STATE OF NEW YORK
COUNTY OF FRANKLIN

60-77

4-10-80

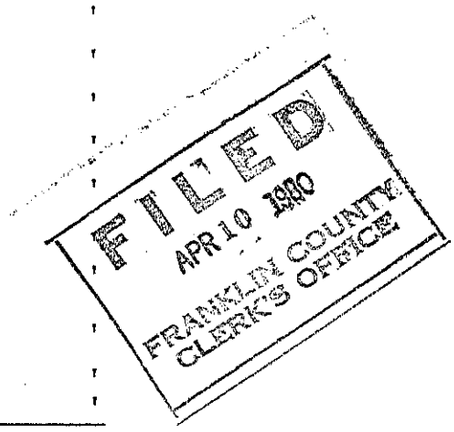
COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

AGAINST

HARRIET BOOTS
DAVID DEER
DOUGLAS GEORGE
ERIN OAKES
RICHARD POWLESS
KENNETH THOMPSON

Defendants



APPEARANCES: Joseph J. Ryan, Esq. District Attorney for the People of the State of New York,

William Kunstler, Esq., Robert Coulter, Esq., and Howard Berman, Esq., Attorneys for the Defendants:

JAN H. PLUMADORE
County Judge

O P I N I O N

These defendants have moved this Court for the following relief: dismissal of all charges because 1) the courts of the State of New York lack jurisdiction over (Mohawk) Indians, 2) the charges are the result of "selective and persecutorial prosecution," 3) in the interests of justice; dismissal of such of the charges as are not supported by sufficient evidence; inspection of the Grand Jury minutes; Bill of Particulars; multi-faceted discovery.

I. JURISDICTION:

A. STATUS OF INDIAN TRIBES:

Indian tribes, contrary to the defendants' assertions, are no longer sovereign bodies or nations, that is, they are "no longer' possessed of the full attributes of sovereignty'"(United States v. Wheeler, 435 U.S. 313, 55 L. Ed 2d 203 at 313, 98 S. Ct. 1079, citing U.S. v. Kagama, 118 U.S. 375 at 381, 30 L. Ed.228,

6 S. Ct. 1109), no longer capable of entering into "direct commercial or governmental relations with foreign nations" (Wheeler, supra at 314, citing Worcester v. Georgia, 6 Pet 515, 559, 8 L. Ed. 483). "Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others" (Wheeler, supra at 312). In 1857 the N.Y. Court of Appeals very aptly termed the status of Indian nations/tribes "quasi independent" (People ex Rel. Cutler v. Dibble, 1857, 16 N.Y. 203 at 212, aff'd 62 U.S. 366; see also St. Regis Tribe of Mohawk Indians v. State of N.Y., 5 N.Y. 2d 24 at 38, 177 N.Y.S. 2d 289, cert, denied 359 U.S. 910, 79 S. Ct. 586, 3 L. Ed. 2d 573, rehearing denied 359 U.S. 1015, 79 S. Ct. 1146, 3 L. Ed. 2d 1039). Finally, and more germane to the cases at bar, while "it is undisputed that Indian tribes have power to enforce their criminal laws against TRIBE MEMBERS" (Wheeler, supra at 312), they cannot try NONMEMBERS in tribal courts (Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 55 L. Ed 2d 209, 98 S. Ct. 1011) (emphasis added). This power is of course subject to complete defeasance by Congress in the exercise of its plenary power. It is of course the customs and practices of the tribe which determine tribal membership or lack thereof (Patterson v. Council of Seneca Nation (1927) 245 N.Y. 433, 157 N.E. 734).

B. VALIDITY OF 25 U.S.C. section 232:

As noted in the Wheeler case, Congress possesses plenary power over Indian tribes by virtue of their dependent status. Included within this plenary power is the exercise of federal criminal jurisdiction over Indians. In the cases of certain groups of States Congress delegated, or in some cases proffered,

this power to them in 1953 (see Pub. L. 280; Washington v. Confederated Bands and Tribes, 1979, 99 S. Ct. 740). In the State of New York's case, however, federal criminal jurisdiction was specifically ceded to it (N.Y.) (Washington, supra at 746) in 1948 via section 232. While section 232 has never been tested in the United States Supreme Court, the cases that do mention it discuss it favorably (Washington, supra; Oneida Indian Nation of N.Y. State v. County of Oneida, N.Y., 1974, 94 S. Ct. 772). This Court shares the Supreme Court's implicit opinion that section 232, like Pub. L. 280, is a valid delegation of Congressional (federal) power.

