today, the Federal Government of Canada does not include a "Nanfan Treaty" in its listing of Indian treaties.

Numerous pieces of evidence support these historical facts. These include:

- The original *Conveyance of Lands* document currently held at the National Archives in Kew, Surrey, England;
- Colonial Papers of the State of New York;
- The records of the Lords of Trades and Plantations for the New York Colony;
- The 2003 Ipperwash Inquiry report by Dr.Darlene Johnston - (pp. 9 - 12);
- The 2006 Indian Land Claims Commission report - (pg. 9);
- The 1840 aboriginal meeting with Chief Yellowhead and the Six Nations of the Grand River…

…and many other records.

However, in determining whether or not the *Conveyance of Lands* constitutes a treaty between the Crown and the Five (later Six) Nations, it is not necessary to explore all this evidence. In Part IV ("Analysis") of his *R. v. Sioui [1990]* decision, Chief Justice Lamer stated:

> *"B. Questions of Capacity of Parties Involved*
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> *"Before deciding whether the intention in the document of September 5, 1760 was to enter into a treaty within the meaning of s. 88 of the Indian Act, this Court must decide preliminary matters regarding the capacity of Great Britain, General Murray and the Huron nation to enter into a treaty. If any one of these parties was without such capacity, the document at issue could not be a valid treaty and it would then be pointless to consider it further."*

Did the Five Nations' sachems have the necessary *capacity* to enter into this "treaty"? To answer this question, one must consider the subject of this particular document, as the concept of *capacity* relates not only to the ability in terms of skills and understanding, or to the authority and validity of representation, but also to the competency in terms of control and ownership of the territory that was "deeded" to the Crown by the Five Nations' sachems. To determine the *capacity* of the Five Nations' sachems to deed the territory listed in the *Conveyance of Lands* to H. M. King William III, the ownership of this land, as of July 19, 1701, must be first established.

Existing historical evidence clearly shows that, in 1701, the Five Nations did not "own", occupy, control, or use these lands. These lands were not abandoned – they were occupied and used by the new owners, the Ojibwe Mississauga Indians. A year earlier, the Five Nations have surrendered these lands to the Ojibwe. According to the Treaty of Ryswick between England and France (1967), the lands involved were also part of the French Territory, under the sovereign administration of New France. Therefore, Governor Nanfan or the Crown itself, did not have necessary legal capacity to make decisions regarding the use of this land for hunting or for any other purposes.

Later, in his analysis of the capacity of the Hurons to enter into a treaty with the Crown, Justice Lamer stated, *"I consider that a territorial claim is not essential to the existence of a treaty."* In the context of the *R. v. Sioui [1990]* case, this may be so, as Justice Lamer was addressing the claim by the appellant that *"the Hurons could not enter into a treaty with the British Crown because this Indian nation had no historical occupation or possession of the territory extending from the St-Maurice to the Saguebay"* - (having moved to this land, after being expelled from Huronia by the Iroquois in early 1650s). However, in 1760, they had current occupancy, control and use of the territory in question that had continuously lasted for at least 110 years prior to 1760. In the context of the so called "Nanfan Treaty", which included the offer of territory in exchange for hunting rights, a decision that a current title to a territory (in 1701) by one party trading it away to another party was *not essential* would lead to an absurd, as it would allow any Indian band to gain "treaty rights" by "deeding" to the British Crown (for example) part of Northern France or part of Russia.

The principle *"**Nemo dat quod non habet**"* has been enshrined in common law since ancient times. In 1701, it was included in English common law. It did not require a sophisticated comprehension or legal knowledge to understand its essence. It simply meant that a person (or a party) could not give a better title than the one they had. On July 19, 1701, the Five Nations' did not have a title to the lands they attempted to give to the Crown. They were not in a position to offer this land to anyone. By "deeding" the lands they no longer occupied and no longer owned, control or use, they demonstrated lack of capacity to enter into a legally binding agreement involving the title to the said lands.

In the words of Chief Justice Lamer, ***"If anyone of these parties was without such capacity, the document at issue could not be a valid treaty and it would then be pointless to consider it further."***

This means that the *"Conveyance of lands by the Native American Chiefs of the Five Nations"* is not a valid treaty. "Nanfan Treaty" does not exist.