THE NANFAN DOCUMENT OF 1701: TREATY OR OTHER

Introduction: There is no treaty registered between the Six Nations and British Crown or Canada. This can be seen clearly in the lists of Treaties and Surrenders recognized by the Government of Canada ("Canada. Indian Treaties and Surrenders from 1680 to 1890 – In Two Volumes", Queen's Printer, Ottawa, 1891). However, that has not stopped certain groups at The Six Nations of the Grand River Reserve from behaving "as if" such a treaty did exist. The document that they refer to is, in their view, properly titled The Nanfan Treaty of 1701.

We will see below what the Nanfan document entails, and whether it would meet the criteria for being a treaty.

If ever there was a more misunderstood and misused piece of parchment than the "Nanfan Treaty", it has eluded my attention – although the Surrender of 18 December 1844 of all lands outside of the present Reserve is also in the same category except that it is simply ignored, as if it did not exist.

The Nanfan Document of 1701: For many years people have been basing their assertions about the content and meaning of this document on a transcript found in the published *Documents Relative to the Colonial History of the State of New York.* By virtue of this document (none other is cited as evidence of treaty rights in Ontario), the Six Nations claim to have rights to hunting and to consultation over land use throughout Southwestern Ontario (SWO). At present this involves purported "treaty rights" to hunt deer in various communities near the Six Nations Reserve, and to be participants in the development of green energy projects and other development projects (to be consulted, and to receive financial and other forms of "compensation") across SWO.

For those who will later claim that the Six Nations land deeds are invalid since they were not signed by all 50 Confederacy Chiefs (actually there was never such a stipulation at any time whatsoever), it is interesting that only 20 Chiefs of the Five Nations placed their totem marks on this document. Recently the original copy of the so-called Nanfan or Fort Albany Treaty was located in England by researchers in St. Catharines, and photographic copies are now available for inspection by all researchers. What the document says is that, *after mature deliberation out of a deep sense of the many Royal favours extended to us by the present great Monarch of England King William the Third,* it was the desire of the Five Nations to yield to their "*Great Lord and Master the King of England*" all of the hunting territory that they possessed by virtue of conquest, with the "expectation" that they could still retain the right to hunt beaver on these lands. The lands in question included most of what is today Southwestern Ontario and the lands above Lake Ontario. The Six Nations did indeed "conqueror" (actually exterminate via genocide and ethnic cleansing) the Wyandot, Petun, Attiwandaronk, Wenro and Erie in the 1640s to 1657 thereby obtaining the lands of these people. A transcript from the Six Nations website is

available here. However by 1701 they had lost, by right of conquest, all these lands to the Mississauga and allies.

The most comprehensive consideration of the wars of this era can be found in a 474 page book written by an author who attempted to explore the mobility and information gathering prowess of the Iroquois in the period of 1534 to 1701. See, Jon Parmenter, "*The Edge of the Woods*", Michigan State University, East Lansing, 2010.

The fact that the Five Nations who signed the document stated that, *wee having subjected ourselves and lands on this side of Cadarachqui lake wholy to the Crown of England* shows that they do not claim sovereignty anywhere within their lands, but they consider themselves as subjects of the King of England which certainly takes the wind out of the sails of the above interpretation of the Two Row Wampum trade agreement of 1613 as being any sort of assertion of being an independent people.