The defense argues, however, the 232 is invalid because 1) Congress did not specifically say it intended, via 232, to abrogate any treaty(ies) and, in the alternative, 2) unilaterally abrogating treaty rights violates international law. As to 1), the Supreme Court addressed this point in Washington (Supra at 750) when it said:

> "The argument made by the Tribe is tendentious. The treaty right asserted by the Tribe is jurisdictional. So also is the entire subject-matter of Pub. L. 280. To accept the Tribes's position would be to hold that Congress could not pass a jurisdictional law of general applicability to Indian country unless in so doing it itemized all potentially conflicting treaty rights that it wished to affect. This we decline to do. The intent to abrogate inconsistent treaty rights is clear enough from the express terms of Pub. L. 280."

If what was said in regard to Pub. L. 280 is true, then it must also be true in the cases at bar where there are at least two major treaties (1794 and 1796) in issue (disregarding, for our purposes, all the other treaties dealing with Indians residing in New York State). With regard to 2) above, despite the fact

that Indian treaties have been referred to as recently as 1979 as "essentially a contract between two sovereign nations" (Washington v. Washington State Commercial Passenger Fishing Vessel Association 99 S. Ct. 3055 at 3069, citing Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S. Ct. 216, 47 L. Ed. 299), by virtue of their special, dependent status Congress has plenary power over Indian tribes (Washington v. Confederated Tribes, supra at 761; Wheeler, supra). Stated simply, from Worcester v. Georgia in continuous succession to Washington v. Confederated Tribes the Indian law of this nation has been shaped and determined by the dependent, quasi sovereign status of the Indians and not by any application of conventional principles of international law.

The prosecution contends that 25 U.S.C. section 232 amounts to a complete defeasance by Congress of any remaining jurisdiction by the tribe. This Court cannot subscribe to that view.

At the time of the enactment of section 232 or at any time before Congress had not shown any intent to completely divest the St. Regis Indians of their remaining jurisdiction. All Congress sought to do by the enactment of the statue in question was to convey whatever jurisdiction the federal government possessed to New York State (S. Rep. No. 1489, 80 th Cong., 2d Sess. (1948)).

In addition a strong presumption exists that in civil or criminal disputes between tribal members on Reservation land the Tribe possesses jurisdiction co-equal with that of the United States. This is retained jurisdiction by the Tribe as a result of its unique quasi sovereign status (Wheeler and Oliphant, supra).

25 U.S.C. section 232 simply transfers the federal portion of jurisdiction in all such matters to New York State.

It is the conclusion of this Court that 25 U.S.C. section 232 was and is a valid surrender of federal criminal jurisdiction over Indians within the borders of New York State.

C. APPLICABILITY OF THE TREATIES OF 1794 v. 1796:

The defense argues that the Canandaigua Treaty of 1794 between the Six Nations and the United States is the treaty determinative of their rights (and indeed the rights of all Indians on the St. Regis Reservation). The courts of this State, however, and the United States Supreme Court by implication, take the opposite view; that is, that the Treaty of 1796, between the Seven Nations of Canada and the United States is the applicable treaty (St. Regis Tribe of Mohawk Indians, supra; Matter of Fischer v. Tebo, 1959 3d Dept., 9 A.D. 2d 470, 194 N.Y.S. 2d 772). In Matter of Fischer the Appellate Division said:

> "Tebo appeared specially to contest the jurisdiction of the Court, contending that the St. Regis Tribe was governed by the Treaty of 1794 which granted to the people of the Six Nations the sole right to govern themselves without interference by the courts, also that the court could not settle jurisdictional disputes as to property within the reservation and that the elective chiefs who filed the complaint did not lawfully represent the American branch of the tribe. The court overruled these objections, determining that the Treaty of 1796-not 1794-was applicable to the American branch of the St. Regis Indians; that section 106 of the Indian Law did not preclude the court from finding Tebo an intruder and that the Legislature of the State of New York provided the manner and method for the election of chiefs and there was no evidence before the court of non-compliance with the law-section 110 of the Indian Law. Section 106, mentioned herein, governs jurisdiction of Council of Chiefs to determine disputes.

In a subsequent opinion, dated January 15, 1958, the County Court determined the merits of the controversy, holding that Tebo was a member of the Canadian branch and as a consequence he was an intruder subject to removal and so ordered. The court made no finding concerning the real property rights.

