



Introduction

- Haudenosaunee Six Nations (HSN) has requested information from Canada regarding the Hamilton Port-Dover Plank Road and the Nathan Gage patents.
- In order to respond to these requests, Canada:
 - > undertook and analyzed historical research;
 - > reviewed relevant maps; and
 - > evaluated the information in light of colonial and Canadian law.
- We will share with you our understanding of the history, and the views we have reached.

The Hamilton Port-Dover Plank Road

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The Issues

- Canada will address two primary issues with respect to the Hamilton Port-Dover Plank Road:
 - whether the lands were surrendered, and;
 - whether compensation was or should have been paid to HSN.

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Historical Findings

Early History of Roads in the Niagara Peninsula

- Canada's research suggests that there was no road approximating the route of the Plank Road prior to contact, during the fur trade era or during the early settlement period.
- This is based primarily on an article by Andrew F. Burghardt entitled "The Origin and Development of the Road Network of the Niagara Peninsula, Ontario, 1770-1851," in *Annals of the Association of American Geographers*, Vol. 59, No. 3 (September 1969), p. 421.
- We have collected a number of maps showing some of the extant routes in the Niagara peninsula in the early 19th century. These include a map from 1839 showing a route between Hamilton and Seneca Township, as well as a map from approximately 1823 showing a route between Hamilton and "Crawford's" (near modern-day Caledonia). Travel by land from Hamilton to Port Dover at this time would have been possible, though would have followed a route considerably longer than the line of the future Plank Road.

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Historical Findings

The Impetus for the Hamilton-Port Dover Plank Road

- Between 1825 and 1842 the population of Upper Canada tripled as a consequence of the influx of immigrants, many of whom settled in the Niagara peninsula. This influx of European settlers coincides with calls and plans for a more direct road from Hamilton, which was at that time the administrative centre for the western half of the peninsula, to Port Dover.
- In November 1833, 147 inhabitants of the Districts of London and Gore petitioned that "An Act may be passed authorizing the construction of a road from the Point where the continuation of the road leading from Hamilton through Glanford to the Grand River, intersects the Westerly Bank of said River, thence ... to the most favourable ground to Port Dover."
- Following this petition, on March 16, 1834, *An Act to authorize the construction of a Road from Hamilton, in the Gore District, to Port Dover in the London District* was passed by the Province of Upper Canada.

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Historical Findings

The Act of 1834

- Under the 1834 statute, seven commissioners were appointed and authorized to survey and mark out a public highway from Hamilton to Port Dover along a generally described direct course. They were instructed not to lead the road through any orchard or garden, or remove any building, without the consent of the owner.
- The commissioners were also authorized, after laying out the route, to enter into agreements for the surrender of land required for the road, and where agreements could not be reached, to appoint arbitrators for the purpose of awarding damages.
- However, we have uncovered no evidence that these commissioners ever acted under this authority, by marking or surveying out a route, entering into any agreements, or appointing any arbitrators. As far as we can tell, the matter was really only taken up seriously by the government of the new Province of Canada, established in 1841.

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Historical Findings

The 1841 Act

- On September 18, 1841, *An Act to appropriate certain Sums of Money for Public Improvements in this Province, and for other purposes therein mentioned* was passed by the legislature of the Province of Canada. This act allocated £30,000 (approx. \$120,000) for construction of the Hamilton-Port Dover Plank Road, as one of a number of projects.
- A complete route for the Plank Road was subsequently surveyed in 1841 and 1842 by the office of the provincial Surveyor General. It appears that parts of the line of the road north east of the Grand River was plotted, or in some use, prior to this time. For example, in February 1838, surveyor Alexander McKenzie prepared a survey showing 24 individuals located on 30-acre plots along an actual or projected line of road north of the Grand River.
- Construction of the road took place between 1843 and 1845, and it was opened to the public in 1845. This, in Canada's view, effectively dedicated the road as a public highway. Overall cost of the road to the Province by the time of completion was £39,000 (approx. \$156,000).