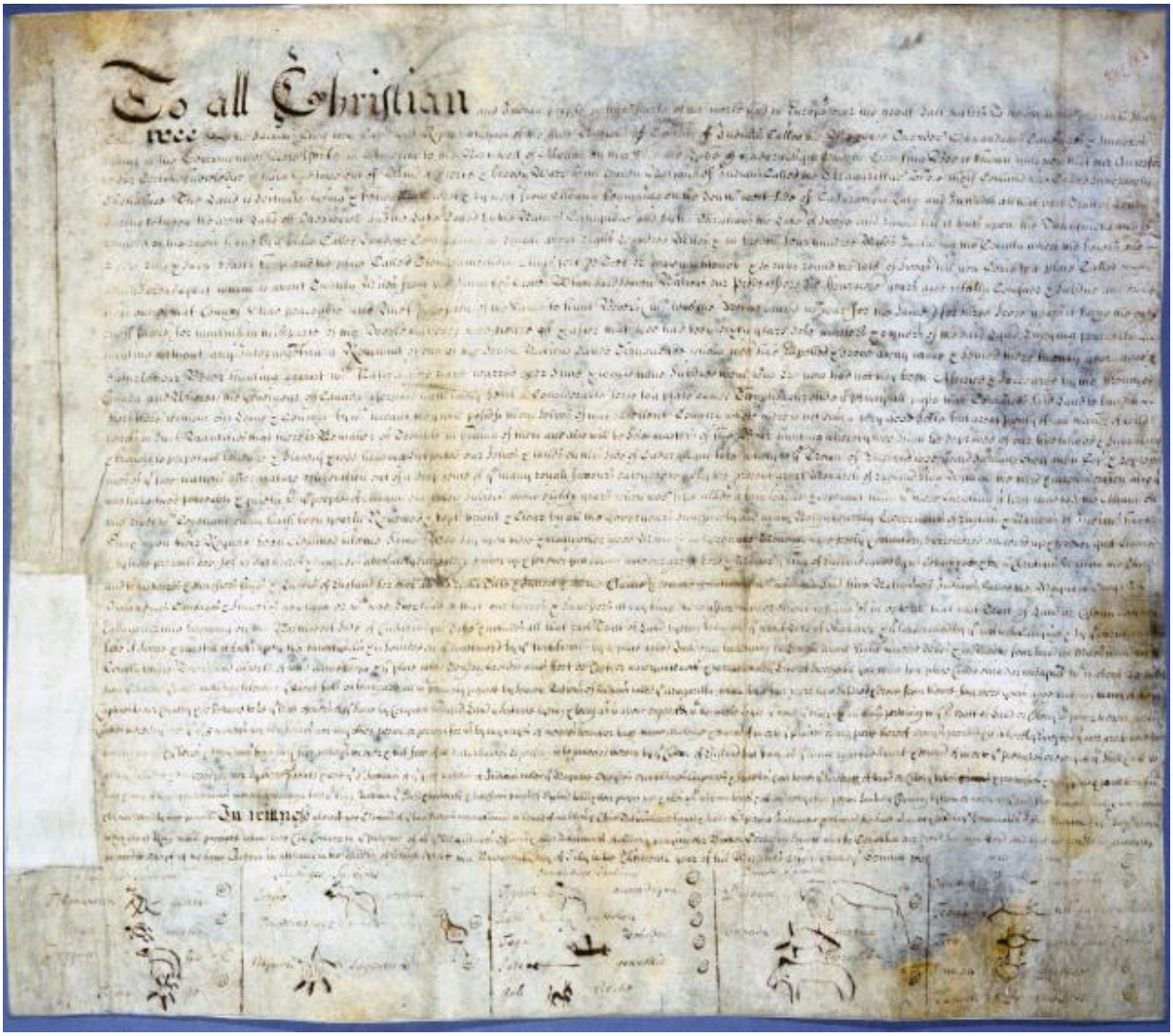
For a document to be considered authoritative it must be valid. The document is an "agreement" not a "treaty". There is a huge difference between these terms. For a treaty to be valid it must conform to certain parameters. First it must be signed by individuals who are legally assigned that role by the two primary parties - here that would be the Five Nations and the Crown. In examining the names of the six Mohawks who placed their names on the agreement, none can be linked to the 9 Mohawk sachems in the Roll Call of Confederacy Chiefs. Actually that in itself is not a problem since very seldom do any of these names appear on treaties - generally it was the village chiefs (Pine Tree Chiefs) and principal warriors who put pen to paper. Thus it cannot be discredited on this basis.

What is more problematic is that the Five Nations did not possess any rights to the lands they wished to transfer to the King in 1701. The historical record shows that after Southern Ontario was emptied of the aboriginal inhabitants, it lay unoccupied for a number of years. During the 1680s however, the Five Nations established settlements on the north side of Lake Ontario. By 1696 they had 8 villages located there, and in that year all vanished. The Mississauga and their allies of the Five Fires Confederacy had destroyed all Five Nations settlements north of the latter's aboriginal lands in what is today Upstate New York. The Mississauga owned all of Southern Ontario by right of conquest in 1700. Thus the Five Nations making a deal with the British one year later over lands to which they had no rights proves that the Nanfan document is worthless. You cannot give what is not yours to give - plain and simple. If one believes in the maxim that one cannot give away or sell that which does not belong to you, then the provisions of the treaty negotiated between Governor John Nanfan and the Six Nations in 1701 can have no validity - despite beliefs to the contrary. The principle is enshrined in law under the term, **Nemo dat quod non habet**. See here for details. This principle is derived from English Common Law and is expressed succinctly here.