From a reading of the two treaties involved, set forth in the record, it conclusively appears that the Treaty of 1796 was intended to govern the St. Regis Indians. Not only does it refer to the tribe by name but provides, among others, for the tract of land now known as the St. Regis Reservation in Franklin County. The Treaty further provided for the State of New York to compensate the seven Canadian tribes and they relinquished all their rights to lands within the State. In recent years there has been considerable litigation as to Indian property-perhaps due to its close proximity to power and water developments-and that the St. Regis Indians were part of the Seven Nations Treaty made in 1796 seems to be authoritatively settled. (St. Regis Tribe v. State of New York, 5 N.Y. 2d 24, 29, 32, 37, 40, cert. denied 359 U.S. 910, rehearing denied 359 U.S. 1015.) We determine in this action that such treaty governs.

...In further reliance upon the Treaty of 1794, appellants argue that sections 108-113 of the Indian Law are unconstitutional. These sections involve the procedure and election of officers-chiefs-of the tribe of St. Regis Indians in New York State. Having already determined that the Treaty of 1794 does not govern the St. Regis Tribe, there is no merit to the argument and no necessity for further discussion." (at 472).

It is therefore the settled law of this State, and indeed implicitly of this nation, that the Treaty of 1796 is the one which, in conjunction with both federal and State law, governs

the rights, especially jurisdictional and governmental, of the Indians on the St. Regis Reservation.

This conclusion regarding the Treaty of 1796 is amply supported by historical evidence dealing with both colonial era Indian demographics and treaty negotiations. Much of the source material for these historical findings was provided or cited by the defense.

Northern New York State and southern Canada during the 1600-1700's were somewhat in dispute as to which tribes of Indians had "proprietary" rights therein. Two of the maps submitted/reviewed show the Mohawks themselves mainly confined to the area around the Mohawk River. [1]The second of these maps, as well as one other,[2] list northern New York and southern Canada as either the country of the Six Nations or their deer-hunting territory, with the latter map listing northern Vermont as Iroquois beaver-hunting country. Two other maps[3] merely list the northern boundary of the Iroquois as open.

Prior to and during the early colonial period:

> Surrounding the few tribes of the Iroquois on every hand dwelt the much more numerous tribes of the Algonquin family, to which belonged all the New England tribes, as well as the Mohicans, Horicans,

[1]Colden, C. History of the Five Indian Nations Depending on the Province of New-York in America, Cornell University Press (1973), 1747 map at pp. xviii and xix. Defense map of 1784; see also Pickering, infra, vol. 62 at p. 261a.

[2]Hough, Dr. Franklin B. History of St. Lawrence and Franklin Counties, New York Regional Pub. Co. (Facsimile Ed., 1970),p.236.

[3]1771 Map in Defense Memorandum of Law; Frisch, J. Revitalization, Nativism and Tribalism Among the St. Regis Mohawks, unpub. PH.D. dissertation, Indiana Univ. Press (1970), p. 25.

and other New York Indians who dwelt east of the Hudson and were known as River Indians.

Northward of the Iroquois were the Nipissings, LaPetite Nation, and LaNation De L'Isle, and other tribes in the valley of the Ottawa River. Along the valley of the St. Lawrence dwelt the Algonquins proper, the Abenaquis, the Montagnais, and other roving bands below the mouth of the Saguenay."[4]

The Iroquois were nearing the height of their power in the 16th and 17th centuries, however, and they succeeded in relegating most of these neighbors to the status of secondary powers. During the middle of the 17th century alone the Iroquois destroyed the Tobacco and Neutral nations of what is now south-eastern Ontario, defeated the Eries and drove the Mohecans of what is now Rensselaer County beyond the Connecticut River, laying claim to Vermont as beaver trapping territory.

Notable exceptions to total Iroquois domination were the Algonquins and the Hurons. The latter restricted Iroquois expansion in the Great Lakes area and the former hotly contested any Iroquois movement into the northern Adirondack Mountains and the St. Lawrence Valley.[5]

The Indians of Akwesasne (the St. Regis Reservation) arrived at that location via Caughnawaga (near Montreal)[6]. The latter reservation was settled by Mohawks (circa 1669), Hurons, Abenakis and many others who had been converted to Christianity by Jesuit missionaries during the 17th century.[7] Around 1755 the Akwesasne settlement was established by a group from Caughnawaga, in part to alleviate overcrowding there.[8] The settlement at

[4]Sylvester, Nathaniel B. History of Ulster County, New York, Everts and Peck (1880), p. 21.

[5]Ibid.

[6]Hough, supra at page 191 [7]Frisch, at pages 44,48,49.

[8]Frisch at p. 60; Hough, Supra beginning at page 111.