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Historical Findings

Post Construction Operation and Transfers

- ❑ Tolls were collected on the Plank Road beginning in 1846. However, due to maintenance costs, the road generally ran at a deficit or at best a small profit.
- ❑ For instance, in 1849, approx. £1811.0.11 (approx. \$7245) in toll revenues were collected, but management fees and repairs cost £5961.1.1 (approx. \$23,850). In 1850, the road operated at a profit of £315.16.0 (approx. \$1260).
- ❑ In 1850, the right to collect tolls (along with the obligation to maintain the road) was sold to the Hamilton and Port Dover Road Company for £7700 (approx. \$30,800). Within ten years, the Company had paid off only \$3964 in principal and \$6729 in interest, and the road was in extreme disrepair.
- ❑ In 1863, management of the road was given to the local municipalities. After repairs were made to the road, management of it was sold to Z.B. Choate and Samuel Kerr in 1865 for \$17,000. However, by 1871, they had incurred a debt of \$9888, and proposed that the government reassume its management.

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Historical Findings

The surrender of 1841

- ❑ Many of the events related to the influx of settlers and to the survey and construction of the Plank Road were occurring at the same time as, and were influencing, discussions between the governments of the day and the Six Nations around the establishment of a compact reserve. These discussions led to what Canada describes as the surrender of 1841.
- ❑ Canada has previously explained its views on those discussions and the eventual agreement, particularly as it relates to the eastern boundary of the reserve in the vicinity of the Plank Road. It is Canada's view that the surrender of 1841, as implemented and given effect to by both parties, not only included the lots on the western side of the Plank Road, but also included the Plank Road bed lands.
- ❑ Canada has found no evidence in the historical records that Six Nations desired to keep the Plank Road bed lands, or believed they were reserved from the surrender. Canada has also found no evidence of any historical complaint from the HSN concerning the surveying, construction or operation of the road after 1841.

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Canada's View

The Crown's Obligations

- According to Canada's information, in the Surrender of 1841, Six Nations and the Crown agreed to the following **with** respect to the disposition of Six Nations lands:
 - "...to her Majesty's Government disposing of the land belonging and formerly reserved upon the Grand River for the Six Nations Indians, for the benefit of the said Six Nations, and for full and valuable consideration according to the best of their [the Government's] judgment, so as to preserve the benefit thereof for them, the said Six Nations and their posterity for ever."
- Canadian case law establishes that the Crown has a duty to dispose of surrendered land in the manner of a prudent individual managing his or her own affairs.

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Canada's View

Dedication of the Public Highway

- From this historical narrative it is reasonably clear, to Canada, that the Plank Road bed lands were never sold, but were instead dedicated as a public highway, and Six Nations were not directly compensated for the road bed acreage.
- Canada estimates that the road (including the road bed and allowance for ditches and other purposes) would have taken up approximately 96 acres of the lands surrendered in 1841.
- Canada has carefully considered whether this was consistent with the terms of the surrender, in the best interests of the Six Nations, and consistent with what a prudent person, managing their own affairs, would have done.
- In Canada's view, it was. In reaching this view it considered the following.

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Canada's View

Dedication of the Public Highway

- Although we have not undertaken an analysis of lot sales in the region of the Plank Road, we believe it is reasonable to conclude that the construction of the road spurred the sale of lands in the vicinity and enhanced its value. A newspaper article from 1845 states that:
 - "The Plank Road is certainly one of the great improvements of the age. It passes from Caledonia through a tract of country which was, at the time of commencement, a dense wilderness, with the exception of a small Indian improvement ... Along the whole line of road, new improvements are in progress, and although the land, generally speaking, is not of the very best description, a good deal of it being low and swampy, yet locations have been eagerly purchased, and settlements are rapidly advancing."
- William Kingsford, a contemporary Canadian engineer who promoted the construction of plank roads, estimated that a plank road increased property values by up to 20%.

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Canada's View

Dedication of the Public Highway

- Furthermore, our research indicates that settlers were willing to, and did in fact, surrender up land without compensation for the purpose of the dedication of the Plank Road. For instance, in 1842, three individuals affirmed that:
 - "We the undersigned taking into consideration the great advantage to the Province at large which is sure to result from the completion of the proposed Road from Hamilton to Port Dover do respectively hereby agree (without compensation) to surrender the said Road allowance through our respective Lands ..."
- To Canada, all of this provides useful information as to what was considered prudent at the time, whether one was acting on one's own behalf, or on behalf of others. And the government of the day not only dedicated the land, but put up the capital to construct the road, and ensured its future maintenance.
- This is not to say Canada believes the highway benefited only the Six Nations – it recognizes the road would have benefited many communities in the area.