However the English were also in no position to make any sort of deal with the Five Nations involving lands in the region of Lakes Ontario and Erie. The Treaty of Ryswick in 1697 between England and France recognized the latter's rights to sovereignty over the lands in what is today Southern Ontario including the area where the Five Nations had established settlements.

Also the names which appear (or do not appear) on the parchment pose more significant problems for those who would use the Nanfan document as evidence of "treaty rights". What one sees is a list of names of those present - generally local officials including, Aldermen, the High Sheriff and the Indian Secretary Robert Livingston from Albany. The Governor at the time was Acting Governor of New York, John Nanfan, who had dissolved the legislature at that time and was acting alone. What the document shows is that Nanfan signed attesting to the names of those who were present, and the authenticity of the parchment, nothing more. He did not include his personal seal let alone anything representative of the Crown - he did not even give his title (acting Governor of the Colony of New York). All he and the others were promising to do was to send the document to England for possible approval of the King and Privy Council. An inspection of the original document below shows that no seals or other official symbols were affixed to it. Apparently it was received in England and simply filed away and never became an official document of any sort. Perhaps it was realized that the Treaty of Ryswick in 1697 with the French invalidated the document. Thus to claim that this was a valid "treaty" cannot be supported by any solid evidence. The "treaty" is only an agreement, and a fraudulent one at that.

Below is a photo of the original Nanfan agreement:



Below is the second page of the Nanfan agreement, affixed to the first, it would appear, by conservators in England:

It is important to note that the image of the back of the document is seen for the first time ever outside a drawer in Kew, England. It has surfaced thanks to the persistent efforts of Alex Biegalski, and included in his website, *My Dundas Valley* which can be seen here.

The map that supposedly accompanied the Nanfan agreement has not been located (by myself). It may have been inspired by French maps of the time, and published in 1718 by De'Lisle, and copied with some additions by Colden in 1747, as found here, and seen below in schematic form:

The Wikipedia interpretation of the boundaries of the territory described by the Nanfan agreement is shown below, although I am not clear on some of the specific boundaries they provide relative to what is included in the verbal description found in the 1701 document:

Coincidentally, while writing this report, the author was reading the book by Gail D. MacLeitch, "*Imperial Entanglements: Iroquois Change and Persistence on the Frontiers of Empire"*, Philadelphia, University of Pennsylvania Press, 2011, which comments on the 1701 agreement. MacLeitch stated that, "*By the early 1700s, the Iroquois had promoted a belief that through the wars of the previous century they had conquered distant tribes and become "sole masters" of great expanses of land beyond their immediate homeland of Iroquoia"*. The Five Nations were asserting that they had defeated the Hurons, Susquehannocks and other far flung peoples and had *won with the sword* vast tracts of land. In the view of MacLeitch, *These claims were flimsy,* but had the effect of *bolstering Iroquois status in an emerging Anglo-Indian political arena.* MacLeitch noted that, *In 1701 they deeded their northwestern "Beaver Hunting Ground" to the King of England. In a practical sense, the deed was meaningless. Despite their grand claims, the Iroquois could not control or dominate distant lands that were occupied by other Indian groups ..... The purpose of the deed seemed to be twofold: to remind the English of their substantial - albeit imagined - land base and to make the English accountable for its protection* (p.32).

Since the English Crown never formally recognized this agreement, it died a natural death - except in the minds of later generations who wished to breath new life into an invalid meaningless agreement to facilitate their present day claims of "treaty rights".