St, Regis was included in the Seven Nations of Canada, a "loose religious confederation formed sometime during the 18th century,"[9] being included therein to "take the place of the scattered tribe" (the Oswegatchies), "and they thenceforth represented them in the assemblies."[10]

Relations between the Iroquois and the Caughnawagas (Seven Nations) were never especially cordial: The Iroquois renounced the Caughnawagas in 1684 because they refused to return to the Mohawk Valley;[11] the Caughnawagas, under the auspices of the French, attacked the Senecas Twice, the last time in 1687;[12] the Iroquois once attacked Caughnawaga, which served to solidify the French-Caughnawaga alliance for 70 years thereafter;[13] the Mohawks and Caughnawagas met in 1799, unsuccessfully, to attempt to resolve differences regarding land claims in northern New York;[14] the Caughnawagas and Iroquois, circa 1757, were at odds over whom to support, the French or the Britsh.[15]

During the time of the American Revolution those residents of Akwesasne/St. Regis who were descended from the Iroquois (generally Mohawk) were separated by religion,[16] form of government (elected v. traditional, which Canadian/U.S. St. Regis split was principally occasioned by annuity disputes and finally by the War of 1812),[17] national allegiance, 100 or more years of history, and 200 miles from their "ancestors" and central New York. This separation has in large part continued until

[9]Frisch at page 65

[10]Hough at page 127

[11]Frisch at page 52

[12]Frisch at page 53

[13]Frisch at page 55

[14]Hough at page 149

[15]Frisch at page 62

[16]Frisch at pages 134 and 138; Hough at page 176

[17]Frisch at pages 75-86, and see espec. 112; Hough at pages 154, 177; see also Matter of Fischer, supra at page 472; U.S. ex rel Kennedy v. Tyler, 269 U.S. 13; Andrews v. State 79 N.Y.S. 2d 479.

the present day, with two exceptions.

In 1888, the Six Nations (Iroquois) adopted the St. Regis Indians to succeed the Mohawks as the "keepers of the eastern door," the Mohawks having lost that status when they moved to Ontario. As a result, the traditional nine Mohawk chiefs' titles were given over to the St. Regis Indians.[18] Also, the Longhouse form of religion arrived at St. Regis in the 1930's (see footnote 16). Despite these two exceptions, the Indians at St. Regis are legally just that, St. Regis Indians despite the fact that most are ethnically Mohawks. Whatever their revived cultural identity may be, it changes their legal status no more than that of the average U.S. citizen who traces his/her ancestry back to England, Poland, Germany, Ireland, China, Africa or wherever. The only difference is that, because they are a recognized tribe, they retain some vestiges of the sovereignty they initially enjoyed as one of the Seven Nations of Canada. The Court would also note at this juncture that symbolic actions of the Iroquois Grand Council and revived cultural awareness notwithstanding, the rights of the St. Regis Indians can only be determined in light of the Treaty of 1796, federal statutes and decisions, and New York State's criminal (here) and Indian Laws.

In view of the fact that it was the Seven Nations of Canada who were parties to the Treaty of 1796, and not the Mohawk/Iroquois, and in light of the Court's historical analysis supra, it appears that there is ample justification for the various court opinions, cited supra, holding that it is the Treaty of 1796, not 1794, which is the treaty applicable to the St. Regis Reservation.

[18] Frisch at pages 91 and 92.

Even if the Treaty of Canadaigua(1794) were applicable to the St. Regis Reservation it would not operate to bar the criminal jurisdiction of State Courts over these alleged offenses. This is true for several reasons:

FIRST, Article VII of that treaty reads as follows:

> "Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed: and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs: and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make other equitable provision for the purpose." (emphasis added).
>
> "NOTE. It is clearly understood by the parties to this treaty, that the annuity stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States; For the United States do not interfere with nations, tribes or families, of Indians elsewhere resident."

The plain language of this section authorizes and in fact seems to anticipate the passage of a statute such as 25 U.S.C. section 232. In this sense the language of Article VII operates as a conditional relinquishment of criminal jurisdiction by the Iroquois. 25 U.S.C. section 232 is in part an exercise of this

conditional relinquishment as well as an exercise of Congressional plenary power. The argument is made that the operative language of section 232 may not have been considered equitable within the meaning of Article VII in 1794 by the parties thereto. However, it cannot be seriously contended that 25 U.S.C. section 232 was not "equitable" when enacted in 1948.

SECOND, even if the Article VII operated to retain jurisdiction by the Iroquois that jurisdiction would only be concurrent with that of the Courts of New York State. (Wheeler, (supra)).

