

STATE OF NEW YORK

ANNUAL REPORT

OF THE

ATTORNEY-GENERAL

FOR THE

Year Ending December 31, 1935

JOHN J. BENNETT, JR., Attorney-General

*Revised in  
the Division  
of Administration  
State Seals in*

*See volume 50*

## OFFICIAL OPINIONS OF THE ATTORNEY-GENERAL

Memorial from King George V in re Annuities of Canadian St. Regis Indians; Treaties of 1700, 1701, 1816 and Subsequent Years; State Constitution, Article VII, Section 6; Civil Practice Act, Section 47.

Article VII, section 6, of the State Constitution prevents the payment by the State of any claim which, as between citizens, would be barred by lapse of time. Unpresented annuity claims of more than twenty years standing prior to the present demand cannot be recognized by the State. The Legislature, equally with State officials and agents, is barred by the constitutional inhibition.

The claims of the memorialist based upon the treaties of 1816 and subsequent years are without merit because of the treaty of March 27, 1797, which had, prior to such treaties, effected a release of all the Canadian Indians' rights in the subject matter of said treaties.

Sufficient evidence exists to establish complete proof of the payment to the Canadian Indians of all annuities prior to 1850. Query as to the receipt by said Indians of an annuity payment of \$2000 subsequent to that year. The State has made full payment of all annuities to the year 1864 and the question of whether the Indians of Canada have received their proper share remains undetermined. At present the State makes no payment to the Canadian Indians. A further investigation is recommended to determine the facts as to payments after the year 1858.

You have forwarded to me, with a request for my advice, a memorial by His Majesty, King George the Fifth, sent you by R. Y. Sinclair, K. O. of Ottawa, Canada, concerning alleged annuity payments claimed by the Canadian St. Regis Indians under various Indian treaties.

Before discussing the treaties involved we are bound to consider a State constitutional provision which must influence any conclusion short of a complete denial of responsibility.

Article VII, section 6, of the State Constitution provides:

"Neither the Legislature, canal board, nor any person or persons acting in behalf of the State, shall audit, allow, or pay any claim which, as between citizens of the State, would be barred by lapse of time. This provision shall not be construed to repeal any statute fixing the time within which claims shall be presented or allowed, nor shall it extend to any claims only presented within the time allowed by law, and presented with due diligence from the time of such presentation. But if the claimant shall be under legal disability, the claim may be presented within two years after such disability is removed."

The most extended limitation period defined by the Civil Practice Act (section 47) is twenty years. This refers to actions upon sealed instruments. The agreements are all State treaties and apparently fall within this category and all claims in excess of the limited period would be barred by the said article.

The Legislature is as helpless as an individual in the face of this constitutional bar. By fixing the limitations, however, it constituted

statutes of repose and did not invalidate contracts but simply prevented their enforcement beyond the limited periods. It would follow that, since the contracts are not invalidated, the provisions for future payments, if liability is determined, could be recognized and provided for by the State. Assuming, therefore, for the purpose of this argument that the claims in toto are based upon valid, subsisting instruments, it would still be my opinion that no State agency could now authorize payment of them beyond the time limited for one of their nature between citizens of the State. Of course, possible established exceptions that would control between citizens would also operate in the same manner in this relation.

The better to understand the various treaty claims involved in the memorial, a brief reference will be first made to contemporary Indian history.

The Iroquois Confederacy or Five Nations, from the beginning of the colonial period, held the balance of power between the French and English in the North and claimed title to the central and north-eastern portion of the State. The French Jesuits exerted considerable influence over them and drew considerable numbers of them to the mission villages of Caughnawaga (Mohawk, at the rapids) and St. Regis. Both were composed principally of Mohawks and were established, the former in 1676 at the head of the Lacine Rapids near Montreal, in the Province of Quebec, and the latter about 1755 by Mohawks from Caughnawaga. The St. Regis settlement was located at the present site of the St. Regis reservation. It covers a tract spanning the international boundary having an area of approximately equal acreage on each side.

The Mohawks as the keepers of the eastern door of the "long house" of the Iroquois confederacy ranged over the eastern part of the State and claimed title to a strip of land south of and bounded on the north by the St. Lawrence river, extending for some distance east and west of the present reservation and running between parallel lines to Albany on the south.

Sir William Johnson, an able, English colonial general, and the proprietor of the patent known as the Royal Grant in Herkimer county, was very influential with the Indians. The noted Mohawk Chief, Joseph Brant (Thayendanegea), was a protégé of his and was educated by him at Dr. Wheelock's school, which later became Dartmouth College.