Legal Rulings: Justice R. John Harper of the Superior Court of Ontario in Cayuga recently (July to October 2020) ruled on the petitions of Foxgate to issue a court injunction to clear their land (Lot 3 Range West of the Caledonia to Townsend (McKenzie) Road) of the Six Nations trespassers. The court has now issued a permanent injunction, and it is up the Ontario Provincial Police (OPP) to enforce the order and clear the land. The occupiers have created significant damage with stolen heavy equipment (for example digging trenches across McKenzie Road) and every conceivable illegal and anti-social act (e.g., creating tire fires and a barricade with a stolen school bus) on Argyle Street, the only road from the south into Caledonia. The protesters, to the date of writing, refuse to leave the premises, and the OPP have refused to arrest the illegal occupants of the land. Justice Harper also ruled on the "Nanfan Treaty" as seen below (thanks to RM).

"I accept the submissions of Foxgate that the Nanfan Treaty which includes lands in Southwestern Ontario, encompass the subject lands. Reference is made to the decision of Justice Broad in Enbridge Pipelines Inc. v. Williams et al, 2017 ONSC 1642. In that case, Broad J. reviewed the case of R. v. Ireland (1990), 1990 CanLII 6945 (ON SC), 1 O.R. (3d) 577 (Ont. Ct. Gen Div), at paras. 66-70:

[66] The Ireland case involved a prosecution brought by the provincial Crown against two members of the Oneida First Nation for hunting without a license and hunting in the closed the season contrary to the Game and Fish Act R.S.O. 1980, c.182. Gautreau, J. noted that under the Nanfan treaty the Iroquois ceded all of the territory which is now Southwestern Ontario to the British in return for a guarantee of free and undisturbed hunting rights over the lands in the territory forever. He characterized the issue in the case as "whether these hunting rights may be exercised today on non-reserve lands in Elgin County, unrestricted by the provisions of the Game and Fish Act."

[67] The Ireland case involved a prosecution under a provincial statute. It did not involve a dispute between an aboriginal group or individual asserting a treaty-protected right to hunt and an owner of private property. Indeed, on this point Gautreau, J. stated as follows, at para. 51-52, as part of his consideration of whether the hunting rights reserved by the Nanfan Treaty were limited or extinguished based on original intent or the common expectation of the parties:

There are two rights in opposition here: the Crown's ownership and consequent rights to use and develop the land and the Indians' right to hunt freely. There are no limiting factors in the treaty. Therefore one can reason that the Indians may hunt anywhere in the territory and this includes private property. This could lead one to suppose that they might hunt racoons in the backyard of a private home. With respect, I believe that this goes beyond what the parties intended or what is

reasonable. To permit it would be to trample on the Crown's ownership rights. On the other hand, it would be equally unreasonable for the Crown to argue that its legal title and its right to use, develop and enjoy the lands can frustrate, and in effect abolish, the hunting rights of the Indians.

Neither of these positions is reasonable. The answer must come from interpretation of the treaty by determining the intention of the parties. How did they intend to solve the problem if rights came into conflict?

[68] Justice Gautreau went on at para. 55 as follows:

I think it can be concluded from history that the British government wished to colonize, use and develop the land for its benefit. Therefore it is unreasonable that absolute rights should have been granted to the Indians which paralyze the Crown's use of the lands. On the other hand, the British wanted the Iroquois as their allies, and understood the importance of free and uninterrupted hunting to them. Therefore it is unreasonable that absolute rights should have been intended for the Crown which would paralyze the Indians' right to hunt. The conclusion must be that the parties intended that the competing rights should be reconciled, and this reconciliation would vary with time and circumstances. The rights are not frozen in time. A treaty must be seen as a living document that evolves with changing times according to the underlying original intent. When the rights of the parties conflict they must be adjusted.

[69] Justice Gautreau dismissed the appeal from acquittal due to an inadequate evidentiary basis, as there was not enough evidence to permit the court to make any findings of conflict or incompatibility between the two rights (see para. 56).

[70] In my view, the Ireland case does not provide support for the proposition advanced by the defendants, namely that the Nanfan Treaty reserves or extends hunting rights to the defendants on private property (see 1536412 Ontario Ltd. v. Haudenosaunee Confederacy Chiefs Council 2008 CarswellOnt 3419 (S.C.J.) at para.14).

[104] I agree with Justice Broad's interpretation of the Nanfan Treaty." See here for original.