THIRD, although unlike the Treaty of 1789 the Treaty of 1794 does not specifically exclude the Mohawks unless they signed it, the fact remains that they were not present during its negotiation,, despite repeated invitations, and they did not sign it.[19] It is interesting to note here that the defense claims that they did sign it, through one Henry Youngbrant. Mr. Youngbrant was the only Mohawk present, however, and never lent his voice to the negotiations, coming forward merely to express his sentiments to Col. Pickering.[20] Additionally, it appears that Mr. Youngbrant was in fact the nephew and "representative" of the very same Joseph Brandt who has been disavowed by the defense as a mere Britsh mercenary and no legitimate Mohawk chief.[21]

[19]Pickering, infra, Vol. 60 at pages 209a, 204, 202, 203; Vol. 62 at 145, 213.

[20]Pickering, infra, Vol. 62 at page 100.

[21]Ibid at page 108.

The defense claims that it matters not whether the Mohawks signed the treaty inasmuch as the Treaty was ratified by the Grand Council of the Iroquois and thereby binds the Mohawks.

Applying fundamental principles of contract law it is obvious that if the Mohawks choose to be bound by a Treaty they did not negotiate or sign this would have no binding effect on the other party to the Treaty, the United States. It is also obvious that by taking such a position the Mohawks could not hope to bind another non-party to the Treaty, the St. Regis Band.

The Court notes that apparently the United States hoped the Mohawks would abide by the Treaty, i.e. live peaceably, and indeed even offered them the money equivalent of the "presents" they gave those tribes who did attend and sign.[22] However, this observation still does not change the factual and legal conclusions outlined above.

FOURTH, and finally, the defense argues that the Treaty of 1794 must be interpreted in the way the Indians (Mohawks) understood/understand it, citing Worcester v. Georgia and Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra.

It is obvious that this rule of Treaty construction would only come into play when the treaty language lends itself to more than one interpretation. The applicable language of Article VII is unequivocal and clear and not subject to any legitimate

[22]Pickering, infra, Vol. 62 at page 108.

variations in interpretation. It is worthy of note that the Treaty of 1794 in its final form was the result of numerous drafts, none of the others of which "gave them satisfaction."[23] It would certainly seem that in this instance that the parties who did sign the Treaty of 1794 got essentially what they bargained for.

D. IS THE ST. REGIS RESERVATION THE SOVEREIGN TERRITORY OF THE MOHAWK NATION:

The answer to this must be "NO". As must be seen from the discussion in section C, supra, it is not historically clear whether or not the area north of the Adirondacks was geographically ever an 'integral part of the Mohawk Nation' as we would understand it.[24] Furthermore, there is historical evidence to indicate that the Mohawks physically, if not legally (highly suspect land "giveaways" notwithstanding)[25] abandoned New York State between the American Revolution and the Treaty of 1794.[26]

Further support for the proposition that the Mohawks physically abandoned New York comes principally from the Papers of Col. Timothy Pickering.[27] From the Court's reading thereof, it is unequivocably established that many of the Mohawks had, prior to 1794, taken up residence in Ontario (448 with Joseph

[23]Pickering, infra, Vol. 60 at page 208.

[24]See, for example, footnotes 1 and 2.

[25]"Treaty with the Mohawk, 1797," wherein Mohawk leaders Joseph Brandt and John Deserontyon, who were not Sachems (chiefs) relinquished all Mohawk land claims for $1000.00 plus $600.00 personal expenses. This "treaty" was never ratified by the Grand Council and appears to be fraudulent on its face.

[26]Footnotes 14 and 18, supra.

[27]Papers of Timothy Pickering, Massachusetts Historical Society Collection, Vols. 60 and 62.

Brandt at Grand River,[28] 200 or so more with John Deserontyon at the Bay of Kentac, sic. Quinte).[29]

The Court would also point out that even were the St. Regis Reservation actually Mohawk territory, it would not and could not be "sovereign" in light of Wheeler et al.

E. ST. REGIS RESERVATION OUTSIDE FRANKLIN COUNTY:

This argument is fallacious. The defendants' cited statutory description of the borders of Franklin County clearly includes the Reservation. Matter of Fischer, supra, describes the Reservation as "in Franklin County." The courts of this State, indeed of this nation, have proceeded under this "premise" for centuries. This is not to deny the quasi-sovereign status of the Reservation, but it is within the borders of Franklin County and New York.