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Canada's View

Summary

- To summarize then, Canada believes that the Province of Canada acted prudently, in accordance with the parties intentions for the surrender of 1841, and in the best of interests of the Six Nations by dedicating and constructing the Plank Road as a public highway, and notwithstanding that no direct compensation was paid for the road bed acreage itself. It believes this was consistent with the practice of other land owners at the time, and enhanced the value and marketability of the lots sold for the benefit of the Six Nations in the area and adjacent to the road.

Nathan Gage Patents

The Issues

- HSN has asserted that:
 - the Surrender of 1830 of the Brantford Town Plot was invalid because it was missing the descriptive plans contrary to the Governor's Instructions of 1812.
 - Nathan Gage received patents to 20 acres of land within the Brantford Town Plot, but HSN was never compensated for those patents.

Historical Findings

The Lewis Lease

- On February 19, 1823, Six Nations leased approximately 20 acres to Marshall Lewis (a millwright from New York State) for a symbolic consideration of 1 peppercorn as annual rent.
- Although the lease had no end date, it stipulated clearly that its express purpose was for the construction and operation of a grist mill, and that Lewis could use the lands as long as the mill was in operation.

Historical Findings

The Lewis Lease

- As required by the Lease Agreement with the Six Nations Council, Marshall Lewis built and operated the grist mill. (Although we don't know the precise date on which the mill ceased operating, the research indicates that it was no longer in existence, at the latest, by 1849.)
- Marshall Lewis also entered into an agreement to pay Esther Hill, whose family claimed rights to the leased lands, 10 bushels of wheat yearly, for as long as the mill was in operation.

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Historical Findings

Lease Transfers

- On November 1, 1828, Marshall Lewis transferred his interest in the leased land to his son-in-law, Julius Morgan, for £750 (approx. \$3000).
- On March 9, 1830, Julius Morgan transferred his interest in the leased land, excluding the mill and certain surrounding lands, to Nathan Gage, for £313.10 (approx. \$1250).
- Shortly before this transfer, Julius Morgan had severed the mill property from the original Lewis lease and transferred it to Jedediah Jackson.

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Historical Findings

Survey of Brantford Town Plot

- While the transactions were taking place between Morgan and Gage, Six Nations were preparing to surrender an 807 acre tract of land for the town plot of Brantford.
- In anticipation of that surrender, John Brant asked Deputy Surveyor, Lewis Burwell, to survey the relevant lands (on March 15, 1830).
- The record shows that Burwell was in regular contact with John Brant in conducting the survey, making alterations at Brant's direction (See, *Diary of the Survey of the Indian Surrender and Town Plot of Brantford...commencing 15th March and ending 24th June 1830. AORG 1-59, Reel MS 924/4*).

Historical Findings

Surrender of 1830 (No. 30)

- On April 19, 1830, Six Nations surrendered 807 acres for the Brantford Town Plot (See: *Surrender No. 30, Treaties and Surrenders, Vol. 1, at pages 76-78*).
- The 807 acres covered by Surrender No. 30 included all of the lands that were ultimately patented to Nathan Gage.

Historical Findings

Surrender of 1830: Intentions and Understandings

- The agreed purpose of Surrender No. 30 was for the lands to be sold, for the benefit of Six Nations. The written record of the Six Nations Council proceedings on the day the surrender was taken express their intentions this way:

“...we are unanimous in ceding to the Government the lands at Brantford, and wished the proceeds of the sale to be added to our money ... we unanimously confirm His Excellency's appointment of the three Trustees named to us this day – we reserve to ourselves the right of fixing the price of the lots in Brantford, both occupied and unoccupied”.

- In addition to these proceedings, there is considerable correspondence between Six Nations and Crown officials expressing their shared understanding that values would be established for each lot, taking into account any improvements made by people already living on the lots.

Historical Findings

Surrender of 1830: Intentions and Understandings

- Peter Robinson (Commissioner of Crown Lands), instructed by the Lieutenant Governor to arrange the sale of Brantford Town lots, described the process he followed (July 20, 1830):
 - reviewed history of all occupied lots (were they leased or purchased, prices paid, years occupied, etc.);
 - established value for lots, with discounts for improvements;
 - recommended that “no lot should be sold for less than ten pounds”.

