

Hamilton's proposed Red Hill Valley expressway project violates important 1701 Crown - Iroquois Treaty rights

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We have recently again seen the sad spectacle of use of force by the state to try to vanquish a small native assertion of Aboriginal and Treaty rights, this time in the wild, game-rich jewel that is the Red Hill Valley in Hamilton. However, there's still a centuries-old huge red granite boulder buried in the path of the City of Hamilton's proposed Red Hill Valley expressway. We believe it'll take more than bulldozers, dynamite, a new mayor, or the Hamilton police to get it out of the way.

Fast rewind 300 years or so to Albany, New York and Montréal, Québec in 1701. The French and British were both trying to make North America theirs, and a key strategic balance lay in alliances with the militarily and strategically powerful Iroquois and other native nations of the Great Lakes region. In what numerous scholars have termed a stroke of diplomatic genius, the five Iroquois nations succeeded in simultaneously entering into treaties of peace, friendship and protection with both of these European powers.

For our purposes here in Hamilton in 2003, the Albany Treaty of 1701 is the more significant one. In return for the peace and friendship of the Iroquois, the five Iroquois Nations extracted fundamentally important promises of protection and security from the Imperial Crown, particularly with respect to their territory around Lakes Erie, Huron and Ontario (and including the present city of Hamilton). These promises are clearly treaty rights as envisaged in our 1982 *Constitution Act*,

and are still binding on our governments including the new City Council of the New City of Hamilton.

A 1990 Ontario court ruling in the *Ireland* case confirms the validity and force of the Albany Treaty of 1701 between “*Master 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*” and the “*five nations of Indians called the Maquase, Oneydes, Onnondages, Cayouges and Sinnekes*” concerning “*that vast Tract of land or Colony called Canagariarchio beginning ... containing in length about eight hundred miles and in breath four hundred miles including the Country where Beavers and all sorts of wild game keeps and the place called Tjeughsaghrondie alias Fort de tret*” [now the greater Hamilton area].

As stated by the Court, “There then follows 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 ...*”

This sentence in old English, clearly declares that the Iroquois people, and their heirs and descendants are to have free hunting, free of all disturbances, protected by the Crown of England, forever, in defined territory – which includes the Red Hill Valley.

Early in the 1980's, one of us found himself by coincidence in the company of a large group of Canadian “Indian” Chiefs on a flight to London, England. They were headed for the Court of St. James to try to prevent the assignment and transfer, in the context of the

impending patriation of the Constitution of Canada, of their treaty relationship with the Crown from the Imperial Crown to the “Crown in Right of Canada”.

Like Nelson Mandela's forebears who tried in vain to ensure that their human rights be protected as the Union of South Africa was being constituted at Westminster in 1910, they were less than successful: the Law Lords of the U.K. Court of Appeal ruled on January 28, 1982 that the Crown was now separate and divisible, and that the Crown's solemn treaty obligations to the Indians now lay with the “Crown in Right of Canada”. Once again, the Mother of all democracies tossed the thorny question of its post-colonial obligations concerning the rights of the natives into the hands of the white settler government.

All was not bleak, however, in 1982 or since. In the 1982 ruling of the U.K. Court, the illustrious Lord Denning stated that the promises contained in treaties with the Indians must be upheld by the Crown: “*No Parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada as long as the sun rises and the river flows. That promise must never be broken.*”

First Nations leaders did succeed in forcing Canadian Governments to emplace in the new Constitution Act of 1982, a “Part II” concerning the collective rights of Aboriginal Peoples (alongside, but importantly separate from Part I, the Charter of Rights and Freedoms concerning the individual rights and freedoms belonging to the rest of us). Part II, Section 35, of the 1982 Act, the highest law of the land, declares that “the existing aboriginal

and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”.

Plain and simple, since 1982 the Crown’s treaty promises to the Indians, and their pre-existing Aboriginal rights, have been re-affirmed as being among the highest constitutional obligations of the governments of the land, and no longer subject to the unilateral actions of Crown breach and extinguishment that had been the practice of earlier, less respectful eras. (These rights have been affirmed many times before in the highest law of the land, for example in the Royal Proclamation of 1763.)

This affirmation has since repeatedly been confirmed by the Supreme Court of Canada and numerous other authorities to mean what it says, namely that the treaties with Native nations in Canada are “sacred promises”; they are obligations in which “the honour of the Crown is at stake”; they are to a certain extent legally paramount over provincial legislation, even statutes of general application; they must be interpreted purposively, broadly, liberally, and in a manner that is generally consistent with the native signatories’ understandings; and any infringement of these promises must meet very high levels of justification.