F. WHEELER, 25 U.S.C. section 232, THE TREATY OF 1796 and THEIR APPLICATION:

The "Treaty with the Seven Nations of Canada, 1796" is reproduced herein as follows:

> "The agents for the State, having, in the presence, and with the approbation of the commissioner, proposed to the deputies for the Indians, the compensation hereinafter mentioned, for the extinguishment of their claim to all lands within

[28]Johnston, Chas. M. The Valley of the Six Nations, the Champlain Society, Toronto 1964 page 52.

[29]Pickering, Vol. 60 at pages 204, 241, 115, 203; Vol. 62 at pages 100, 250.

the State, and the said deputies being willing to accept the same, it is thereupon granted, agreed and concluded between the said deputies and the said agents, as follows: The said deputies do, for and in the name of the said Seven Nations or Tribes of Indians, cede, release and quit claim to the people of the State of New-York, forever, all the claim, right, or title of them, the said Seven Nations or tribes of Indians, to lands within the said State: PROVIDED NEVERTHELESS, That the tract equal to six miles square, reserved in the sale made by the commissioners of the land-office of the said State, to Alexander Macomb, to be applied to the use of the Indians of the Village of St. Regis, shall still remain so reserved. The said agents do, for and in the name of the People of the State of New-York, grant to the said Seven Nations or tribes of Indians, that the People of the State of New-York shall pay to them, at the mouth of the River Chazy, on Lake Champlain, on the third Monday in August next, the sum of one thousand two hundred and thirty-three pounds, six shillings and eight-pence, and the further sum of two hundred and thirteen pounds six shillings and eight-pence, lawful money of the said State, and on the third Monday in August, yearly, forever thereafter, the like sum of two hundred and thirteen pounds six shillings and eight-pence: PROVIDED NEVERTHELESS, That the People of the State of New-York shall not be held to pay the said sums, unless in respect to the two sums to be paid on the third Monday in August next, at least twenty, and in respect to the said yearly sum to be paid thereafter, at least five of the principal men of the said Seven Nations or tribes of Indians, shall attend as deputies to receive and to give receipts for the same: The said deputies having suggested, that the Indians of the Village of St. Regis have built a mill on Salmon River, and another on Grass River, and that the meadows on Grass River are necessary to them for hay; in order, therefore, to secure to the Indians of the said village, the use of the said mills and meadows, in case they should hereafter appear not to be included within the above tract so to remain reserved; it is, therefore, also agreed and

> concluded between the said deputies, the said agents, and the said William Constable and Daniel M'Cormick, for themselves and their associates, purchasers under the said Alexander Macomb, of the adjacent lands, that there shall be reserved, to be applied to the use of the Indians of the said Village of St. Regis, in like manner as the said tract is to remain reserved, a tract of one mile square, at each of the said mills, and the meadows on both sides of the Grass River from the said mill thereon, to its confluences with the River St. Lawrence."

It will be noted that nowhere therein do the Caughnawagas (St. Regis Indians, for our purposes) purport to surrender or cede any jurisdiction, over tribal members, criminal or civil, to the United States. Under Wheeler and its decisional ancestors, that jurisdiction therefore is still retained by the Indians. Congress has never exercised its plenary power to divest them of this jurisdiction, so they still have it, though at this time there exist no Indian Courts on the Reservation capable of exercising it. What Congress has done, however, is cede federal jurisdiction to New York State via 25 U.S.C. sections 232 (criminal) and 233 (civil).

In summary all the above leads the Court to the following conclusions:

1) The St. Regis Indians are still possessed of both civil and criminal jurisdiction over disputes involving only tribe members on their Reservation, though at present they have not the judicial machinery necessary to exercise it;

2) The State of New York, and this Court specifically, have criminal (and civil) jurisdiction which is concurrent with that of the Indians with respect to members of their tribe as it does not arise from the same sovereign (Wheeler, supra), and exclusive with respect to all other persons or criminal acts on

or off the Reservation. (25 U.S.C. section 232).

Therefore the motion to dismiss due to lack of jurisdiction will be denied.

II. INSPECTION OF THE GRAND JURY MINUTES:

The People have consented to have the Court inspect the Grand Jury minutes, and the Court will do so.

The defense has also requested the opportunity to review and copy the Grand Jury minutes. To such relief they are simply not entitled (C.P.L. section 210, 30 subd. 2; Proskin v. County Court of Albany County, 1972, 30 N.Y. 2d 15, 330 N.Y.S. 2d 44). From the same authorities comes the conclusion that the defense is not entitled to the testimony of grand jury witnesses whom the People do not intend to call at trial(s). Additionally, such testimony is quite likely irrelevant, and if it is not, i.e. IS exculpatory, the People have a continuing Brady obligation to divulge it.