In addition to Regina v. Ireland, there are other cases including Jamieson 1990, as well as Regina v. Barberstock 2003, but in none of these cases did the judge have the original document, nor the historical context to use in the respective decisions. The upshot is that judges have concluded that both Robert Livingston and John Nanfan signed the document, and hence the agreement is valid. However, there was no personal seal of the Acting Governor, nor Colonial seal let alone Crown seal – as noted from viewing the original copies. Thus the judges appear to have come to a conclusion based on a flawed published transcript, and no context - that the Five Nations were not in possession of the land they proposed to cede to the King of England. Therefore it is a fraudulent document that is only of historical interest.

Six Nations Use the Nanfan Document as Leverage: Since 2006 the Six Nations have used "treaty rights" to justify coercing power company owners building wind turbine projects in Southwestern Ontario (e.g., Port Ryerse) to "consult" and then to "negotiate" - meaning give a few million dollars to either the Elected or Confederacy Councils or other pressure groups. This is money that is in the category of "ill gotten gains". If these companies have such a generous spirit that for no reason they wish to turn over a large percentage of the profits to Six Nations, that is their choice. The point is that there is nothing based on "treaty rights" which would justify any interference by Six Nations with activities going on outside the bounds of the present-day Reserve.

"Turtle Island News" (15 January 2014, p.7) included an article, "*Treaty rights flexed in HWHA harvests, 70 deer taken*". Here the reporter quoted a representative of the Haudenosaunee Wildlife & Habitat Authority (HWHA), who stated that, "*the most important thing to come out of the annual deer harvest in Dundas, St. Catharines, and the Royal Botanical Gardens in Burlington conducted by Six Nations bow hunters was actually not the meat that can be distributed to the Longhouses for ceremonies and to feed those in need*" - which I thought was the point of permitting Six Nations to participate in a cull of deer in these locations. According to the HWHA representative, "*what is of greatest consequence is that Six Nations were able to "flex" their "treaty rights*". So the primary goal to be achieved was that, treaty rights were exercised and affirmed. While some in Dundas and St. Catharines probably believe this fairy tale, there are a growing number of very well educated people in these communities prepared to do their homework, and publish their findings to the Internet.

A few examples of <u>those impacted by the improper use of the term "treaty rights"</u> include:

1) Federal, Provincial and local governments.

2) Land developers.

3) Hydro One.

4) Power companies constructing wind turbines.

5) Archaeological consultants.

6) Conservation agencies.

7) The taxpayers of Canada.

It is presumptuous for Six Nations to use a document which is invalid as the basis for their claim to sweeping rights across the length and breadth of Southern and Central Ontario. The fact that no one seems to have issued a formal challenge means that the Federal Government of Canada has stood in the role of enabler by not asserting the obvious - <u>there are no "treaty rights" possessed by the Haudenosaunee in Ontario</u>.

This statement that Six Nations have, since about 1696, had no treaty rights in the area is further underscored by the fact that the Mississauga are the only group that can claim aboriginal rights in this part of Ontario, including the Haldimand Tract. They were the "owners" of this land in 1701 when the agreement was signed. These people then became owners by right of conquest but were not consulted in the process. It is the Mississauga from whom, in 1784, Governor General Frederick Haldimand purchased the land that would become the Haldimand Tract.

The Six Nations are aboriginal to Upstate New York which was lost during the American Revolution making the People of the Longhouse (Haudenosaunee) refugees, who were granted lands purchased from the Mississauga by the Crown in 1784 for them to occupy. There are no "treaty rights" pertaining to the Haldimand Tract. It is Crown land, and all sales by Six Nations within that grant must be approved by the Crown. It was so in 1784, and is so now. One may not like the historical reality, and one has the right to challenge it, but the facts show that the Six Nations do not have "rights" that they adamantly claim to possess. The fact that the Six Nations are having a laugh at everyone else's expense is not lost on everyone, as seen in an article in the Hamilton Spectator here.

Six Nations Lands and Resources Deny that the Nanfan Document is about Land: Actually, it might be possible to stop any further discussion here in that the Supervisor of the Lands and Resources Office of the Elected Council at Six Nations recently made a statement with incontrovertible meaning. At long last, the person at Six Nations most knowledgeable about land issues, LB (the author will not print the full name to afford him some Internet privacy with a very contentious topic), has spoken directly about the Nanfan document. A situation arose where the Supervisor of the Lands and Resources Office of the Elected Council has, in frustration, spoken openly about what he and others have known for years but have not seen it advantageous or opportune to speak about the facts as they know them.