Due to Johnson's influence, a great part of the Mohawks under the leadership of Brant fled to Canada at the time of the Revolution and became active enemies of this country. After the war the English government gave them lands with the Seven Nations of Canada.

In considering the merit of the claims advanced it should be understood that the original rights of title of the Indians was possessory only. *Johnson v. McIntosh*, 9 Wheat, 543; *Michell v. United States*, 9 Pet. 711; *Semeca Nation v. Christie*, 126 N. Y. 122. For reasons of convenience attention will be first directed to the claims based upon the treaties and agreements of March 15, 1816, and subsequent years.

The statement of the memorial is correct that such treaties were made by the American St. Regis Indians only.

The first claim set forth in the memorial is based upon the treaty of May 31, 1796. This treaty will be set forth and considered more exactly later in this report in connection with that claim. It is sufficient for the present purpose that certain salient features of it be outlined. The Indian parties to the treaty were two chiefs from the Caughnawagas and two deputies from the St. Regis as representatives of the Seven Nations. The subject matter of the compact was the possessory right of the Mohawks to the northern and eastern area of the State. In consideration of a principal payment and an annuity in perpetuity they released all claims to lands in the State except certain parcels at and near the St. Regis reservation. The treaties referred to by the memorialist subsequent to 1796 all concern the said reserved parcels.

At the outset it is apparent that these claims cannot be sustained. The Canadian Indians cannot claim any rights under a contract to which confessedly they were not parties. Their only claim must therefore be that, not being parties thereto and not being bound thereby, they were fraudulent and the possessory right in the lands remains undisturbed. That contention, if well founded, must entail different procedure than here considered.

There is, however, sufficient additional reason for holding that those treaties are entirely valid and that at the time they were made the Canadian Indians had no rights in their subject matter concerning which they could barter.

It must be held that as to the land reserved by the treaty of 1796, the Mohawks of Canada still retained a possessory right such as they formerly claimed to the whole Mohawk domain in this State. The date of the treaty, May 31, 1796, must be held to have determined the rights of the signatories thereto although it was not formally approved by the Governor until later.

The Indian right was solely a possessory one against the State. They were subject nations or tribes and their claims were not against other Indians or individuals but against their conquerors. In addition the greater part of the Mohawks were alien enemies during the Revolution and as such they stood for whatever rights the State recognized. For many years after the war, bands of Mohawks harassed the settlers and did great damage. At each of the early treaties the State was forced to guarantee their representatives safe conduct while here. In some instances this required that all inhabitants remove themselves temporarily from the area where negotiations were conducted.

With these conditions existing, a treaty was made, March 29, 1797 (Vol. 2 Indian Deeds and Treaties, p. 186, Office of Secretary of State), under the authority of the United States with the "Mohawk Nation of Indians residing in the province of Upper Canada within the Dominions of the King of Great Britain." Captain Joseph Brant, the most influential chief of the Mohawks, had retired to Caughnawaga and made his headquarters there. The

Indians were represented by him and Captain John Deserontzon, John Abel, "alias the cornplanter," a Seneca chief, was also present and signed the treaty with his mark. The Federal government was represented by Commissioner Isaac Smith; the State by Abraham Ten Broeck, Egbert Benson and Ezra L'Hommedieu. Brant's name alone would be sufficient to attest to the validity of the agreement on the part of the Mohawks. The treaty recites that the Indian deputies proposed and the agreement adjusted with the said deputies the compensation stated therein to be made to said Nation for their claim to be extinguished by this Treaty to all Lands within the said State.

It was affirmed that "the said Agents do agree to pay to the said deputies the sum of One thousand Dollars for the use of the said Nation to be by the said Deputies paid over to and distributed among the persons and families of the said Nation according to their usage, the sum of Five hundred Dollars for the expenses of the said deputies during the time they have attended this Treaty and the sum of One hundred Dollars for their expenses returning and for conveying the said sum of One thousand Dollars to where the said Nation resides."

Payment of the compensation is acknowledged for which the Indian deputies "do agree to Code and Release and these presents witness that they Accordingly do for and in the name of the said Nation in Consideration of the said Compensation Code and Release to the People of the State of New York forever All the Right or Title of the said Nation to Lands within the said State and the Claim of the said Nation to lands within the said State is hereby wholly and finally extinguished."