The Court would note that with respect to the defendants' other request regarding the Grand Jury, disclosure of the records of the votes, this relief is unwarranted and unauthorized. The Grand Jury need not record its votes. It is the District Attorney's responsibility to instruct them as to the applicable law and voting procedure; in this respect nothing else is required (see People v. Colebut, 1976, N.Y. Co. S.Ct., 86 Misc 2d 729, 383 N.Y.S. 2d 985 at 991).

The Court will reserve decision on the questions of sufficency of evidence until it has completed its reading of the minutes.

III. DISMISSAL IN THE INTERESTS OF JUSTICE:

The defendants have moved, in the alternative, for a dismissal of the indictments in the interests of justice. As grounds therefor they assert 1) the alleged political basis, Indian and otherwise, of the incidents and indictments, 2) the different criminal justice result of an investigation into the unrelated shooting death in this County of a Canadian St. Regis Indian, 3) the very nature of the instant charges, and 4) Iran (upon which the Court will not comment further).

Interest of justice dismissals are governed by C.P.L. section 210.40, which states that indictments may be dismissed when:

> "...such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice. In determining whether such compelling factor, consideration or circumstance exists, the Court must, to the extent applicable, examine and consider, individually and collectively, the following:
>
> (A) the seriousness and circumstances of the offense;
>
> (B) the extent of harm caused by the offense;
>
> (C) the evidence of guilt, whether admissible or inadmissible at trial;

(D) the history, character and condition of the defendant;

(E) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;

(F) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;

(G) the impact of a dismissal upon the confidence of the public in the criminal justice system;

(H) the impact of a dismissal on the safety or welfare of the community;

(I) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;

(J) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

2. An order dismissing an indictment in the interest of justice may be issued upon motion of the people or on the court itself as well as upon that of the defendant. Upon issuing such an order, the court must set forth its reasons therefor upon the record."

It appears that consideration of this aspect of the motion must also await completion of the Court's reading of the Grand Jury minutes. This is so because C.P.L. section 210.40's factors (A), (B), (C) and (J), which encompass defendants' alleged grounds, cannot realistically be evaluated until then.

Factor (E) will in all likelihood be determined in light of the Discovery to be ordered infra. Factors (G) and (H) are especially important in related criminal actions of the numerical magnitude exhibited herein.

Upon completing review of the Grand Jury minutes, IF the Court finds that some or all of the arraigned defendants are prima facie eligible for a dismissal (assuming arguendo that all the indictments are based upon legally sufficient evidence), a Clayton hearing may be required. At such hearing the Court will consider the attitude and testimony of the complainants/ victims with respect to such dismissals (C.P.L. section 210.40, subd. 1 (I)).

Defense counsel have urged the Court to consider dismissals in the interests of justice with regard to those unnamed defendants who have yet to surrender/be arrested. Simply stated, there are not nor can there be any omnibus motions on those defendants' behalf before this Court at this time as they have not yet been arraigned upon their indictments (C.P.L. section 210.20).

IV. DISCOVERY AND BILLS OF PARTICULARS:

The first part of defendants' Discovery motion deals with intercepted communications and a demand on their part therefor. The People concede/point out that they have never served upon defendants copies of any warrants(s) and application(s); ergo if they DID have any such material they would be precluded from offering it in evidence (citing C.P.L. section 700.70).

Defense counsel during oral argument suggested that perhaps the People could write to all of the agencies listed and inquire whether or not they have (independently or not) conducted any surveillance in connection herewith. Such a request is not unreasonable and could be accomplished by means of a form letter, culminating in an itemized (sworn) statement by the People that "the results of the inquiry are as follows..." Furthermore, the results may well facilitate disposition of the interests of

justice portion of this motion, as noted supra.

The People deny that they have or are aware of any personal property taken from the defendants under any circumstances.