Historical Findings

Sorting out the claims post-Surrender

- ❑ Lot sales in the Brantford Town Plot were stalled after Surrender No. 30 was taken, because many of the surrendered lots were already occupied by squatters and leaseholders, and those occupations did not necessarily correspond neatly with the lots that had been laid out on the survey plan.
- ❑ To sort out confusion in the Brantford Town Plot and more generally in the Haldimand Tract, the Executive Council of Upper Canada recommended a review of all transactions (leases and sales) previously made between Joseph Brant and non-natives.
- ❑ The review process took 4 years, and resulted in a report from Six Nations trustees recommending that patents be issued only to individuals who could show original grants or leases from Joseph Brant.

Historical Findings

Sorting out the claims post-Surrender: Where did Nathan Gage's claim fit?

- ❑ Nathan Gage's claim was initially rejected, perhaps because the Six Nations trustees had not dealt with *derivative titles* (i.e. Gage had acquired from Julius Morgan and Morgan from Marshall Lewis, the original lessee).
- ❑ Nathan Gage petitioned Crown officials, from 1834 to his death in 1849, to acquire the patents that he believed were rightfully his.

Historical Findings

Sorting out the claims post-Surrender:
Where did Nathan Gage's claim fit?

- On September 9, 1836, William Hepburn, Acting Six Nations' Trustee, recommended that patents be issued to Nathan Gage for the approximately 20 acres of lands originally leased to Marshall Lewis.
- Hepburn recommended the patents because of the strength of the original Lewis lease – it had come directly from the Six Nations Council, and not from individual members of Six Nations – and because the grist mill had been built and operated as required by the Council, contributing positively to the rise of Brantford.

Historical Findings

Sorting out the claims post-Surrender:
Where did Nathan Gage's claim fit?

- The Executive Council of Upper Canada agreed with Hepburn, and on September 9, 1836, an Order in Council was passed authorizing the issuance of the Gage patents.
- Nathan Gage, however, continued to petition the Crown, because he believed he was entitled to patents over and above the 20 acres of the Lewis lease.

Historical Findings

Sorting out the claims post-Surrender:
Where did Nathan Gage's claim fit?

- On March 10, 1840, Nathan Gage received 2 patents for the lands he had purchased from Julius Morgan:
 - > For 11 acres, 3 roods and 8 perches situated in park lot nos. 1,2,3,4,5,6,7, the westerly four-fifths of lot number 25, and lot numbers 26, 27, 28 and 29.
 - > For 8 acres, 2 roods, 6 perches in park lot nos. 30, 31, 32, 33, 34, 35 and 36 in the town plot of Brantford.

Historical Findings

Sorting out the claims post-Surrender:
Where did Nathan Gage's claim fit?

- Nathan Gage continued to petition for lots 12, 13, 15 and 16 on the south side of Colborne Street, which he argued should have been included in the 20 acres he purchased from Julius Morgan, and for lands additional to the Lewis lease lands.
- This long-running dispute illustrates the difficulties of matching up land descriptions from earlier transactions with the lots that were later laid out by survey for the Brantford Town Plot.

Historical Findings

Sorting out the claims post-Surrender:
Where did Nathan Gage's claim fit?

- In 1849, David Thorburn, "Superintendent of the Six Nations Indians", reviewed Gage's claims and recommended an additional patent for lots 12, 13, and the westerly part of 15 and 16 lying on the south side of Colborne Street. But, Thorburn recommended against a patent to Gage for the other properties he was claiming.
- Like William Hepburn before him, David Thorburn was motivated in his decisions by the strength of the original Lewis lease and the existence of the grist mill, which was seen as having benefited the community.

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Historical Findings

Sorting out the claims post-Surrender:
Where did Nathan Gage's claim fit?

- Gage pressed on with his petitions, seeking arbitration to have them resolved.
- In 1849, the arbitrators ruled that Gage was entitled to an additional patent for lot nos. 12, 13, east ½ of 15 and 16 south of Colborne Street, which were seen as flowing from the 20 acres originally leased to Marshall Lewis (HSN assertions in respect of Nathan Gage do not include these additional patents).
- Nathan Gage died in 1849, shortly before the arbitrators made their final ruling, and his remaining claims were settled by his estate.