One copy of the treaty was delivered to the Indians and one to the Federal government.

It is certified as having been compared with the original on June 7, 1797.

I have not considered it necessary to examine the record for proof of actual payment.

Referring again to the fact that the Mohawks were the only Indians who made or could make claim to the lands in the area considered, it must be evident that all of their remaining rights to the lands excepted by the treaty of 1796 at New York City were foreclosed by the treaty of March 29, 1797.

All treaties referred to in the memorial subsequent to the date of that release were properly made by the American St. Regis tribe, and the Canadian Indians therewith had no right vested or otherwise in either the subject matter of those treaties or the consideration therein. For that reason the claims thereunder should not be recognized.

Reference will now be made to the first demand set forth in the memorial as based upon the treaty of May 31, 1796. (Kappler's Indian Treaties, Vol. 2, p. 45.) It was held at New York City under the auspices and approval of Abraham Ogden, Federal Indian Commissioner. The Indian participants, as noted above, were two chiefs

from the Caughnawagas and two deputies from the St. Regis, as representatives of the Seven Nations. It released all claim of said Seven Nations to any lands within the State except certain deserted parcels, among them, a tract equal to six miles square, excepted by the sale of the State to Alexander Macomb, "to be applied to the use of the Indians of the village of St. Regis, . . ." these were to remain as so reserved. The State agreed to pay on the third Monday of the following August the principal sum of \$1293.68; and the additional sum of \$213.68 on that date and yearly forever thereafter, at the mouth of the Chazy river, on Lake Champlain, but such payment was not to be made in August, 1796, unless twenty of the principal men of the Seven Nations were there to receipt for the same. As to later years five principal Indians of the tribe were to appear for that purpose.

While there is nothing in the treaty to indicate that any payment, as stated in the memorial, should be in two equal parts, one to the Caughnawagas and one to the St. Regis, and the receipts the lump sum without division, there are indications in various filed documents that there was such an understanding. The memorial is apparently correct in that regard.

A somewhat cursory examination of the great volume of various documents, printed and otherwise, in the many State departments, has developed much explanatory material. The memorial is incorrect in stating the principal amount of the treaty. Instead of \$2131.68, it was \$1293.68. The original voucher for the payment of the principal amount I have been unable to locate but in view of the facts hereinafter set forth, I am satisfied it was paid at or about the time of the treaty. A more intensive search would undoubtedly disclose complete proof of this.

The petitioner concedes proper payment of annuities until the year 1834 but claims none were made afterward. The disclosed facts negate the alleged failure to pay in subsequent years.

Examination of the original receipts filed with the reports of the various Indian agents for the St. Regis discloses that throughout the period from long prior to 1834 up to and including the payment of August 1844, the Canadian Indians were receiving \$533.33. This was a complete payment.

The minutes of the State Land Commissioners for July 14, 1841 (Vol. 10, p. 144), have a resolution providing for the investigation of a claim made by the Canadian Indians of the Oka reservation at the Lake of the Two Mountains asking for a share of the annuity of 1793. At page 169 of the same volume is a report, following an investigation of the claim, and therein it is stated that the previous payment of \$533.33 had been made for forty-six years to the Caughnawagas and St. Regis tribes and that on many occasions the Caughnawagas Canadian Indian agent had been present, assented to and witnessed the receipts therefor. The claim was denied and the board directed payments to be made as formerly to the chiefs and principal men of the St. Regis and Caughnawagas.

Previous to this, on March 24, 1835 (Assembly Document No. 318), the American St. Regis Indians had presented to the Assembly a memorial asking that payment of the entire annuity of \$533,333 be thereafter made to them and they would make the proper distribution. The Comptroller reported unfavorably upon this resolution and payments followed without change.

On January 31, 1841, the State Comptroller reported to the Assembly a petition of the Caughnawagas to commute their annuity. The petitioners stated that they had received their annuity for over forty years but they had heard that the three nations of the Lake of the Two Mountains had made a claim to a share of the annuity and for their own protection they desired payment of the principal of the annuities. The Comptroller suggested that authority be conferred upon the Land Board to investigate and settle conflicting claims under the treaties.

On May 25, 1841, the Legislature passed an act (chapter 234) concerning upon the Commissioners of the Land Office, power "to hear and determine all questions which may arise in relation to annuities under the control of the state" and also "to direct the payment in their discretion to the Caughnawagas and St. Regis tribes representing the Seven Nations of Canada, or any portion of them of the principal of the annuities \* \* \*".