The rest of defendants' Discovery demands are covered by C.P.L. Art. 240 and cases decided thereunder and, stated as follows, will be

-photographs and sketches: Decision reserved pending a statement by the People as to whether any or all of such material was made by (a) public servant(s) engaged in law enforcement activity (C.P.L. section 240.20 subd. 1. (d);

-statements of defendants to or for law enforcement personnel or their agents only: Granted, to the extent that People are by due diligence aware of same (C.P.L. section 240.20 subd. 1. (a);

-suppression of statements by defendants: Denied without prejudice to an application for a Huntley hearing upon a showing that such statements do in fact exist;

-law enforcement agency reports: Granted, though not required by C.P.L. section 240.20, they are material and necessary to the preparation of the defense, to the extent that they do not contain witnesses' statements nor work-product (People v. Wright, 74 Misc. 2d 419; People v. Rice, 76 Misc. 2d 632; People v. Inness, 69 Misc. 2d 429);

-names, addresses and statements of any informants/witnesses; Denied at this time as not required by 240.20, and in fact not mandated until the trial jury has been sworn (240.45);

-notes taken, now or in the future, by witnesses: Granted to the extent that the People shall exercise a good faith effort to ensure that the witnesses are ready to produce any such writings at the time of their testimony at any trials herein;

-records of conviction/pending charges (only) of any forthcoming trial witnesses: Denied until the time of trial and then only pursuant to the terms of 240.45;

-names and addresses of all PEOPLE present when defendants may have made statements and/or interviewed by the People with respect hereto: Denied as beyond the scope/mandates of Art. 240;

-personnel files of public employees: Denied as beyond the mandates of Art. 240, and see People v. Gissendanner, 48 N.Y. 2d 543;

-any and all written or recorded documents the People intend to introduce: Granted, to the extent that they exist without prejudice to People's application for a protective order where warranted;

-inspection of any physical evidence in the custody or control of the People: Granted, and to the extent such evidence exists the Court will hear an application for the suppression thereof;

-defendants criminal records: People consent, Granted.

The Court would emphasize, at this point, that the ordered Discovery is to be made available to and for the use of Defense Counsel only, especially with regard to police reports and witnesses names, addresses and statements when those are required

to be disclosed (see C.P.L. section 240.50). The very community sensitivity which may have been a contributing factor in the alleged underlying incidents mandates this step. Accordingly, disclosure will be to and for the eyes of defense counsel alone, for their exclusive use and possession in the preparation of the defense of these actions, and shall not be further copied nor in any way revealed nor disseminated.

WITH RESPECT TO THE DEMAND FOR A BILL OF PARTICULARS:

-the defendants have been apprised of the exact time, date, place and actions constituting their alleged offenses by their indictments,

-defendants are not entitled to names and addresses (see Discovery, supra, and C.P.L. section 200.90 case notes 43 McKinney's Book 11A);

-People state that they are unaware of any property taken from the defendants;

-manner, time, date and place of arrest; irrelevant with respect to the function of a Bill of Particulars and/or already within knowledge of defendants.

Defendants' demand for a Court review of the People's entire file(s) with an eye towards discovering exculpatory information will be denied. The People, as they have indicated, are aware of their continuing duty to disclose Brady material. The defense will, at trial, have the benefit of the criminal records/status of any witnesses. Even U.S. v. Agurs (427 U.S. 97) did not discuss court inspection of a prosecutor's file; it

dealt principally with the difficulties of determining and the subtle shades of what is or could be exculpatory evidence, and in fact upheld the conviction wherein the non-disclosure was raised. The defendants' list of evidentiary matters sought in this context, however, is a good one. Prosecutors in general might find it useful, for example, in determining (and disclosing) what is or may be exculpatory.

V. "SELECTIVE AND PERSECUTORIAL PROSECUTION"

The defendants also claim that they have been charged due to their adherence to the laws and customs of the Iroquois, and also to influence others not to so-adhere.

Discriminatory enforcement is a defense only where it is, or can be, shown the alleged discrimination was intentional or purposeful. This is the well-settled New York rule, determined and strictly developed through a long line of cases commencing with the Yick Wo case in 1886. (Yick Wo v. Hopkins, 118 U.S. 356 (1886); People v. Friedman, 302 N.Y. 75 (1950), app. dsmd. 341 U.S. 907 (1951); People v. Utica Daw's Drug Co., 16 A.D. 2d 12 (4th Dept. 1964), affd. 16 N.Y. 2d 503 (1965), cert. denied 382 U.S. 838 (1965); cf. People v. Walker, 14 N.Y. 2d 901 (1964) Matter of DiMaggio v. Brown, 19 N.Y. 2d 283 (1967)).

In the case of these defendants, however, the Record thus far is barren of any support for what is merely a conclusory allegation. Without more, this portion of defendants' motion must at this time be denied without prejudice to the defense's right to request such relief should egregious conduct by the prosecution come to light by trial testimony, discovery or otherwise.

People to submit Order.

DATED: April 9, 1980

Jan H. Plumadore

Jan H. Plumadore, County Judge