I am familiar with PM, the predecessor of LB, and have always respected his skills as a researcher. He is one of the very few (handful?) of people at Six Nations who have actually read all the original documents and if circumstances allowed, would be in a position to knowledgeably address everything the present author has reported in his various writings.

A few years ago LB and others of the Elected Council met with the principals at the McClung Housing Development group and hammered out a "draft agreement" which would see 200 acres of the 530 acre development given to Six Nations to presumably add to their land base. Objectively this is a tremendous gift since in fact Six Nations have no treaty rights, and surrendered all land in the Haldimand Tract outside the present Reserve in the 1844 - duly acknowledged by all the Chiefs in Council. Many at Six Nations simply have never seen the documents, and all they have to go on is a belief or what others have said. Some beliefs have become entrenched, including the "fact" that Six Nations have treaty rights that extend across all of Southwestern Ontario, but since it is a hot button topic, all tend to avoid any direct

confrontation over the subject. Thus there has been no move coming from either inside or outside the community to stop Six Nations from using this falsehood to justify extracting millions of dollars from wind turbine and solar farm energy firms such as Samsung. Nor has anyone been able to stop Six Nations from controlled deer hunting (bow hunting) in the Dundas Valley, and Short Hills near St. Catharines - although it is illegal for non Six Nations people to do the very same thing.

It took an acrimonious exchange arising from "community consultation" about the 200 acre land gift to prod the Six Nations land researcher to speak the truth since it was clear that many are unable to see the land donation as a major coup - considering the evidence. After some very agitated and demanding women made unrealistic demands and off the wall assertions, finally LB, after hearing an angry, "we're talking about 530 acres of unceded lands .... " LB cut her off arguing the Haudenosaunee ceded lands in the 1701 Nanfan Treaty. "*It's already ceded land. It's been ceded before. It says it right in the treaty - 'that we surrender this land to you, the British Crown, for certain promises'. We got our hunting and fishing rights.*" Of course the hunting and fishing rights are based on a false belief that the Five / Six Nations had control of that land in 1701 which is simply not the case. LB did not speak about whether the land was considered ceded or unceded – surrendered to the Crown for sale.

The bottom line is that LB is well aware that getting even a single acre of land for nothing is a great deal. Here they were getting 200 acres, a windfall for which there is no justification, but LB was able to negotiate this amazing gift to Six Nations. Hence his frustration, knowing the contents of the records relating to the so-called treaty (and the so called unsurrendered land), that there were people so ignorant of reality who were raking him over the coals - for what can only be described as having negotiated an incredibly smooth deal. Something for nothing - and 200 acres at that. The same can be said for the "gift" of 42 acres near Little Buffalo and $385,000 to the Elected Council for the Foxgate Development in Caledonia in 2020 with the rational of "Duty to Consult" Policy of the Elected Council. See here for more information about the CAP policy. Now that windfall will need to be returned to the developer. Another sweet deal down the drain. The reason is that for the last 3 months a group of Hereditary Council supporters, using an unproven false claim that the land is unceded, have occupied the development site and the homes slated for completion this fall will not be built in 2020. See here for details about the land surrenders.

Conclusion: The Crown and Canada have no treaty with the Six Nations. The assertion that the "Nanfan Treaty of 1701" was ever at any time a valid instrument, when the reality is that it was a massive fraud, will eventually have to be recognized by the Federal Government. Meanwhile Six Nations continue to claim the "right" to hunt protected deer in places such as Shorthills, Niagara, be consulted in municipal projects (e.g., Red Hill Creek Project), be involved in all archaeological explorations in the area (being present as paid "monitors"), and to be involved (paid) in any green energy project in what is considered to be the boundaries of the "Nanfan Treaty". Such an egregious disregard for the truth, , calls into question the validity of other Six

Nations claims, that any land outside the present-day Reserve is unsurrendered / unceded land in the Haldimand Tract (see here); and that they are a sovereign people (see here).

Respectfully,

Dr. David K. Faux
Caledonia, Ontario
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