Without setting forth all intermediate steps as shown by the records it is sufficient to state that under this authority the commissioners acted upon the petition of the Caughnawagas and entered into an agreement with them to commute their annuity by the payment of the sum of \$4,444.44, which invested at 6 per cent would provide annually the amount thereof, namely, \$266.67 (Minutes of the Land Office of May 16, 1844, Vol. 10, p. 397). The commissioners issued a warrant to the Comptroller to pay that amount. Upon the settlement, powers of attorney, properly authenticated in favor of Edward Nardesse De Lorimer, Martin Tolmanasche and Thomas Nebatkon, by the Caughnawagas were filed with the Land Commissioners. In the records of the Comptroller's office (Day Book No. 30, July 1, 1842, to July 31, 1844) appears warrant No. 2573 showing payment to the above attorneys in full of the sum of \$4,444. Of this principal with interest of \$211.22, making a total of \$4,655.20. There appears a discrepancy of forty cents in the statement of the principal. Apparently there was an error in the receipt.

In 1844 the Canadian St. Regis Indians made application for the payment of the principal of their annuity. This request was apparently denied as subsequent annuity payments establish that after 1844 and to and including the year 1858 the sum of \$266.67 was paid annually to the St. Regis of Canada as is shown by their separate receipts for that amount now on file with the State Comptroller. Such receipts state without exception that the payments are in full satisfaction of the annuity pursuant to the treaty of May 31, 1796. Throughout this time the American St. Regis were acknowledging at the same time by separate receipt the payment of \$1,865 in satisfaction of annuities payable under four treaties with

them dated, respectively, March 15, 1816, February 20, 1818, June 12, 1824 and December 14, 1824.

These facts prove that until the year 1859 all obligations of the State under the treaty of May 31, 1796, were fulfilled. It seems incredible that the Canadian Indians throughout a period of sixty-three years prior thereto had received the annuity under that treaty without objection but had not received the principal amount thereunder. The payment of the principal sum cannot be doubted.

In 1858, as in former years, the American tribe gave a receipt for \$1,865 and a separate receipt was taken from the Seven Nations of Canada for \$266.67. Beginning with 1859, a new procedure was adopted. Chapter 368 of the laws of that year provided for the appointment of an Indian Commissioner and section 3 sets forth that one of his duties shall be to receive from the comptroller the annuities due "to the St. Regis tribe of Indians, and apportion and pay the same over to the heads of the families belonging to said tribe, by paying each their equal share of said annuities and to take from each the necessary receipt therefor \* \* \*". Although the complete file subsequent to that year has not been located, an examination of many years reports shows no separate receipt thereafter given by the Seven Nations of Canada. One receipt was taken for all annuity payments, in which the head of each Indian family personally signed for the amount to which that family was entitled.

Some interesting facts appear in connection with the receipts for 1858 and 1859. In 1858, a receipt was taken by the Indian agent from the Canadian Indians for \$266.67, signed by Lewis Lafrance and two others, Louis X          and          (Indian names not legible), as deputies for the Seven Nations of Canada, and the other for \$1,865, signed by the American Indians, reciting receipt stated that it was given in satisfaction of the annuity under the treaty of May 31, 1796; the latter one recited that it was given in satisfaction of annuities created by four treaties with the St. Regis, dated, respectively, March 15, 1816, February 20, 1818, June 12, 1824, and December 14, 1824. In 1859 one receipt was taken which recites that it is by the "St. Regis or American Indians for annuities this day payable to the said Nation or tribe by the State of New York under the several treaties or agreements between the People of the said State and the said Nation or tribe providing for the payment of such annuities." This receipt is signed with the undoubted personal signature of Lewis Lafrance who signed the Canadian receipt in the preceding year. Due to the inability to decipher the names of the two remaining signatories of the receipts of the previous year it is impossible to determine whether or not they signed the receipt for 1859. In 1861 the same sort of receipt was signed by Lewis Lafrance but in a different handwriting. In 1862 a Lewis Lafrance, 2nd, signs with an X. The total of the two annuities in 1858 and prior years was \$2,131.57 (\$1,865 plus \$266.67). In 1859 the same total amount was paid but recaptured for as set forth.