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Historical Findings

Some additional information

- Through our historical research we discovered that after his death, Nathan Gage's estate seems to have received patents for lot nos. 14 and the west part of 15 on the North side of Colborne Street, as well as lot nos. 13 and the west part of 14 on the south side of Dalhousie Street. HSN assertions in respect of Nathan Gage do not include these additional patents.
- We have commissioned further historical research into the story behind these additional patents, and would not take a position on them until we could assess the results of that research.
- Nevertheless, we are sharing this preliminary information with you today so that you have the benefit of our findings.

Canada's View

Surrender No. 30

- Canadian case law establishes that the critical factor in determining the validity of a surrender is the intention of the Aboriginal nation. A surrender requires "a voluntary, informed, communal decision to give up the lands".
- Evidence that certain formalities were followed in the taking of a surrender can help to demonstrate that intention, but the courts have said that *form should not trump substance*: it is important to look at all of the circumstances surrounding the surrender itself to determine the Aboriginal nation's real intention.

Canada's View

Surrender No. 30: Six Nations' Intentions

- Having carefully considered the historical findings, we have reached the view that Six Nations fully and voluntarily intended to surrender for sale 807 acres for the Brantford Town Plot.

- We base this view on a range of findings, including:
 - Six Nations Council proceedings on the day the surrender was taken demonstrating this intention;
 - John Brant's involvement in Burwell's survey of the Town Plot;
 - Correspondence between Six Nations and Crown officials showing their mutual intent that sale prices be established for each of the lots within the Town Plot; and finally,
 - Evidence of Six Nations' own involvement in sorting out the post-surrender confusion around which of the non-native occupiers should be offered lots for sale and the prices at which the lots should be sold.

Canada's View

Surrender No. 30: Six Nations' Intentions

- In summary, we take the view that Surrender No. 30 was voluntary and agreed to. We read the historical findings to suggest that Six Nations' concerns with these lots related to how the lots would ultimately be disposed of – who would get to purchase them and at what price. We have no information to suggest that Six Nations expressed any concerns about the surrender itself.

- We do not believe that the absence of a descriptive plan as an attachment to the instrument of surrender would have affected its validity, because it is more in the nature of a technicality, and does not suggest a lack of intention to surrender, particularly given Brant's oversight of the survey process.

Canada's View

Compensation for Nathan Gage Patents

- As indicated above, we take the view that both Six Nations and Crown officials intended the lands covered by Surrender No. 30 to be evaluated on a lot-by-lot basis, taking improvements into account, and then to be sold for the benefit of Six Nations, with proceeds being "added to their money".
- We therefore start from the premise that Six Nations should have received financial compensation for the lots patented to Nathan Gage.

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Canada's View

Compensation for Nathan Gage Patents

- We understand from the historical findings that the various Crown officials who recommended that patents be issued to Nathan Gage did so on the basis that:
 - > his interest flowed from the Lewis lease, which had been granted directly by the Six Nations Council, and
 - > the grist mill required by that lease had been built and operated for a number of years, providing benefits to Six Nations and to other communities.
- We therefore do not believe that the Crown decision to issue patents to Gage for the Lewis lease lands was motivated by any negative intent.

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Canada's View

Compensation for Nathan Gage Patents

- However, the fact remains that Gage had acquired those lands under a lease, not a sale (even though he had paid good consideration to Julius Morgan).
- We believe that this leasehold interest should **not** have entitled Nathan Gage to obtain patents for the lands without any compensation being paid to Six Nations.

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Canada's View

Compensation for Nathan Gage Patents

- It appears from the historical record that Six Nations did not receive compensation for the approximately 20 acres of surrendered land that were ultimately patented to Nathan Gage.
- In Canada's view, compensation should have been paid to Six Nations.

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Canada's View

Compensation for Nathan Gage Patents

- We have not tried to determine what that compensation might be.
- Additional work would be required to learn more about the historical values of the patented lands, and about any other factors that might have a bearing on those values, such as improvements to the lands or benefits to the Six Nations from the existence of the grist mill.**