Accordingly, notwithstanding the passage of two centuries, the nine (non-native) justices of our Supreme Court recently upheld the 1700’s treaties of peace and friendship with the Mi’kmaq up to the light. They agreed with Mi’kmaq fisherman Donald Marshall Jr.’s assertion that the Mi’kmaq nations had kept their side of the treaty deal for 200 years (they never did side with the American rebels), and accordingly that the treaty promises made to them in the 1700’s still bind the Crown going into the 2000’s -- to the effect that that Marshall and his people still have a priority treaty right to fish, sell their catch, and be free from molestation by Her Majesty’s troops.

Can we take comfort here in Hamilton that the Iroquois have perhaps abandoned their 1701 treaty rights -- also involving peace, friendship, protection and non-disturbance -- in and to the Red Hill Valley? No, says the Ontario court in *Ireland*: “A treaty is a solemn, sacred agreement between the Crown and the Indians and there are

sovereign elements to it. This being the case, much more is required than mere non-use to show abandonment - even if the non-use is for 150 years.”

Yes, “we” have simply occupied and stolen much of the rest of the 1701 territory identified in the treaty and on the treaty map. However, surely this makes the rights of the Iroquois people and their “heires and descendants” to be “free of all disturbances” in the modest remaining Red Hill Valley corner of their original 1701 hunting territory so very much more important. It is a corner that is clearly still very amenable to the exercise of these economically, culturally and spiritually fundamentally important hunting and other treaty rights.

But have the Iroquois’ rights in the Red Hill Valley not been unilaterally extinguished by Crown occupation of much of the rest of the 1701 Beaver Hunting Ground or our use of the valley itself? Again, in *Ireland*: “I think it can now be said that a treaty and the rights created under it cannot be unilaterally extinguished. It requires consent.” The Sacred Fire burning in the Valley (until it was recently removed at the behest of the police) showed clearly we don’t have it.

Contrary to the pronouncements of the new Mayor immediately after the election, fundamental rights and liberties are not a question of majority rule popularity contests. The Mayor needs to be reminded that Constitutions exist precisely to protect fundamental rights, especially the rights of vulnerable peoples (such as the Iroquois) or minorities, and *precisely when they are unpopular to overall populations and mobs, city councils, or police forces*. If just one person wishes to assert, say, her constitutional freedom of expression or her treaty right to hunt in an otherwise “unpopular” but legally-protected manner, all of our rights are diminished if we tolerate her being silenced or removed, or her rights being extinguished.

Treaty rights are nation-to-nation rights and obligations, including according to our own Supreme Court. Our Canadian nation may no longer find these rights and obligations convenient, such as when we want to expand “our” Oka golf-courses, “our” Ipperwash provincial campgrounds, or “our”

Hamilton expressway networks – and especially when the Indians’ reserves or their hunting and sacred burial grounds are the only “vacant” lands in which we can do so without having to expropriate non-native voters’ properties for the purpose.

Significantly, governments and councils at Oka, Ipperwash and Burnt Church all declared they had the law on their side. They did not. They also stated that the Indians were illegals, and used injunctions and even force and to try to obscure, roll over and ultimately deny the aboriginal and treaty rights issues involved. They were unsuccessful. The land and fisheries concerned are still in native hands, despite hundreds of wrongful arrests and even some fatalities.

As declared by the court in *Ireland* concerning the 1701 Albany Treaty, it would be “unreasonable for the Crown to argue that its legal title and its right to use, develop and enjoy the lands can frustrate, and in effect abolish, the hunting rights of the Indians.” And once again, as stated by Lord Denning, that promise “*should be honoured by the Crown in respect of Canada as long as the sun rises and the river flows*” and “*must never be broken*.”

What on earth makes us think, in light of these various court judgments, that what was recently done in our name to the Iroquois’ Sacred Fire in the Red Hill Valley is O.K.? We clearly do not have the necessary permission, freely given and obtained in a manner required by our own laws and theirs, from the “heires and descendants” of the Iroquois signatories to the 1701 Treaty to abolish their treaty rights in the Red Hill Valley by building an expressway there. If the City of Hamilton insists on proceeding without it, and on extracting it under the clear duress of bulldozers, chainsaws and police raids, it will be doing so unwisely, arrogantly, and only to our very great shame.

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