For many years the Legislature made a specific appropriation of \$1,965 to pay St. Regis annuities but provided nothing to pay the \$266.67 due the Canadian Indians. The latter annuity was paid during that time and the apparent reason that no appropriation was made for it must be explained by the fact that a principal sum had been set aside to provide for it. Since 1848, at least, as an examination of the annual supply bills shows, there has been an appropriation of \$2,131.67 yearly to cover all St. Regis annuities and they are receiving that amount now. At present, however, the Indian agent simply acknowledges the receipt of the check from the Department of Social Welfare and reports the distribution with an appended list of Indian recipients and the amounts received by each. The total annuity payment (\$2,131.67) is now made to the American St. Regis tribe.

Disregarding for the moment the question whether or not the proper recipients have been paid, it is clear from the facts at hand that some persons have received from the State all the annuity payments; it was obligated to pay from 1796 to 1833. Due to failure to hold a proper election of officers, the 1934 annuity has not yet been paid.

It seems established by a preponderance of proof that the Canadian Indians received their share in full of the principal and the annuity to the year 1833 at least. At that time the later method of payment, above set forth, was commenced. It is contrary to reason that the Indians on the Canadian side, with the history of continued squabbling over small amounts claimed by them as annuities and living on part of a reservation separated from the Americans only by the international boundary, should have been scrupulously denied further payments of their annuity without voicing and some recorded objections on their part. Prior thereto, alleged mispayment of amounts as little as \$5 were the cause of extended correspondence with the Comptroller as shown by his records. Yet nothing has been discovered indicating dissatisfaction until the instant claim was made. Can it be possible that they would remain quiet for a period of seventy-five years? It is significant that one, at least, of the Canadian delegates, viz., Lewis Lafrance, who signed the receipt in 1858 also signed an individual receipt for his share in 1859. It seems reasonable to infer that at that time all those entitled to share received their portion and made individual acknowledgment thereof. If it be argued that they had been deprived of it by fraud prior thereto, the wonder would be still greater that no protest was made, and if such a claim were true, the question of the state's liability would not necessarily be established. On the other hand, we find the American tribe at present receiving the total payment of \$2,131.67 with no clear evidence way the specific annuity for \$266.67 to the Canadian Indians, as such, was discontinued. Whether there was some understanding or agreement by which the American representatives have received the whole amount and distributed the \$266.67 to the proper bene-

ficiaries, or that perhaps it has not reached the correct persons by reason of facts beyond the State's control, the records have not disclosed and the matter must remain one of conjecture unless and until what is probably extrinsic evidence has been produced. The present situation is, in brief, as follows:

1. The State Constitution (Article VII, section 6) apparently bars any State agency from paying a claim of more than twenty years prior to a sufficient, actual presentation. Nothing appears to indicate such claim without the twenty years preceding the present demand.
  2. The release of March 29, 1797, by the Mohawks of Canada has foreclosed any right of recovery on the part of the memorialist by reason of any treaty or agreement between the State and the American tribe of St. Regis subsequent to that date.
  3. All claims by reason of the treaty of May 31, 1796, have apparently been satisfied excepting a possible and highly doubtful claim for the annuity of \$266.67 and interest subsequent to the year 1833. This has been paid each year since that time by the State but its liability to make such payments in a manner sufficient to satisfy its alleged legal obligation is not clearly defined. Such proof, if existing, must be shown by further and convincing evidence. Reservations and extrinsic proof elsewhere may be available, which at present cannot be secured in the State's records.
- As to the State's liability under the treaties subsequent to March 29, 1797, the facts set forth are convincing proof that they are without merit.
- I return the memorial herewith.

Dated: January 3, 1935.

Very truly yours,

JOHN J. BENNETT, JR.,

Attorney-General

EXECUTIVE DEPARTMENT,

CONSTITUTION, ARTICLES V, SECTION 4; AGRICULTURE AND MARKETS LAW, SECTION 5; ASSEMBLY BILL, 1ST NO. 10, PA. NO. 10, OF 1935—CONSENT OF AGRICULTURE AND MARKETS—POWER OF THE LEGISLATURE TO ABOLISH.

The terms of office of the members of the Council of Agriculture and Markets are prescribed by statute, rather than by the Constitution. The Council may, therefore, be abolished, during the term of office of existing members and a Commissioner of Agriculture and Markets, to be appointed by the Governor, by and with the advice and consent of the Senate, substituted as head of the Department of Agriculture and Markets.

You have, through your Counsel's letter of the 21st ult., requested my opinion as to the constitutionality of Assembly Bill (Int. No. 10, Pt. No. 10), now before you for executive action.